COURT OF APPEALS
DECISION
DATED AND FILED

September 14, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-3133

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

PARK BANK,

PLAINTIFF-APPELLANT,

V.

COULEE STATE BANK,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

¶1 PER CURIAM. Park Bank appeals a judgment dismissing its complaint against Coulee State Bank. The issue is whether Park Bank was Coulee State Bank's agent. We conclude it was not. We affirm.

¶2 Park Bank is attempting to obtain payment from Coulee State Bank for money Park Bank spent defending itself against a third party who had borrowed money from both banks under a "participation agreement." According to the banks' factual stipulation in the trial court, a loan participation agreement is "a vehicle whereby the lending bank is able to make loans to a customer that exceed the lending bank's lending limits by having some of the money that is lent provided by another bank, called the participant bank." In this case, the banks signed two participation agreements involving the same third-party borrower. In both agreements, Park was the lead bank and Coulee was the participant bank, and Coulee put forth the entire loan amount for each agreement.

¶3 The borrower sued Park Bank for actions that Park Bank took in enforcing and collecting on the loans. Park Bank prevailed in that action, but now seeks to recover its attorney expenses from Coulee State Bank. Park Bank's theory is that in administering the loans made under the above participation agreements, Park was acting as Coulee's agent, and therefore is entitled to recover those expenses under the common law of agency.

¶4 In the trial court, the parties agreed that one of the requirements for formation of an agency relationship is that the parties have an understanding that the principal is to control the undertaking. The parties presented the court with stipulated facts and certain other material, and then argued the question of control. The court concluded that Coulee State Bank did not control the undertaking. Park Bank appeals from that decision.

¶5 On appeal, Park Bank first argues that the express terms of the participation agreements show that Coulee State Bank controlled the

administration of the agreements. The parties agree that this issue presents a contractual question of law we review without deference to the trial court.

¶6 As a threshold issue, the parties disagree over exactly what we should consider as "the undertaking." Park Bank argues that we should look at who controlled the entire participation agreement, while Coulee State Bank argues that we should look solely at who was in control of the enforcement and collection of the notes, because it was Park Bank's actions in that area that led to the borrower's lawsuit. Neither party has cited any case law to provide guidance in determining the scope of the undertaking.

¶7 On this point, we agree with Park Bank that the undertaking to be reviewed is the entire participation agreement. Coulee State Bank's argument would lead to an impractical and untenable result. Under Coulee's view the existence of an agency relationship would depend on the specific action being taken. For every action taken by one of the banks, the contract would have to be analyzed to determine which, if either, of the two banks could be considered to control that specific "undertaking." Under this view, Park Bank could simultaneously be both an agent of Coulee and not an agent of Coulee, depending on what actions it was taking at that moment. In fact, at any given moment, but regarding different actions, each bank might be considered the agent of the other. This would be a nightmare of administration and analysis, especially when a particular course of action encompasses several sub-actions that fall under different provisions of the agreements.

¶8 Therefore, we now examine the full participation agreements to determine whether Coulee State Bank controlled the undertaking. The text of the two agreements appears to be identical, except as to the financial particulars. The

key paragraph is number 7, entitled "Administration." The parties are familiar with the document, so we will not attempt to reproduce this lengthy provision here.

¶9 To show that it did not control the undertaking, Coulee relies mainly on passages which give control of certain tasks to the lead bank, Park. For example, the paragraph's first sentence states in part that the lead bank "may take any action determined by it in its sole discretion to be appropriate to enforce payment of the Note or to realize upon any collateral." The paragraph also provides that, with certain stated exceptions, the lead bank "will service and manage the loan in accordance with its usual practices," which suggests control of the administration by the lead bank.

¶10 On the other hand, there are also provisions giving significant control to the participant bank, Coulee. For example, the paragraph requires the consent of the participant bank before the lead bank may extend, renew, amend or change the note, or grant any consents, waivers, variances, or releases thereunder, or permit the release or substitution of any collateral therefor. The agreement further provides that if the banks are unable to agree on any of these acts which require the participant bank's consent, the binding decision shall be made by "the beneficial owners of a majority in amount of the Note." Coulee State Bank is the owner of 100% of both notes, and therefore this provision appears to give it substantial control over the administration of the agreements.

¶11 However, the preceding provision also has certain exceptions that still require the agreement of both banks, regardless of the decision reached by the majority owners. And, most importantly, there is a provision which states that, as to those actions which require the consent of the participant bank, if the participant

bank "refuses to consent to any such act … when requested to do so by [the lead bank], [the lead bank] may at any time thereafter, at its option, purchase the interest" of the participant bank, on terms provided in the agreement.

¶12 Under this provision, it is the lead bank, Park, which has the ultimate authority to "take its ball and go home." It would be a highly unusual principal-agent relationship in which the agent, when dissatisfied with the principal's refusal to take action suggested by the agent, has the absolute authority to buy out the principal's entire interest in the undertaking. Rather than an agency relationship, the participation agreements establish a complicated structure of mutual authority, with the ultimate final power, in the form of the buy-out provision, given to Park Bank. Therefore, we conclude that the participation agreements do not establish that Park Bank was acting as Coulee State Bank's agent.

¶13 Park Bank also argues that an agency relationship was established by the specific conduct of the parties during the period leading up to its collection actions against the borrower. Park Bank offers no authority for the proposition that actions by the parties to a contractual relationship can convert that relationship into an agency relationship, despite what the contract may show. Coulee State Bank responds with case law to the effect that the proper test is the *right* to control under the contract, and that the parties' course of conduct is irrelevant. Park Bank did not file a reply brief, and has not rebutted this argument. We take this as a concession that the issue of control is properly resolved by reviewing only the contract, and we do not discuss the parties' course of conduct further. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (party cannot complain if other party's propositions are taken as confessed when not refuted).

By the Court.—Judgment affirmed.

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