Affirmed and Opinion filed October 14, 1999.

In The

Fourteenth Court of Appeals

NO. 14-98-00698-CV

JOHN F. DEVEREUX AND LYLE METZDORF, Appellants

V.

ALVIN STATE BANK, Appellee

On Appeal from the 149th District Court
Brazoria County, Texas
Trial Court Cause No. 1728*RM97

O P I N I O N

Appellants, John F. Devereux and Lyle Metzdorf, appeal a summary judgment in favor of Alvin State of Bank on four issues presented. We affirm the trial court judgment.

BACKGROUND FACTS

In May of 1994, Devereux and Metzdorf met with Errol G. Rollen, a vice-president of the Bank, to discuss an investment opportunity involving a third bank customer, Clifford J. Scrutchin, who was the owner of a used car dealership. Scrutchin needed a loan from the Bank to help his business. Devereux

and Metzdorf agreed to provide the security for the loan by pledging Certificates of Deposits totaling $100,000, with each pledging a certificate of deposit in the face amount of $50,000.

On June 1, 1994, Scrutchin signed and issued to the Bank a Universal Note and Security Agreement, #715500. According to this Note, Scrutchin promised to pay the Bank the principal sum of $100,000, with interest at 5.400 percent per year. Contemporaneously with the execution of this Note, Devereux and Metzdorf each signed a third party pledge agreement, a separate document assigning their own certificates of deposit to the Bank, and an endorsement and delivery document. The security agreement expressly provided that the property securing Scrutchin's indebtedness to the Bank included an assignment of the following certificates of deposit:

> Number 41691 in the principal amount of $50,000, in the name of John F. Devereux, bearing interest at the rate of 3.4 percent per year, dated June 1, 1994, maturing December 1, 1994; and,
>
> Number 41692 in the principal amount of $50,000, in the name of Metzdorf, Inc., bearing interest at the rate of 3.4 percent per year, dated June 1, 1994, maturing December 1, 1994.

Likewise, the pledge agreements Metzdorf and Devereux signed expressly provided that, as pledgors, they granted the Bank security interests in their respective certificates of deposit to secure Scrutchin's debt to the Bank. Metzdorf and Devereus gave the Bank the right to withdraw all or any part of their respective certificates of deposit and apply them toward the payment of Scrutchin's debt. They also agreed that the rights and remedies they granted the Bank in their pledge agreements were in addition to those stated in other agreements and that if there were more than one debt secured or more than one type of collateral (including collateral outside of their pledge agreements), it was entirely within the Bank's discretion as to the order and timing of remedies the Bank selected.

On June 8, 1994, Scrutchin signed and issued to the Bank a Universal Note and Security Agreement, # 716800, whereby Scrutchin promised to pay to the Bank the principal sum of $50,000, with interest at the rate of 10.500 percent per year. The security agreement of this note provided that the

secured property included, but was not limited to, an assignment of all the used car inventory, whether held for sale or for lease.

Every six months, each of the notes was renewed and extended. The last renewal occurred on December 1, 1996. However, because of the renewals, the first note (secured by the certificates of deposit) was numbered 715504, and the second note (secured by the inventory) was numbered 716805; in addition, the interest rates on each note had changed.

Scrutchin defaulted on his obligation to pay the balances owed to the Bank on both notes. The Bank notified Scrutchin of the defaults and made demands for payment. Scrutchin refused to pay the amount owed to the Bank. As of July 2, 1997, Scrutchin owed $93,272.57, plus accrued interest of $1,545.89 on note # 715504. Scrutchin owed $1,649.59, plus accrued interest of $646.80 on note #716805. Devereux and Metzdorf told the Bank that it could not utilize the certificates of deposit pledged by them to the Bank to secure note #715504. The Bank sued Scrutchin, Devereux, and Metzdorf. They responded by pleading fraud, specifically, fraud in the inducement. The trial court granted the Bank's motion for summary judgment and entered judgment in favor of the Bank and against Scrutchin for all amounts owing on both notes as well as attorney's fees and costs. The judgment provided for the Bank to recover from Devereux and Metzdorf all proceeds from the surrender of the certificates of deposit and that any amounts that exceeded the total amount of unpaid principal, interest and attorney's fees would be distributed to Devereux and Metzdorf in equal shares. Devereux and Metzdorf appeal on four points of error.

STANDARD OF REVIEW

A defendant prevails on a motion for summary judgment if he can establish with competent proof that, as a matter of law, there is no genuine issue of fact as to one or more of the essential elements of the plaintiff's cause of action. *See Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970). If the defendant bases his motion for summary judgment on an affirmative defense, he must prove all the elements of the defense as a matter of law. *See Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex. 1984). Once the movant establishes a right to summary judgment, the non-movant must expressly present any reasons avoiding the movant's entitlement and must support the response with summary

judgment proof to establish a fact issue. *See Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 907 (Tex. 1982); *Cummings v. HCA Health Servs. of Texas*, 799 S.W.2d 403, 405 (Tex. App.—Houston [14th Dist.] 1990, no writ).

The standards an appellate court employs to review summary judgment proof are as follows:

1. The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.
2. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.
3. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.

Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548-49 (Tex. 1985); *see Karl v. Oaks Minor Emergency Clinic*, 826 S.W.2d 791, 794 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

DISCUSSION AND HOLDINGS

In their first point of error, Devereux and Metzdorf contend the trial court committed reversible error by granting summary judgment in the Bank's favor because their affidavits established the defense of fraud in the inducement, rendering the pledge agreements unenforceable. Devereux and Metzdorf argue that the Bank fraudulently induced them into securing note # 715504 by telling them that the note would actually be secured by the inventory of Scrutchin's car dealership. Thus, Devereux and Metzdorf argue that they have established the defense of fraud. In response, the Bank argues that the parol evidence rule bars our consideration of the affidavits. We need not address the parol evidence rule, because, as we discuss below, the affidavits fail to raise a fact issue on the affirmative defense of fraud in the inducement.

To establish fraud in the inducement, Devereux and Metzdorf must establish that the Bank engaged in fraud to induce them to enter into the contract. To establish fraud Devereux and Metzdorf must show (1) a material representation, (2) that is false, (3) was made with knowledge of its falsity and as a positive assertion, (4) with the intention that it be acted upon by them, (5) that they acted in reliance upon that assertion, and (6) that they suffered injury. *See Johnson & Higgins of Texas, Inc. v. Kenneco*

Energy, Inc., 962 S.W.2d 507, 524 (Tex. 1998). We find that Devereux and Metzdorf have not met these criteria.

The only evidence offered by Devereux and Metzdorf is their affidavits attached to their response to Bank's motion for summary judgment. In these affidavits, Devereux and Metzdorf each state the following about a meeting they attended with each other and Rollen:

> The purpose of the meeting was to discuss the terms of an agreement to provide security for a proposed floor plan loan by Alvin State Bank to Clifford Scrutchins [sic] d/b/a League City Auto Sales. During that meeting, Mr. Rollen asked us to provide security for the proposed loan by pledges of Certificates of Deposit totaling $100,000. Half of the amount was to be provided by Mr. Metzdorf[1] and I was to provide the balance of $50,000. Mr. Rollen represented that the proceeds of the loan were to be used by Mr. Scrutchins [sic] to purchase vehicles for the inventory of Mr. Scrutchins' [sic] auto business. Mr. Rollen represented that in connection with any draw on the proposed loan, Mr. Scrutchins [sic] would be required to deliver the certificate of title for the automobile to the Bank for any draw of proceeds to be used to purchase that automobile, that the title would be held by the Bank as security for the repayment of the draw of funds used to purchase the automobile and that the Bank would release the certificate of title Mr. Scrutchins [sic] only upon repayment of an amount equivalent to the money drawn to purchase the automobile. Mr. Rollen told us that the titles for the automobiles would be handled in this manner, if we agreed to pledge additional security for the loan in the form of the Certificates of Deposit totaling $100,000.
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> I relied upon these representations and promises by Mr. Rollen. I understood that Mr. Rollen was making these statements on behalf of Alvin State Bank in his capacity as an officer of the Bank. I would not have made the agreement to pledge the Certificate of Deposit as part of the security for Mr. Scrutchins' [sic] loan from Alvin State Bank, without those promises having been made by Mr. Rollen for the Bank. I would not have pledged my Certificate of Deposit as part of the security for Mr. Scrutchins' [sic] loan, if I had known that the Bank did not intend to perform the agreement as represented by Mr. Rollen.
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> In order to perform my portion of the agreement, I arranged to purchase certificate of deposit No. 41691[2] in the principal amount of $50,000 in the name of John F.

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[1] In Metzdorf's affidavit, this word is Devereux.

[2] In Metzdorf's affidavit, this number is 41692.

> Devereux. [sic][3], bearing interest at the rate of 3.4 percent per annum, payable by the Alvin State Bank. This CD was then pledged to the Bank as part of the security for the loan that is referred to in the Plaintiff's Petition as the "CD loan".[4] The certificates of deposits and third party pledge agreements were renewed every six months from June 1, 1994 through December 1, 1996. From June 1, 1994 through December 1, 1996, neither Errol G. Rollen nor any other representative of Alvin State Bank told me that the Bank had not been requiring Mr. Scrutchins to deposit vehicle titles with the Bank as security for his draws under the CD loan, as had been promised by Mr. Rollen during our meeting at Enzo's. I would not have renew [sic] my CD or executed the renewal of the third party pledge agreements in years following December 1, 1994, if the Bank had disclosed this information to me.

While these affidavits contain most of the elements needed to establish fraud, they do not show Rollen's intent. The failure to perform a future act, *i.e.*, to secure the loan by Scrutchin's inventory rather than by the certificates of deposit, is only fraud when there is no intent to perform the act at the time the representation was made. *See T.O. Stanley Boot Co. v. Bank of El Paso,* 847 S.W.2d 218, 222 (Tex. 1992); *Oliver v. Rogers*, 976 S.W.2d 792, 804 (Tex. App.—Houston [1st Dist.] 1998, no pet.); *Figueroa v. West*, 902 S.W.2d 701, 707 (Tex. App.—El Paso 1995, no writ). Devereux and Metzdorf have not established that, at the time of the discussion with Rollen, he made the representation with the intent not to act in accordance with it. While we can infer the party's intent from subsequent acts after the representation was made, the evidence in this case does not allow us to infer that Rollen did not intend to act on the representation. *See Oliver*, 976 S.W.2d at 804.

> Failure to perform a future act is fraud only when there is no intent to perform the act at the time the representation was made. Cases in which a party was induced into signing a contract by a promise that the promisor had no intention of keeping at the time he made the promise are to be distinguished from situations in which a party has made a promise with an existent intent to fulfill its terms and who then changes his mind and refuses to perform; otherwise, every breach of contract would involve fraud.

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[3] In Metzdorf's affidavit, the purchased in the name of Metzdorf, Inc.

[4] In Metzdorf's affidavit, an extra sentence was added here which reads, "The original CD No. 41692 was replaced by Certificate of Deposit No. 20010054 in the principal amount of $59,232.62 in the name of Lyle Metzdorf, bearing interest at the rate of 3.4 percent per annum, payable by the Alvin State Bank."

Id. (citations omitted). The evidence provided by Devereux and Metzdorf does not establish that Rollen had the intent, at the time the statements were made, not to perform. Because Devereux and Metzdorf did not conclusively establish the issue of intent, the affirmative defense of fraud was not proven. Thus, the trial court did not err when it granted the Bank's summary judgment. We, therefore, overrule Devereux's and Metzdorf's first point of error.

In their second and third points of error, Devereux and Metzdorf contend that neither the parol evidence rule nor section 26.02 of the Texas Business and Commerce Code preclude the consideration of their affidavits. These issues are moot now because we considered the affidavits and found that they did not raise a fact issue regarding the their affirmative defense of fraud.

In their fourth point of error, Devereux and Metzdorf contend the trial court erred by denying their motion for new trial because their summary judgment affidavits established fraud. Based on our discussion under point of error one, the trial court properly denied the motion for new trial.

We, therefore, overrule Devereux's and Metzdorf's fourth point of error and affirm the trial court judgment.

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Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed October 14, 1999.
Panel consists of Justices Yates, Fowler and Frost.

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