[Cite as *Krukrubo v. Fifth Third Bank* , 2010-Ohio-1691.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Augustine B. Krukrubo,	:	
Plaintiff-Appellant,	:	
		No. 09AP-933
v.	:	(C.P.C. No. 06CVH07-8866)
Fifth Third Bank et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on April 15, 2010

The Law Offices of Robert C. Wood, and *Robert C. Wood*, for appellant.

Vorys, *Sater*, *Seymour & Pease LLP*, *Victor A. Walton*, *Jr.*, *Eric W. Richardson*, and *Anthony L. Osterlund*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Plaintiff-appellant, Augustine B. Krukrubo ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas, in which that court granted summary judgment against appellant and in favor of defendants-appellees, Fifth Third

Bank and Fifth Third Bank (Central Ohio) ("appellees"), on appellant's claims for negligent misrepresentation and fraudulent misrepresentation.

{¶2} This is the second occasion upon which this case has come before this court. In *Krukrubo v. Fifth Third Bank*, 10th Dist. No. 07AP-270, 2007-Ohio-7007, we affirmed the trial court's grant of appellees' Civ.R. 12(B)(6) motion to dismiss appellant's claims for breach of contract, "bad faith," "willful misconduct," and intentional infliction of emotional distress. However, we reversed the trial court's dismissal of appellant's claims for negligent misrepresentation and fraudulent misrepresentation because, we determined, appellant had adequately pleaded those two claims in his complaint.

{¶3} Following remand, both appellant and appellees filed motions for summary judgment, pursuant to Civ.R. 56, along with accompanying evidence. This required the parties to meet a different and more challenging standard than had been required under the earlier motion to dismiss. "A Civ.R. 12(B)(6) motion to dismiss, unlike a motion for summary judgment, merely tests the sufficiency of the complaint." *Holzman v. Fifth Third Bank, N.A.* (Apr. 30, 1999), 1st Dist. No. C-980546. Thus, in reviewing the grant of appellees' motion to dismiss, we were required to take all allegations in the complaint as true. Civ.R. 12(B)(6). "Under the rules of notice pleading, Civ.R. 8(A)(1) requires only 'a short and plain statement of the claim showing that the party is entitled to relief.' Because it is easy for the plaintiff to satisfy the standard for pleading under Civ.R. 8(A), few [claims] are subject to a motion to dismiss." *Holzman*. In contrast, a summary judgment motion requires the non-moving party to present evidentiary materials demonstrating the existence of a genuine issue of material fact as to each element of that party's claims. Civ.R. 56(C).

{¶4} In their motion for summary judgment, appellees argued that appellant could not produce any evidence demonstrating the existence of a genuine issue of material fact with respect to either of his two surviving claims, to wit: negligent misrepresentation and fraudulent misrepresentation. Both of those claims rested upon the allegation that appellees' agent, C. Allen McConnell ("McConnell"), falsely represented to appellant that appellees would fund a loan for which appellant had applied, which appellant planned to use to refinance two mortgage loans and provide additional cash for the opening of a day-care center. Appellant alleged that McConnell's representations regarding the status of the loan application and anticipated closing dates caused foreclosure on one of the mortgage notes that appellant had been attempting to refinance, plus related collection activities. For a full recitation of the allegations in the complaint, see *Krukrubo* at ¶2-9.

{¶5} In its September 3, 2009 decision and entry granting appellees' motion for summary judgment, the trial court set forth the elements of each of appellant's causes of action and noted that common to both claims are the following two elements: (1) that appellees made a false statement of a material fact; and (2) that appellant justifiably relied upon the false statement. The trial court determined that appellees had adduced evidence that they had not made a false statement of material fact and that appellant did not justifiably rely on any statement attributable to appellees; and it further determined that appellant had failed to meet his reciprocal burden of demonstrating the existence of a genuine issue of fact with respect to these two elements of his claims. Accordingly, the trial court granted appellees' motion for summary judgment and denied appellant's motion.

{¶6} On appeal, appellant raises four assignments of error, as follows:

> [1.] THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR SUMMARY JUDGMENT.
>
> [2.] THE TRIAL COURT ERRED IN GRANTING THE APPELLEE'S [sic] MOTION FOR SUMMARY JUDGMENT.
>
> [3.] THE TRIAL COURT ERRED IN FAILING TO CONSIDER AND DISPOSE OF THE APPELLANT'S MOTION TO STRIKE AND/OR DISREGARD THE STATEMENTS CONTAINED IN PARAGRAPH 10 OF THE AFFIDAVIT OF ERIC RIEDINGER AND MOTION FOR SANCTIONS AND FOR REASONABLE EXPENSES AND ATTORNEY'S FEES PURSUANT TO OHIO CIVIL RULE 56(G) IN CONNECTION WITH ITS CONSIDERATION OF THE CROSS MOTIONS FOR SUMMARY JUDGMENT.
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> [4.] THE TRIAL COURT ERRED IN FAILING TO GRANT THE APPELLANT'S MOTION TO STRIKE AND/OR DISREGARD THE STATEMENTS CONTAINED IN PARAGRAPH 10 OF THE AFFIDAVIT OF ERIC REIDINGER AND MOTION FOR SANCTIONS AND FOR REASONABLE EXPENSES AND ATTORNEY'S FEES PURSUANT TO OHIO CIVIL RULE 56(G) IN CONNECTION WITH ITS CONSIDERATION OF THE CROSS MOTIONS FOR SUMMARY JUDGMENT.

{¶7} In his brief, appellant has combined his arguments supporting his first and second assignments of error, and we will combine our analysis of these assignments as well. We begin our discussion by recalling the standard of review applicable to summary judgments. An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc*. (1994), 94 Ohio App.3d 579, 588. Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, when the evidence is

construed in a light most favorable to the non-moving party. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd*., 78 Ohio St.3d 181, 183, 1997-Ohio-221.

{¶8} The factual basis for appellant's claim that appellees made a false statement of material fact is that appellees "gave Mr. Krukrubo several false closing dates * * * but never kept any." (Complaint, ¶54.) He further alleged that appellees misrepresented that "it would fund and close a refinance. Fifth Third made this representation through the Commitment Letter * * * and through consistent and repeated representations of [McConnell]." (Answer to Appellees' Interrogatory Number 7.)

{¶9} The trial court summarized these allegations, which appellant repeated at his deposition, as an assertion that appellees fraudulently and/or negligently led him to believe that it would close on his refinancing proposal, but then never closed the transaction, instead ultimately denying his loan application. The court observed that appellant had adduced no evidence that appellees knew, at the time the alleged false statements were made, that they would not ever close the loan. Fraud is generally predicated on a misrepresentation relating to a past or existing fact, and not on promises or representations relating to future actions or conduct. " 'Representations concerning what will occur in the future are considered to be predictions and not fraudulent misrepresentations.' " *Englert v. Nutritional Sciences, LLC*, 10th Dist. No. 07AP-989, 2008-Ohio-5062, ¶25, quoting *Assn. for Responsible Dev. v. Fieldstone Ltd. Partnership* (Nov. 13, 1998), 2d Dist. No. 16994. "An exception to this rule exists, however, where an individual makes a promise concerning a future action, occurrence, or conduct, and, at the time he makes it, has no intention of keeping the promise. In such a case, the

individual possesses actual fraudulent intent and a claim for fraud may be asserted against him." *Williams v. Edwards* (1998), 129 Ohio App.3d 116, 124.

{¶10} Review of the record reveals that the Commitment Letter that McConnell provided to appellant contained several express conditions, including a statement that closing was "to be determined." The Commitment Letter also contained a provision stating that appellees could terminate the provisional commitment without notice. (Krukrubo Depo., 75-77.) Appellant himself, in a letter to appellees, characterized the closing dates that had been discussed as "tentative" and "proposed."

{¶11} At his deposition, appellant testified that final approval of his loan application was conditioned upon completion of "the necessary investigations." (Krukrubo Depo., 66-67.) The Commitment Letter required, as a condition precedent to funding the loan, that appellant provide all requested financial information. The record reveals that appellant refused to provide a requested bank statement because, he told McConnell, he was hiding assets from creditors and did not want anyone to know where he banked. Finally, and most importantly, McConnell testified that throughout the loan investigation process, he *always intended to close the loan*. (McConnell Depo., 58, 85, 116-17, 121, 124-25.) All of this evidence demonstrates that appellees did not make the alleged false statements of material fact, including a false statement about their then-present intention to close the loan in the future.

{¶12} Appellant adduced no contradictory evidence to demonstrate that McConnell or any other agent of appellees made a false statement of material fact with respect to the loan application investigation or anticipated closing thereof. In his brief, he points to his own testimony that McConnell told him the loan was approved when it had

not been approved, but McConnell's statements to which appellant refers are all statements that the loan would close on or about a certain date; appellant argues that when McConnell set closing dates this was tantamount to stating that the loan had been approved. We disagree. The Commitment Letter and appellant's own testimony establish that closing dates were conditional and tentative and remained so unless and until the loan actually closed.

{¶13} Upon our thorough review of the record, we conclude that the trial court correctly determined that there exists no genuine issue of fact with respect to whether appellees made a false statement of a material fact, and reasonable minds could only conclude that appellees did not make such a statement. For this reason alone, appellees were entitled to summary judgment on both of appellant's claims.

{¶14} The trial court also concluded that any reliance by appellant on any of McConnell's statements about the status of appellant's loan application was not justifiable because: (1) appellant has worked in the financial industry since the early 1980s, holds a master's degree in business administration, and has purchased five pieces of real property; (2) appellant knew that the closing dates were "proposed" and "tentative," as evidenced by his characterization of them in this manner in his October 2005 letter to McConnell; and (3) appellant knew that the Commitment Letter allowed appellees to cancel at any time if appellant failed to provide all requested documentation, and appellant failed and refused to provide his bank account information to McConnell.

{¶15} On appeal, appellant argues that he was entitled to rely upon McConnell's statements because McConnell held the position of "vice president" and had provided a term sheet and Commitment Letter, had ordered a property appraisal, and had proposed

closing dates. However, appellant does not address how his reliance on these facts (that is, his belief that his loan application would ultimately be approved) was justifiable. In determining whether a plaintiff is justified in relying upon the defendant's representations, a "reasonable person" standard is not used. *Morgan v. Mikhail*, 10th Dist. No. 08AP-87, 2008-Ohio-4598, ¶74, citing *Three-C Body Shops, Inc. v. Welsh Ohio, LLC,* 10th Dist. No. 02AP-523, 2003-Ohio-756, ¶21. "Rather, the inquiry focuses upon the circumstances of the case and the relationship between the parties. Reliance is justified if, under the circumstances, the plaintiff did not have reason to doubt the veracity of the representation." (Citations omitted.) Id.

{¶16} Here, as set forth hereinabove, appellees adduced several pieces of uncontroverted evidence demonstrating that, under the circumstances and given the parties' relationship, appellant did have reason to doubt that his loan application would ultimately be approved and the loan that he hoped to obtain from appellees would ultimately close. Neither the fact that McConnell held a "vice president" title, nor the fact that McConnell had taken numerous steps in the loan application investigation process, provides a legitimate reason for appellant to have believed that he would obtain the loan he sought. Accordingly, the trial court was correct when it decided that reasonable minds could only conclude that appellant could not make out the justifiable reliance element of his fraud and negligence claims. This provides the second reason why the trial court's entry of summary judgment was correct.

{¶17} For all of the foregoing reasons, appellant's first and second assignments of error are overruled.

{¶18} Because they are interrelated, we will address appellant's third and fourth assignments of error together. Therein, he argues that the trial court erred when it failed to grant his motion to strike paragraph ten of the affidavit of Eric Riedinger, Fifth Third Bank Vice President and Special Assets Director, in which Mr. Riedinger averred that, upon reviewing McConnell's files after McConnell's resignation, he came upon correspondence from appellant's attorney and, on January 4, 2006, telephoned the attorney to inform him that appellant's loan application would not be approved. Appellant argues that the trial court was required to rule on – and grant – the motion before it ruled on the summary judgment motions, because this aspect of Mr. Riedinger's affidavit was inconsistent with his deposition testimony and was presented in bad faith. We disagree.

{¶19} We observe at the outset that "any pending motions that a trial court does not expressly rule upon ordinarily are considered impliedly overruled." *Asset Acceptance, LLC v. Rees*, 10th Dist. No. 05AP-388, 2006-Ohio-794, ¶9, fn. 2, citing *Maust v. Palmer* (1994), 94 Ohio App.3d 764, 769. Moreover, while it is true that a summary judgment movant may not benefit from the use of an affidavit that is contradictory to earlier deposition testimony, *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, ¶22, here, appellees did not benefit from paragraph ten of Mr. Riedinger's affidavit because the trial court did not rely on any aspect of that affidavit in granting appellees' motion for summary judgment or in denying appellant's motion for summary judgment. For these reasons, the trial court erred neither in impliedly overruling appellant's motion to strike, nor in failing to explicitly rule on it. Accordingly, appellant's third and fourth assignments of error are overruled.

{¶20} Having overruled all of appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK, P.J., and McGRATH, J., concur.

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