COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP760 **Cir. Ct. No. 2013CV993**

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

FIRST BANK FINANCIAL CENTRE,

PLAINTIFF-RESPONDENT,

V.

JAMES C. JURANITCH,

DEFENDANT-APPELLANT,

JANET M. JURANITCH A/K/A JANET M. HARTE,

DEFENDANT.

APPEAL from judgment of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed*.

Before Reilly, Gundrum and Kessler, JJ.

¶1 PER CURIAM. James C. Juranitch appeals from a judgment entered in favor of First Bank Financial Centre against Juranitch and his former

spouse, Janet M. Harte, based on defaulted payments owed pursuant to a Home Equity Credit Agreement (HECA). Juranitch argues that summary judgment in favor of First Bank was improper because his pleadings filed in opposition to summary judgment established a prima facie defense that would defeat First Bank's claim for relief. Specifically, he contends that First Bank breached the terms of the HECA by negligently monitoring and supervising the account, thereby allowing Harte to make a draw despite a material change in financial circumstances. He further argues that First Bank breached its duty of good faith and that he should be relieved of joint liability for the debt because he was not provided notice of Harte's loan. We conclude that there are no material facts in dispute, First Bank did not breach any duty owed to Juranitch, and First Bank was entitled to summary judgment as a matter of law. We affirm.

¶2 In February 2008, while still married, Juranitch and Harte, executed a Home Equity Credit Agreement (HECA) with First Bank, secured by their Oconomowoc residence. The HECA provided a $600,000.00 cap and between the time of its execution and May 2011, Juranitch and Harte borrowed and repaid over $2,000,000.00, often drawing large amounts. Juranitch and Harte were divorced in 2009.[1] In May 2011, Harte borrowed $386,911.00 from the HECA, bringing the line back up to its $600,000.00 maximum. The last payment made on the HECA was in November 2011. First Bank declared default and on April 30, 2013,

[1] Juranitch averred that at the time of the divorce, the HECA balance was at its maximum balance of $600,000.00 but per the divorce terms, he paid Harte $300,000.00 of which $277,983.22 was applied to the HECA. He averred that Harte paid an additional $90,000.00 so that in November 2009, the HECA balance was down to $233,672.14. Upon the post-divorce sale of a jointly-owned lot, Harte paid an additional $126,729.99, leaving the HECA balance at $172,088.20.

filed a complaint alleging breach of contract and requesting judgment in the amount of $630,095.84 plus attorney fees and costs.

¶3 Juranitch filed an answer and raised as "affirmative defenses" that First Bank "failed to exercise ordinary care, reasonable lender diligence and other lender requirements in managing the subject line of credit account" and "failed to exercise good faith and fair dealing" regarding the HECA contract. He asserted that pursuant to the terms of the parties' 2009 divorce, Harte was ordered to pay the First Bank HECA and that her May 2011 draw was made without his knowledge or permission, at a time when she was not credit worthy and the underlying security, the Oconomowoc residence, was insufficient to cover the ensuing HECA balance.[2]

¶4 First Bank moved for summary judgment against both Juranitch and Harte as co-obligors jointly and severally liable for the debt. Relying on the affirmative defense theories alleged in his answer, Juranitch submitted affidavits opposing summary judgment, averring that as part of the divorce, Harte was awarded the Oconomowoc residence and ordered to pay both the first mortgage and the First Bank HECA. He averred that around the time of the divorce, he had relocated to Florida, closed all of his personal accounts at First Bank, and that his staff contact person at First Bank, Rosalyn Rutkowski, was aware of the parties' divorce. He further averred that after the divorce, he neither borrowed on nor made payments toward the HECA, and never received any monthly statements concerning the account.

[2] Juranitch also filed a cross-claim against Harte, seeking indemnification and a constructive trust. The trial court stayed further proceedings concerning the cross-claim pending disposition of this appeal.

¶5 Juranitch also provided the affidavit of William Stube, who previously served as vice president of a separate bank. Stube averred that he had substantial experience as a loan officer and knowledge of area banking practices and procedures. Citing to the FDIC regulations and provisions of the Comptroller's Handbook attached to his affidavit, Stube averred that acceptable area banking practices included periodic evaluation of a loan's security, the borrower's credit score, receipt of annual income tax returns and personal financial statements as well as personal borrower contact. Stube opined that First Bank "failed to exercise ordinary care and prudent loan monitoring practices in the oversight of" the parties' HECA and that Harte's May 2011 draw request "should have been declined by the Bank."

¶6 The trial court granted summary judgment in favor of First Bank, rejecting Juranitch's position that the bank "had an obligation or owed a duty in this case to Mr. Juranitch to sort of protect him from himself.":

> Now, the bank certainly always had the ability under the terms of the agreement to have requested additional information from them to have determined if they would still be defined as being credit worthy, meaning this was secured. … The bank didn't do that, but there's also nothing that required or obligated them to do that. I'm satisfied that was something they had the ability to do, not for their protection of what would be Mr. Juranitch and Ms. Harte, but, essentially, to protect their own interest, meaning their right to repayment and the ability of these individuals to repay the loan. … The bank was obligated to comply with [the HECA's] terms unless they were changed or modified. They weren't. … Mr. Juranitch had the opportunity to have done that at any time after the date of the divorce. … That would have certainly protected [him] from what now is the claim here.

Juranitch appeals.

¶7 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. ***Frost v. Whitbeck***, 2001 WI App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325. We first examine the pleadings to determine whether the complaint states a claim and whether the answer joins an issue of fact or law. ***Id.*** If an issue has been joined, we examine the parties' affidavits and other submissions to determine whether the movant has made a prima facie case for judgment and, if so, whether the opposing party's affidavits establish a disputed material fact that would entitle the opposing party to trial. ***Id.***; *see also* WIS. STAT. § 802.08(2) (2013-14).[3]

¶8 Juranitch concedes and we agree that First Bank's motion for summary judgment established a prima facie case for relief. As such, Juranitch admits that he executed the HECA and was a co-obligor, the HECA was valid, binding, and in full force and effect, the Bank advanced sums thereunder for the benefit of Juranitch and Harte, there was a default, and the amount due and owing under the HECA. However, Juranitch maintains that summary judgment was inappropriate because his opposing affidavits establish on a prima facie basis that First Bank was negligent in its administration and monitoring of the HECA, thereby breaching its terms and relieving him of any payment obligation. In support, Juranitch cites the following provision in the HECA:

> 11. Refusal to Lend. The Lender may refuse the Credit Limit and/or refuse to honor any Check or request by me for a Loan during such time as … (b) the value of the real estate securing this Agreement has declined significantly from its value as initially appraised by or for the Lender, (c) the Lender reasonably believes that I will be unable to

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

> fulfill my repayment obligations under this Agreement due to a material change in my financial condition.

¶9 Juranitch argues that "these reserved contractual prerogatives gave rise to a duty of First Bank to act upon them if and when the circumstances of the borrowers so dictated." In other words, Juranitch contends that because the bank could refuse to honor a draw request if the securing real estate had declined in value or based on a party's materially changed financial circumstances, it had a duty to supervise and monitor the account to ensure that the borrower would be able "to fufill [his or her] repayment obligations under the Agreement."

¶10 We conclude that First Bank owed no duty to the borrowers under the HECA to ensure, prior to a disbursement, that no change in circumstances existed which might interfere with the repayment obligation. Whether or not a duty exists is a question of law. ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 416, 385 N.W.2d 219 (Ct. App. 1986) (citation omitted). The clear language in Section 11 authorizes First Bank to refuse to honor a draw request under certain circumstances but does not obligate the bank to refuse such requests under any circumstances. Juranitch points to no promise in or failure to perform under the HECA that constitutes a breach. *See* ***Steele v. Pacesetter Motor Cars, Inc.,*** 2003 WI App 242, ¶10, 267 Wis. 2d 873, 672 N.W.2d 141 (citation omitted) (a party breaches a contract when performance of a duty is due and that party fails to perform).

¶11 We also reject Juranitch's claim that First Bank breached its duty of good faith. *See* ***Schaller v. Marine Nat'l Bank of Neenah***, 131 Wis. 2d 389, 402, 388 N.W.2d 645 (Ct. App. 1986) (it is well established that every contract imposes an obligation of good faith in its performance). Section 12 of the HECA provides:

> I may terminate my right to obtain loans under this Agreement at any time and for any reason by written notice to Lender by any of us, and such notice of termination shall be binding on each of us… termination, for whatever reason, does not affect the Lender's rights, power and privileges, or my duties and liabilities with regard to the then existing balance of the Account.

¶12 Juranitch had the power to protect himself. *See* ***Schaller***, 131 Wis. 2d at 403 (where a party not at the mercy of the other could have taken steps to avoid harm but did not, the duty of good faith is not breached). Juranitch does not assert that his access to the HECA account was restricted or that he was unable to obtain information related to the HECA.[4] Juranitch acknowledges that he maintained business accounts at First Bank and as indicated in his affidavit, had regular contact with the bank, including Ms. Rutkowski, who also handled the HECA. Juranitch did nothing to inquire as to the status of the HECA; he did not ask the bank or his ex-wife, or look at the monthly statements. Harte's draw was not extraordinary, but part of a pattern of large draws and payments made pursuant to the HECA between 2008 and 2011.[5] First Bank was aware that Juranitch had the ability to close or limit the HECA, and absent any indication from Juranitch, had no duty to pry into his affairs to discern his intent concerning the HECA.

¶13 We also reject Juranitch's attempt to establish through Stube's affidavit a breach of First Bank's good faith duty. Recognizing that the Federal

[4] While Juranitch complains that he only learned about Harte's May 2011 draw upon default, notices were sent out each month from First Bank to the address on the account. Juranitch did not request separate notices or notify the bank in any way that he wanted notices sent to a new address.

[5] Between February 2008 and November 2011, there were in excess of 120 transactions on the HECA account, with Juranitch and Harte making regular and extra payments such that the HECA was not in default.

Banking Regulations he cites do not create a private right of action, Juranitch posits: "Stube's affidavit is not being used to create a duty, his affidavit is being used to show that the bank breached its duty."[6] We are not persuaded. Stube's affidavit and the arguments therefrom constitute Juranitch's attempt to establish First Bank's affirmative duty to periodically evaluate the borrowers' credit scores, annual tax returns, and financial statements, as well as the value of the loan's security. This goes above and beyond the scope of a bank's duty to act in good faith, and falls short of establishing any common law, statutory or other duty owed by First Bank to monitor a borrower's financial circumstances.

¶14 Finally, Juranitch cites ***Capocasa v. First Nat'l Bank of Stevens Point***, 36 Wis. 2d 714, 154 N.W.2d 271 (1967), for the proposition that because he did not have notice of the Harte loan, he should be relieved of his repayment obligation. In ***Capocasa***, a husband and wife executed a note and granted the bank a mortgage on their personal property as security. ***Id.*** at 717. The mortgage contained a "dragnet" clause providing that future advances would also be secured by the mortgage. ***Id.*** The marriage began to fall apart. ***Id.*** The wife informed the bank that the husband had left and ceased operating his business, but that she would continue mortgage payments on the house. ***Id.*** Unbeknownst to the wife, the husband then exchanged his defunct business note for a personal note, which was subject to the home mortgage's dragnet clause. ***Id.*** The parties divorced and the wife was awarded the property and mortgage in the divorce. ***Id.*** When the

[6] In his reply brief, Juranitch concedes that violations of the banking regulations on which he relies do not create a private right of action. Juranitch asserts that he is not raising a counter-claim in negligence or tort, but is relying on Stube's affidavit to "posit the negligence of the respondent as an affirmative defense."

wife attempted to sell the house, the bank would not satisfy the mortgage until the husband's personal note was paid off. ***Id.*** at 717-18.

¶15 The ***Capocasa*** Court observed that courts generally viewed dragnet clauses with disfavor and thus tended to place limitations on the indebtedness permissibly secured by these mortgages. ***Id.*** at 721-23. After examining various jurisidictions' approaches, the ***Capocasa*** Court adopted the rule in Iowa "that a joint mortgagor is bound by the 'dragnet' clause to the extent that his individual interest in the property will be security for his own antecedent or subsequent obligations to the mortgagee."[7] ***Id.*** at 723.

¶16 The ***Capocasa*** holding relates to the enforceability of dragnet clauses in mortgages and is of little relevance to this case involving the liability of co-obligors under an open line of credit agreement that Juranitch himself signed, was aware of and able to monitor, and could have cancelled at any time.

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[7] Specifically, the court stated:

> We conclude therefore that, when a "dragnet" clause is made part of a mortgage executed by joint tenants, each mortgagor pledges his undivided interest in the mortgaged property to secure (1) the joint indebtedness or other indebtedness specifically named in the instrument, and any existing or future *joint* indebtedness of the mortgagors to the mortgagee; (2) any existing or future individual indebtedness to the mortgagee; and (3) any future debt of his comortgagor which is known to him and to which he consents to be a lien upon his interest; provided (4), in addition, that whenever the proceeds or the benefits derived from the other mortgagor's contracting a further obligation inure to the enhancement of his interest, the "dragnet" clause will be construed to cover such indebtedness to the extent of that enhancement notwithstanding the fact that the mortgagor did not know of or consent to the indebtedness.

Capocasa v. First National Bank, 36 Wis. 2d 714, 726-27, 154 N.W.2d 271 (1967) (emphasis in original).

By the Court.—Judgment affirmed.

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