COURT OF APPEALS
DECISION
DATED AND RELEASED

April 23, 1997

NOTICE

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

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1688

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

RUTH ANN HACKMAN, D/B/A AERIAL STUNT KITES,

PLAINTIFF-APPELLANT,

V.

FIRST BANK SOUTHEAST OF LAKE GENEVA, N.A.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Ruth Ann Hackman, d/b/a Aerial Stunt Kites, has appealed from a judgment which granted a motion for summary judgment filed by the respondent, First Bank Southeast of Lake Geneva, N.A., and dismissed Hackman's complaint. We affirm the judgment.

When reviewing a grant of summary judgment, we apply the same methodology as the trial court and decide de novo whether summary judgment was appropriate. *See* ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis.2d 548, 555, 508 N.W.2d 610, 612 (Ct. App. 1993). We first examine the pleadings to determine whether a claim has been stated and whether a material issue of fact is presented. *See* ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476 (1980). If the pleadings set forth a claim for relief and a material issue of fact, our inquiry shifts to the moving party's affidavits or other proof to determine whether a prima facie case for summary judgment has been presented. *See* ***id.*** at 338, 294 N.W.2d at 476-77. If the moving party has made a prima facie case, the affidavits or other proof of the opposing party must be examined to determine whether there exist disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to trial. *See* ***id.*** at 338, 294 N.W.2d at 477.

Based upon these standards, we conclude that the trial court properly granted summary judgment to the bank. In her complaint, Hackman sought damages based on allegations that the bank mishandled her application for a loan guaranteed by the United States Small Business Administration (SBA) and the subsequent administration of that loan. She labeled her claims as: (1) tortious breach of contract; (2) professional negligence; (3) tortious breach of fiduciary duty; and (4) intentional damage and infliction of emotional distress.

The bank correctly argues that Wisconsin law recognizes no claim for "tortious breach of contract." *See* ***Autumn Grove Joint Venture v. Rachlin***, 138 Wis.2d 273, 281 n.6, 405 N.W.2d 759, 763 (Ct. App. 1987). It argues that, recognizing this problem, Hackman changed her claim during the summary

judgment proceedings to a claim of intentional interference with contracts between herself and third parties.

Addressing Hackman's claim as currently set forth by her, it nevertheless fails. To recover for interference with a contract under Wisconsin law, it is essential that the defendant acted intentionally. *See* ***Cudd v. Crownhart***, 122 Wis.2d 656, 660, 364 N.W.2d 158, 160 (Ct. App. 1985). To have the requisite intent, the defendant must act with the purpose of interfering with the contract. *See* ***id.*** If the defendant does not have this purpose, his or her conduct does not subject him or her to liability even if it has the unintended effect of deterring third persons from dealing with the claimant. *See* ***id.*** Since nothing in the allegations of the complaint or the summary judgment record provides any basis for concluding that the bank acted with the purpose of interfering with Hackman's contract or business relationships with others, the trial court properly granted summary judgment dismissing this claim.

Hackman's claims of negligence and breach of a fiduciary duty are intertwined, *see* ***Production Credit Ass'n v. Croft***, 143 Wis.2d 746, 758, 423 N.W.2d 544, 548 (Ct. App. 1983), and were both properly dismissed by the trial court. Fiduciary relationships arise only when specifically created by contract or by a formal legal relationship, or when implied in law due to the factual situation surrounding the parties' relationships and transactions. *See* ***id.*** at 752, 423 N.W.2d at 546. Here, the contract itself did not specifically create a fiduciary relationship, nor did the bank become a fiduciary merely because it entered into a lender-borrower relationship with Hackman. *See* ***id.*** at 752-54, 423 N.W.2d at 546-47. Moreover, while the contract and SBA guaranty agreement contemplated some review and control by the bank of loan disbursements and their allocation to certain specified line item categories, these controls were reasonably necessary to

protect the interests of the bank and the SBA in the loan proceeds and did not vest control of Hackman's business in the bank. The degree of control did not rise to the level necessary to create a fiduciary duty. *See* ***id.*** at 753-54, 423 N.W.2d at 546-47. The relationship between Hackman and the bank thus was distinguishable from the situation in ***Production Credit Ass'n v. Vodak***, 150 Wis.2d 294, 310-12, 441 N.W.2d 338, 344-45 (Ct. App. 1989), where undisputed affidavits gave rise to the inference that the lender managed the borrower's farm operation and rendered summary judgment dismissing the borrower's claims inappropriate.

Hackman argues that a fiduciary relationship arose because she lacked business experience and relied on the bank's representation that it had experience in dealing with SBA loans. However, a fiduciary relationship does not arise merely because advice and counsel are offered upon which a customer places trust and confidence. *See* ***Croft***, 143 Wis.2d at 757, 423 N.W.2d at 548. Manifest in the existence of a fiduciary relationship between a borrower and lender is that there exists an inequality, dependence, weakness of mental strength, business intelligence, knowledge of facts involved, or other conditions which give to one an advantage over the other. *See* ***id.*** at 755-56, 423 N.W.2d at 547.

Hackman had never dealt with the bank previously and thus had no history of relying on its advice. In addition, she had her own business consultant who assisted her in preparing her business plans for submission to the SBA and who personally discussed the matter with the SBA when her guaranty application was initially rejected. The bank did nothing more than advise and assist Hackman in applying for the loan guaranty and, after its approval, took steps to monitor and allocate disbursements of the loan proceeds as required under the SBA agreement, thus protecting its interest in its loan and the SBA guaranty. The facts surrounding the relationship therefore did not give rise to a fiduciary relationship, even

accepting that the bank had superior knowledge and experience in financial matters. *See* ***id.*** at 756-57, 423 N.W.2d at 547-48.[1]

Absent a fiduciary duty, Hackman's negligence claim was also properly dismissed. *See* ***Croft,*** 143 Wis.2d at 757-58, 423 N.W.2d at 548. Unlike the situation in ***Vodak***, 150 Wis.2d at 311-12, 441 N.W.2d at 345, the bank did not prepare and implement a plan for the operation of Hackman's business nor adopt a role regarding its actual operation which went beyond what was permitted by the SBA agreement regarding disbursements and protecting its guaranty. While Hackman objects that the bank should have approved disbursements of the loan proceeds faster in order to cover checks she wrote, nothing in the summary judgment record provides a basis for concluding that the bank acted unreasonably or improperly in requiring invoices or other documentation before making disbursements, in allocating the disbursements, or in the length of time it took to review the disbursement requests.

Absent a "managing partner" role like that set forth in ***Vodak***, no claim based on negligence in administering the loan could be maintained. Similarly, since Hackman created her own business plan and the bank merely assisted her in applying for an SBA loan guaranty and advising her of additions or

[1] The parties cite language in ***Production Credit Ass'n v. Vodak***, 150 Wis.2d 294, 313, 441 N.W.2d 338, 346 (Ct. App. 1989), indicating that if a fiduciary relationship arises between a borrower and a lender, it triggers a duty to disclose. Because the pleadings and summary judgment record provide no basis for concluding that the bank had a fiduciary relationship with Hackman, we need not address whether the bank had any duty of disclosure to Hackman arising from a fiduciary relationship.

changes required by the SBA for approval, no cause of action for negligence arising from the SBA application process was set forth by Hackman.[2]

Hackman's final claim alleged intentional infliction of emotional distress. To establish such a claim, a plaintiff must show: (1) that the defendant behaved as it did for the purpose of causing emotional distress to the plaintiff and that its conduct was thus intentional; (2) that the defendant's conduct was extreme and outrageous; (3) that it was a cause-in-fact of the plaintiff's injury; and (4) that the plaintiff suffered an extreme disabling emotional response to the defendant's conduct. *See* ***Alsteen v. Gehl***, 21 Wis.2d 349, 359-60, 124 N.W.2d 312, 318 (1963).

Neither the allegations of the complaint nor the evidence in the summary judgment record provides a basis for concluding that Hackman suffered an extreme disabling emotional response to the bank's conduct. Severe emotional distress is anxiety of such substantial quantity or enduring quality that no reasonable person could be expected to endure it. *See* ***Evrard v. Jacobson***, 117 Wis.2d 69, 73, 342 N.W.2d 788, 791 (Ct. App. 1983). While Hackman alleged humiliation, emotional distress, inability to sleep, vomiting and migraine headaches, she admitted that she never sought medical, psychiatric or psychological treatment, and ultimately continued her business. While these allegations demonstrate a stress reaction to business difficulties and uncertainties,

[2] Hackman emphasizes that her first application to the SBA was rejected because it did not include a bank analysis. We have reviewed the SBA's July 31, 1992 rejection letter. While stating that the application was incomplete because it did not include a bank analysis, the application was rejected on the ground that there was a lack of reasonable assurance that projected revenues and profits could be achieved, and Hackman's collateral was deemed insufficient to protect the government's interest. Those concerns were reiterated by the SBA in a letter dated September 24, 1992. They relate to the perceived soundness of Hackman's overall business plan and do not establish a prima facie basis for finding negligence on the part of the bank.

they do not rise to the level necessary to establish an extreme disabling emotional response. *See* ***id.*** The claim therefore was properly dismissed.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.