

NO. A09-876

STATE OF MINNESOTA
IN COURT OF APPEALS

Jeffrey M. Schoenwetter,

Appellant,

v.

BankCherokee, a Minnesota corporation,

Respondent.

RESPONDENT'S BRIEF, ADDENDUM
AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

1. Did the District Court properly reject Appellant's defense of fraud in the execution?

The District Court determined as a matter of law that Appellant had a reasonable opportunity to know that he was signing a personal guaranty and that there is no clear and convincing evidence that BankCherokee committed fraud in the execution.

Apposite Legal Authorities:

Restatement (Second) Contract § 163

Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Chisholm, 57 N.W. 63 (Minn. 1893)

2. Did the District Court correctly apply Minn. Stat. § 513.33 to bar the affirmative defenses raised by Appellant?

The District Court held that Minn. Stat. § 513.33 barred the affirmative defenses.

Apposite Legal Authorities:

Minnesota Statutes § 513.33

Rural Am. Bank of Greenwald v. Herickhoff, 485 N.W.2d 702 (Minn. 1992)

3. Did the District Court correctly reject Appellant's promissory estoppel defense?

The District Court determined as a matter of law that Appellant could not show reasonable reliance on alleged oral promises that contradicted the clear and unambiguous terms of the Note and Guaranty.

Apposite Legal Authorities:

Johnson Bldg. Co. v. River Bluff Dev. Co., 374 N.W.2d 187 (Minn. Ct. App. 1985)

4. Did the District Court correctly determine the amount owed by Appellant under the Guaranty.

The District Court determined that the \$34,325.43 payment of the debtor corporation was properly credited to past due interest on the prior Note and not the September 12, 2007 Note guaranteed by Appellant's September 12, 2007 Guaranty.

STATEMENT OF THE CASE

Respondent BankCherokee, moved for summary judgment pursuant to Minn. R. Civ. P. 56.03 on the personal guaranty of Appellant Jeffrey M. Schoenwetter. Appellant moved to amend his answer to assert certain affirmative defenses. Appellant also opposed summary judgment as premature under Minn. R. Civ. P. 56.06 and sought an order compelling discovery. On March 16, 2009, the District Court entered its order granting Respondent's motion for summary judgment, denying Appellant's motion to amend its Answer and denying Appellant's motion to compel discovery.

On April 2, 2009, the District Court entered its Order for Entry of Judgment determining that the total amount Appellant owed Respondent through March 20, 2009, inclusive of attorney's fees and collection expenses, to be \$467,504.19. Judgment was entered on April 7, 2009.

STATEMENT OF FACTS

1. In October of 2004, Respondent BankCherokee (f/n/a Cherokee State Bank) made a one-year, revolving line of credit loan in the amount of \$200,000 to Defendant Insignia Development LLC (“Insignia”). The loan was documented by an Insignia promissory note signed by Appellant Schoenwetter and Insignia’s minority owner David Sebold, together with personal guaranties signed by both individuals. (App-195)

2. In October of 2005, the Insignia line of credit loan was increased to \$400,000, with a one-year note again signed by Schoenwetter and Sebold on behalf of the corporation, and new personal guaranties signed by both individuals. (App-195, 196) In June of 2006, Insignia took its final advance on the line of credit bringing the total outstanding balance to \$400,000. (App-136, 137)

3. When the Insignia line of credit loan came up for renewal in October of 2006, Schoenwetter and Sebold were engaged in a legal dispute with each other and the renewal of the line of credit loan was delayed. (App-137, 138)

4. In addition to the Insignia line of credit loan, Schoenwetter and Sebold had two other loans with BankCherokee made to separate corporate entities which were developing Victory Pass, a residential development in Stillwater Township, and Eden View Estate, a development in Eden Prairie. (App-134)

5. In April of 2007, Schoenwetter and Sebold reached a mediated settlement of their lawsuit. As part of the settlement, Schoenwetter obtained 100% of the ownership

interest in Insignia. In exchange Sebold received ownership of Victory Pass and Eden View Estates. Sebold agreed to use reasonable efforts to have Schoenwetter removed as personal guarantor on the BankCherokee loans relating to Victory Pass and Eden View Estates. (App-137, 199-200)

6. On July 31, 2007, the BankCherokee loan committee approved a new \$400,000 term note for the Insignia line of credit loan guaranteed by Schoenwetter. The comments from the loan committee meeting state, in part:

Dave Sebold and Jeff Schoenwetter had legally divided their interests in Insignia Development. As part of the split, Jeff will retain the Insignia line of credit. He will guaranty the loan but will not have anything to do with Eden View or Victory Pass.

* * *

The guaranty for Dave will NOT cross over to Insignia and Jeff's guaranty will not carry over to Victory Pass. Their separation was not pretty they will not guaranty each others loans.

(Respondent's Appendix, hereinafter RApp-43)

7. In September of 2007, the restructuring of the loans approved by the BankCherokee loan committee was completed. At that time an Insignia Promissory Note, dated September 12, 2007, in the amount of \$399,999.95 was signed by Schoenwetter as Chief Manager of Insignia. (App-197; RApp-5) Schoenwetter also signed his personal guaranty of the Insignia indebtedness also dated September 12, 2007. (App-197, 198; Appellant's Addendum, hereinafter Add-20)

8. Unlike his prior guaranties (designated "continuing debt-unlimited"), which guaranteed the continuing, future debt of Insignia, the September 12, 2007 Guaranty was designated "Specific Debt-Limited", and guaranteed only the September 12, 2007 Note

and was capped at the outstanding principal amount, plus interest and costs of collection.

(App-202, 206, Add-20) Schoenwetter was also released from his personal guaranties of

the Victory Pass and Eden View Estates loans totaling over two million dollars and

Sebold was released from his personal guaranty of the Insignia line of credit loan.

Sebold continued to personally guaranty the Victory Pass and Eden View Estates loans.

(RApp-43)

9. Schoenwetter initialed the four-page, September 12, 2007 Guaranty on each page and signed his name on the last page on a signature block that read:

GUARANTOR

Jeffrey M. Schoenwetter
Individually

(App-197, 198; Add-23)

10. The first page of the September 12, 2007 Guaranty lists the parties as follows:

LENDER:

BANKCHEROKEE
607 South Smith Avenue
Saint Paul, Minnesota 55107
Telephone: (651) 291-6220

BORROWER:

INSIGNIA DEVELOPMENT LLC
a Minnesota Limited Liability Company
6889 Rowland Road, Suite 100
Eden Prairie, Minnesota 55344

GUARANTOR:
JEFFREY M. SCHOENWETTER
4503 Edina Blvd.
Edina, Minnesota 55424

(Add-20)

11. At the same time he signed the September 12, 2007 Guaranty, Schoenwetter also signed the Insignia Promissory Note, initialing each page and signing it as Jeffrey M. Schoenwetter, Chief Manager. (RApp-5) The fifth page of the Note states as an additional charge "accrued interest fee of \$34,319.43 payable from separate funds on or before today's date." (RApp-9)

12. Prior to signing the September 12, 2007 Insignia Promissory Note and September 12, 2007 Guaranty, Insignia paid \$34,325.43 to bring the interest on the Insignia line of credit loan current. (App-150, 247)

13. On December 12, 2007, Insignia failed to make its first quarterly principal payment of \$25,000 and interest payment of \$7,941.20. (App-198; RApp-20)

14. On February 26, 2008, BankCherokee made written demand for payment upon both Insignia and Schoenwetter personally. Neither Insignia nor Schoenwetter cured the default as stated in the Demand Letter on or before March 7, 2008 and BankCherokee accelerated the amount due and owing under the Insignia Promissory Note. (App-198; RApp-20, 31)

15. After Schoenwetter received the February 26, 2008 demand letter from the bank he never contacted the bank and objected to the fact that the demand included him individually as a guarantor. (RApp-40)

16. In April of 2008, the bank commenced this action to obtain judgment against Insignia on the Note and against Schoenwetter on the Guaranty. (RApp-1) Insignia subsequently filed for bankruptcy and its obligation on the Note has been discharged.

17. Schoenwetter's Answer to the Complaint, served May 12, 2008, does not contain either an affirmative defense or any factual allegations relating to fraud in the execution of the Guaranty. (RApp-14)

18. Schoenwetter is an experienced, sophisticated real estate developer, builder and financier who has signed personal guaranties of debt totaling over \$100 million in the course of his career. (RApp-38)

ARGUMENT

I. APPELLANT’S FRAUD IN THE EXECUTION DEFENSE FAILS AS A MATTER OF LAW.

There is no genuine issue of material fact when the record on the whole “could not lead a rational trier of fact to find for the non-moving party.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). To resist summary judgment, a party must produce more than mere averments; the party must establish a genuine issue for trial through substantial evidence. *Id.* at 69-71.

Fraud in the execution arises when an agreement is executed, but a party neither has knowledge nor reasonable opportunity to obtain knowledge of its character and essential terms. *Trustees of the Twin City Bricklayers v. McArthur Tile Corp.*, 351 F.Supp.2d 921, 924-25 (D. Minn. 2005); *T.E.A.M. Scaffolding Sys., Inc. v. United Bdh. of Carpenters & Joiners of Am.*, 29 Fed.App’x 414, 416 (8th Cir. 2002).

Restatement (Second) of Contracts §163 (1981) states:

If a misrepresentation as to the character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the character or essential terms of the proposed contract, his conduct is not effective as a manifestation of assent.

(emphasis added).

In *T.E.A.M. Scaffolding Sys., Inc.*, 29 Fed.App’x at 416, the Court commented on the duty to read the document you are signing:

TEAM had both a reasonable opportunity and a duty to read the documents before signing them. [citation omitted] Indeed, the district court found that “it was unreasonable for [TEAM’s representative] to sign the documents

without reading them and that T.E.A.M. failed to prove “excusable ignorance.”

Here, it is undisputed that Schoenwetter initialed every page of the guaranty and signed his name on the last page on a signature block that reads:

GUARANTOR

Jeffrey M. Schoenwetter
Individually

(Add-23)

In addition to the signature page, on page one, which he initialed, the document lists him prominently as the Guarantor. Even a quick glance at this familiar form by a sophisticated business person like Defendant would reveal that it is a personal guaranty. The signature block itself explicitly states it is an individual guaranty. Schoenwetter’s whole claim is based, not on facts, but on the bald-faced speculative claim that bank employee, Jeff Elden, who brought the documents to his office to sign, “must have switched the loan documents I reviewed with a different set of documents.” (App-249)

The cases cited by Appellant are either distinguishable or support the District Court’s determination that Appellant, as a matter of law, had a reasonable opportunity to know he was signing a personal guaranty. In *Hetchkop v. Woodlawn at Grassmere, Inc.*, 116 F.3d 28 (2nd. Cir. 1997), cited by Appellant, the purported change was to the first page of the document and the alleged perpetrator had the document open to the last page for plaintiff’s signature. In determining that a fact issue existed, the Second Circuit Court of Appeals in *Hetchkop* pointed out that the signator had no reason to suspect that the

document he was signing was not the one he had been just shown. In distinguishing *Hetchkop* from this case, the District Court in its Summary Judgment Memorandum stated:

In this case, however, Schoenwetter did have a reasonable opportunity to know that what he was signing was a personal guaranty. He specifically initialed each page of the document titled GUARANTY, and signed on a signature block where it was clear he was signing as an individual guarantor.

(Add-11)

Appellant does not and cannot credibly argue that somehow a judge or jury could reasonably find that he did not have the opportunity to know what he was signing. Appellant instead asserts that he had no duty to review the guaranty he signed. This argument is based upon a line of cases relating to a fraud in the inducement defense which Appellant has not asserted. The cases also do not factually involve a situation such as here where the nature of the document is obvious on its face.

Appellant specifically asserted the affirmative defense of fraud in the execution, which involves misrepresentations going to the “factum” or “execution” of a contract rather than merely the inducement to enter into the agreement. It also makes the contract void rather than voidable. Restatement (Second) of Contracts §163, cmt. a (1981). If a person had a reasonable opportunity to know the character or essential terms of the proposed contract, the defense of fraud in the execution does not apply, and his or her conduct is effective as a manifestation of assent. Restatement (Second) of Contracts §163, cmt. b (1981). Fraud in the inducement, on the other hand, may in some cases not

be precluded by the claimant's own negligence in failing to read the document, and is voidable rather than void. Restatement (Second) of Contracts §164. It is a different claim, again not asserted in this case.

The Supreme Court's 1932 decision in *Phillips Petrol. Co. v. Roth*, 242 N.W. 629 (Minn. 1932) cited by Appellant, involved a situation where the defendant was induced to sign a lease and operator's agreement by a plaintiff who "presented the two instruments to defendant as being the same as the prior agreement, and concealed from defendant the fact that the written instrument contained terms materially different from the oral agreement." *Id.* at 631. The other cases cited by Appellant are likewise fraudulent inducement claims. *Finkelstein v. Henslin*, 188 N.W. 737 (Minn. 1922) (party fraudulently induced to execute a written agreement); *C. Gotzian & Co. v. Truszinski*, 210 N.W. 880 (Minn. 1926) (plaintiff induced defendant to sign guaranty by enclosing a letter with the guaranty misrepresenting its contents).

Appellant omits from its Brief the holding in the fraud in the execution case of *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Chisholm*, 57 N.W. 63 (Minn. 1893) in which the court stated:

The trial court held that the evidence was not sufficiently clear and satisfactory to establish fraud in the execution of the contract. In this we think the court did not err, since the rule in such cases is that the party seeking to avoid the contract should himself be reasonably free from negligence, and the evidence should be clear and persuasive.

In *McCall v. Bushnell*, 42 N.W. 545 (Minn. 1889) the court set aside a verdict in favor of plaintiff who claimed she signed a release based upon representations made to her about

the nature of the document and did not pay attention when the document was read to her.

The court stated:

It is inexpedient, upon grounds of public policy, that a solemnly executed instrument, known at the time to have been executed for the very purpose of embodying and evidencing the agreements and accomplishing the purposes of the parties, should be set aside upon the ground of fraud, unless the proof be clear and strong. (citations omitted) The instrument itself, knowingly executed, becomes a strong "wall of evidence," not to be lightly overcome by unsatisfactory oral testimony.

Id. at 546.

Considering all facts and reasonable inference in Schoenwetter's favor, there simply is no way a reasonable fact finder could determine that he did not have a reasonable opportunity to ascertain that the document he signed was his individual guaranty. Additionally, Appellant's entire claim of fraud is based upon his inadmissible speculation that bank employee Elden must have switched the guaranty document.

There is not one e-mail, letter, internal bank document, draft document, note, memorandum or any other writing of any sort in this record that supports Appellant's statements that the bank intended to release him from his personal guaranty, and instead have Schoenwetter take the nonsensical step of signing a corporate guaranty of the corporation's own Note. Every writing in this record, including the July 31, 2007 bank loan committee minutes, is one hundred percent consistent with Respondent's position that it was accommodating the settlement between Schoenwetter and his business partner Sebold by releasing Schoenwetter from his personal guaranty of the Eden View Estates and Victory Pass loans that Sebold was taking over, and releasing Sebold from the

Insignia obligation which Schoenwetter was assuming. There is likewise not one fact to support Schoenwetter's opinion that bank employee Eiden "switched the document."

Appellant argues that the District Court wrongfully applied a clear and convincing standard to the fraud in the execution claim. In its Memorandum, the District Court stated:

Thus, there is no question that Schoenwetter had the opportunity to know that he was signing a personal guaranty, and there is no clear and convincing evidence that BankCherokee committed fraud in the execution of the document.

(Add-9-10)

It is unclear whether the District Court was applying a clear and convincing standard to the issue of Appellant's reasonable opportunity to know he was signing a personal guaranty. Regardless, under any standard Plaintiff's fraud in the execution defense fails for lack of proof. Additionally, a clear and convincing standard is the correct standard.

Summary judgment is appropriate when the nonmoving party fails to provide the court with specific, admissible facts indicating a genuine issue of fact remains. *Hunt v. IBM Mid Am. Employees Fed. Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).

However, the analysis in a ruling on "a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Thus, the Court must "view the evidence presented through the prism of the substantive evidentiary burden." *Swanlund v. Shimano Indus. Corp.*, 459 N.W.2d 151,

154 (Minn. Ct. App. 1990) (quoting *Anderson*, 477 U.S. at 254), review denied (Minn. Oct. 5, 1990); *see also Chafoulias v. Peterson*, 668 N.W.2d 642, 655 (Minn. 2003) (applying clear-and-convincing standard to summary-judgment analysis on defamation claim subject to a heightened burden of proof).

Appellant cites a number of cases finding that a plaintiff does not need to produce clear and convincing evidence to defeat a summary judgment motion in this case. However, none of these cases deal with fraud in the execution or other causes of action requiring a higher evidentiary standard at trial. *See Lundgren v. Eustermann*, 356 N.W.2d 762, 765 (Minn. Ct. App. 1984) (finding clear and convincing evidence is not needed to defeat summary judgment in a medical malpractice case); *Williams v. Curtis*, 501 N.W.2d 653, 656 (Minn. Ct. App. 1993) (determining clear and convincing evidence not required in a paternity suit); *Anderson v. State Dept. of Natural Res.*, 693 N.W.2d 181, 191 (Minn. 2005) (refusing to apply clear and convincing standard to a negligence per se claim that the defendants were in violation of the Minnesota Pesticide Control Act).

Fraud in the execution claims can be distinguished from the cases Appellant cites. Certain types of fraud actions use the higher evidential standard of clear and convincing. *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 57 N.W. at 64 (finding that “to avoid an instrument for fraud in its execution, the evidence must be clear and convincing); *see also Hentges v. Shuttler*, 77 N.W.2d 743, 746 (Minn. 1956) (applying clear and convincing standard to fraud in the inducement claims); *Hous. & Redev. Auth. of City of St. Paul v. Alexander*, 437 N.W.2d 97, 100 (Minn. Ct. App. 1989) (using clear and convincing standard in fraud in the inducement claims); *Bolander v. Bolander*, 703

N.W.2d 529 (Minn. Ct. App. 2005) (determining that clear and convincing evidence is needed to rescind a contract based on fraud).

Appellant argues *Hentges* is inapposite because it applied the clear and convincing standard after trial. However, the standard remains applicable to summary judgment decisions. *Anderson*, 477 U.S. at 252 (holding that standard for granting summary judgment mirrors the standard for a directed verdict made after a trial because the primary difference between the two motion is only procedural); *Richardson by Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 828 (D.C. Cir. 1988) (applying *Anderson's* reasoning to find that judgment n.o.v. uses same standard as summary judgment standard).

The District Court correctly determined that the Appellant's fraud in the execution defense fails as a matter of law.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT APPELLANT'S CLAIMED DEFENSES ARE BARRED BY THE MINNESOTA CREDIT AGREEMENT STATUTE, MINN. STAT. §513.33 (2006).

All of Appellant's defenses arise out of his assertion that the bank (1) promised to release him from his personal guaranty of the Insignia debt and substitute a corporate guaranty of the corporation's own debt¹ and (2) forbear collection of the debt until the

¹ Schoenwetter, who had personally guaranteed in excess of \$100 million of corporate debt, (RApp-38), could not recall a guaranty of a corporation guarantying its own debt and admitted that it could be perceived as duplicative. (App-173, 174) There was in fact a change to the form of the guaranty. The September 12, 2007 guaranty was changed to a limited guaranty. The prior guaranties had guaranteed the on-going future debt of Insignia. The change to a debt specific personal guaranty morphed into the non-sensical corporate guaranty of its own debt for the first time well after the bank's February 26, 2008 demand on the personal guaranty, and well after the original Answer to the Complaint, as Appellant's facts were tailored to meet the ever dwindling defense strategies.

real estate market improved.² Such promises constitute an unenforceable oral credit agreement. Minn. Stat. § 513.33 (2006).

Minn. Stat. § 513.33, referred to as the Minnesota Credit Agreement Statute, reads in its entirety as follows:

Subdivision 1. **Definitions.** For the purposes of this section, the following terms have the meanings given them:

(1) “credit agreement” means an agreement to lend or forbear repayment of money, goods, or things in action, to otherwise extend credit, or to make any other financial accommodation;

(2) “creditor” means a person who extends credit under a credit agreement with a debtor;

(3) “debtor” means a person who obtains credit or seeks a credit agreement with a creditor or who owes money to a creditor; and

(4) “signed” has the meaning specified in section 336.1-201(b)(37).

Subd. 2. **Credit agreements to be in writing.** A debtor may not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor.

Subd. 3. **Actions not considered agreements.** (a) The following actions do not give rise to a claim that a new credit agreement is created, unless the agreement satisfies the requirements of subdivision 2:

(1) the rendering of financial advice by a creditor to a debtor;

(2) the consultation by a creditor with a debtor; or

(3) the agreement by a creditor to take certain actions, such as entering into a new credit agreement, forbearing from exercising remedies under prior credit agreements, or extending installments due under prior credit agreements.

(b) A credit agreement may not be implied from the relationship, fiduciary or otherwise of the creditor and debtor.

(emphasis added).

² Contrary to this post lawsuit recollection of an open-ended forbearance, at the time the Note and Guaranty were signed, Schoenwetter stated that he and Bank Vice President Robert Platzer reached a compromise of quarterly principal and interests payments, with the Bank wanting monthly and Schoenwetter proposing annual payments. (App-178)

Here, Appellant signed on behalf of Insignia the September 12, 2007 Promissory Note and his Guaranty, also dated September 12, 2007, personally guarantying the Note. Unlike his prior personal guaranties, this guaranty was limited to this Note and did not include any on-going future obligations of Insignia. Appellant contends that Bank Vice President Robert Platzer promised to forbear from collecting the Insignia debt from him personally by substituting a corporate guaranty and to also forbear on the collection of any defaults on the Insignia Note.

There is one Minnesota Supreme Court case interpreting Minn. Stat. § 513.33. In *Rural Am. Bank of Greenwald v. Herickhoff*, 485 N.W.2d 702 (Minn. 1992) the bank commenced an action to collect on a promissory note relating to a farm loan. The defendant asserted as defenses fraud and breach of an underlying loan agreement in which the bank agreed to first apply payments made from the farming operation to defendant's note rather than his son's note with whom he farmed. Ultimately, the Supreme Court decided that the written documentation of this payment priority agreement did in fact meet the Minn. Stat. § 513.33 "writing" requirement. In its opinion, the Supreme Court discussed the broad purpose of the statute and why the loan agreement at issue, which was asserted as a defense to the bank's action to collect on a note, fell squarely within the intent and language of the statute. The Court stated:

The Minnesota credit agreement statute was enacted in 1985 to protect lenders from having to litigate claims of oral promises to renew agricultural loans. *Becker v. First American State Bank of Redwood Falls*, 420 N.W.2d 239, 241 (Minn. Ct. App. 1988) (the farm financing problems prompted the enactment of §513.33); *Rural Am. Bank of Greenwald v. Herickhoff*, 473 N.W.2d at 363. The farm crisis of the 1980s produced cash-strapped and financially unsophisticated farmers who claimed reliance upon their bank

officers' oral promises to renew their loans. Numerous lawsuits arose over the bankers' alleged oral promises. The credit agreement statute was passed to prevent the litigation of such difficult claims.

The statute defines a "credit agreement" as "an agreement to lend or forbear repayment of money, goods, or things in action, to otherwise extend credit, or to make any other financial accommodation." Minn. Stat. § 513.33 subd. 1(1) (1990 & Supp. 1991).

The Court of Appeals relied upon rules of statutory construction and concluded

"any financial accommodation' must be interpreted to mean a financial accommodation in the nature of lending or forbearance agreement or some other agreement for extension of credit." *Rural Am. Bank of Greenwald v. Herickhoff*, 473 N.W.2d at 363. The Court of Appeals stated that the Loan Agreement itself was not a lending agreement, a forbearance agreement or an extension of credit and thus was not within the statute.

We believe such analysis does disservice to the spirit and purpose of the legislation. The Loan Agreement is precisely the kind of "financial accommodation" intended to be covered by the statute.

The Loan Agreement is a financial accommodation with respect to a lending agreement. In the alternative, one could describe the Bank's promise to apply proceeds to Ben's loan first as an agreement to forbear repayment of Mark Herickhoff's loan. See *Pako Corp. v. Citytrust*, 109 B.R. 368, 377 (Bankr. D. Minn. 1989) ("[T]he broad language of the statute ... reaches not only agreements to 'lend or forbear repayment of money,' but also any other 'financial accommodation.'")

We hold that the credit exchange between the Herickhoffs and the Rural American Bank of Greenwald falls squarely within the parameters of the legislature's concerns and that the Loan Agreement's priority repayment plan qualifies as a financial accommodation within the meaning of the credit agreement statute.

Id. at 705-06.

In *Rural Am. Bank of Greenwald*, the credit agreement was the bank's promise as to how proceeds would be applied between two different loans of related debtors. Here, the alleged oral credit agreement is a promise to forbear repayment of the Insignia line of

credit loan from Schoenwetter by releasing him from his on-going personal guaranty of that debt and to forbear collection until the real estate market improved.³ This situation fits squarely within both the exact language of the statute and the legislative intent to prevent the litigation of difficult claims based upon oral promises. This case is truly a poster child example of the litigation the statute intends to preclude.

Appellant puts a variety of labels on his claimed defenses all of which are premised upon an unenforceable oral credit agreement. The labels, and counsel's broken-record description of the factual basis for each theory, bears this out. As to the claim of mistake, counsel states that Platzer repeatedly made representations that the bank would not require a personal guaranty and that Platzer promised that by bringing interest due the bank would release Schoenwetter from personal liability. (App-120).⁴ As to the "no meeting of the minds" defense, counsel asserts that the bank agreed to accept the corporate guaranty; that BankCherokee and Schoenwetter's agreement was for one thing (the corporate guaranty) and BankCherokee now seeks enforcement of a different personal guaranty. (App-125). The promissory estoppel defense is supported by counsel's assertion that Schoenwetter negotiated for his removal as a personal guarantor and for the bank's forbearance in the event of a default and that based upon these negotiations, BankCherokee is estopped. (App-126).

³ On appeal, Schoenwetter also asserts an oral promise similar to the one in *Rural Am. Bank of Greenwald* to first satisfy any default on the Insignia Line of Credit against the Eden View and Victory Pass development equity. Any such promise is barred by Minn. Stat. 513.33. Also, any such statements obviously had no application to the September 12, 2007 guaranty since Schoenwetter was giving up his interest in those entities.

⁴ Establishing unilateral or mutual mistake would result in rescission of the transaction meaning that Schoenwetter's prior personal guaranty would remain in effect, which unlike the September 12, 2007 limited guaranty covers all ongoing debts of the corporation including this Note.

The Minnesota Court of Appeals has followed the dictates of the Supreme Court in *Rural Am. Bank of Greenwald* and given the statute broad application. In *Becker*, 420 N.W.2d at 239, appellants claimed that the bank president orally agreed that if appellants would reduce their indebtedness, respondent would continue financing them. In reliance on this oral promise, appellants sold several parcels of their property at less than market value. The bank subsequently refused appellants' request for additional financing. The Court of Appeals upheld the District Court's summary judgment order dismissing appellants' damage claim, holding that the alleged oral agreement fits squarely within the statute's definition of "credit agreement." *Id.* at 240; *see also Drewes v. First Nat'l Bank of Detroit Lakes*, 461 N.W.2d 389, 392 (Minn. Ct. App. 1990) (legislative purpose behind Minn. Stat. § 513.33 is to protect financial institutions and their depositors from fraudulent claims); *Calhoun Beach Assocs. v. Citicorp Real Estate Inc.*, 1993 WL 71498 at *2 (Minn. Ct. App. Mar. 1, 1993) (RAdd-4) (the statute's core concept is that the existence of a credit agreement cannot be implied from the parties' past dealings); *Pope County State Bank v. Am. Target Co.*, 1994 WL 49527 at *2 (Minn. Ct. App. Feb. 22, 1994) (RAdd-19) (Appellant cannot rely on estoppel to enforce any implied or explicit oral agreement to forbear); *Norwest Bank of Montevideo v. General Dryer Corp.*, 1990 WL 48553 at *2 (Minn. Ct. App. Apr. 24, 1990) (bank customer's claims of fraud/misrepresentation and breach of fiduciary duty based on bank's oral promise to extend credit if customer paid down loan by \$260,000 are barred by Minn. Stat. § 513.33) (RAdd-16); *Capital Bank v. Sorenson*, 1990 WL 211991 at *2 (Minn. Ct. App. Dec. 24,

1990) (claim of fraudulent misrepresentation based on oral promise to renew notes is barred by Minn. Stat. §513.33) (RAdd-14).

Appellant's claim that the statute only applies when the debtor is the plaintiff as opposed to a defendant asserting an affirmative defense was implicitly rejected by the Supreme Court in *Rural Am. Bank of Greenwald*. See also *ALC Fin. Corp. v. Harrington*, 1994 WL 284972 at *1 (Minn. Ct. App. June 28, 1994) (RAdd-1) ("we find unpersuasive the Harrington's argument that Minn. Stat. § 513.33 does not apply because they are not maintaining an action on a credit agreement, but defending use of the statute against them"). Given the broad construction of the statute by the Supreme Court in *Rural Am. Bank of Greenwald*, whether the debtor procedurally initiates a declaratory judgment action asserting the existence of an oral credit agreement, asserts an oral credit agreement as an affirmative defense or raises the issue in a counterclaim does not make any difference in regard to the substantive application of the statute.

Additionally, Minn. Stat § 513.33, modifies the common law to require that an agreement "to lend or forbear repayment of money," ... "forbearing from exercising remedies under prior credit agreements" or ... "make any other financial accommodations" must be in writing. *Rural Am. Bank of Greenwald*, 485 N.W.2d at 705-706 (Minn. Stat. § 513.33 is broad in scope and purpose relative to claimed oral financial accommodations).

The cases cited by Appellant which apply Minn. Stat. § 513.33 relate to a potential estoppel exception to Minn. Stat. § 513.33, which is discussed below. The other cases, *Thoe v. Rasmussen*, 322 N.W.2d 775, 777 (Minn. 1982) and *Scheerschmidt v. Smith*, 77

N.W. 34 (Minn. 1898) simply stand for the general proposition that the performance of an agreement subject to the statute of frauds can subsequently be modified by an oral agreement. Here, the alleged statements are not subsequent modifications and, even if they would be admissible under a common law exception to the parole evidence rule, Minn. Stat. § 513.33 has modified common law in the area of credit agreements.

Finally, Appellant cites no relevant authority to support its argument that Minn. Stat. §513.33 does not cover alleged financial accommodations or forbearance relating to a personal guaranty. The broad statutory language covers this situation.

A “debtor” is not only a person who obtains credit, but also a person “who owes money to a creditor.” Minn. Stat. § 513.33, subd. 1(3). While the corporate defendant, Insignia, obtained the credit from BankCherokee, Schoenwetter owes money to the Bank under his guaranty. Appellant would read this last category of debtor out of the statute. “Credit Agreement” includes an agreement to “forbear repayment of money” or “to make any other financial accommodation.” Minn. Stat. § 513.33, subd. 1(1).

Here, Appellant claims BankCherokee agreed to forbear repayment of money owed to the Bank by Schoenwetter under his guaranty. This is an oral credit agreement prohibited by Minn. Stat. § 513.33, subd. 2. *See Carlson v. Norwest Bank Minn., N.A.*, 1998 WL 436877 at *6 (Minn. Ct. App. Aug. 04, 1998) (promise to release personal guarantees barred by Minn. Stat. § 513.33, subd. 3). (RAdd-7)

III. THE DISTRICT COURT CORRECTLY REJECTED APPELLANT'S PROMISSORY ESTOPPEL CLAIM.

Appellant argues that he reasonably relied on a bank official's oral promises to release him from his personal guaranty and to forbear repayment of the loan until the real estate market improved. The District Court determined that there was no reasonable reliance as a matter of law because the personal guaranty he signed directly contradicted the oral promises. In *Johnson Bldg. Co. v. River Bluff Dev. Co.*, 374 N.W.2d 187, 194 (Minn. Ct. App. 1985), review denied (Minn. Nov. 18, 1995), the Court stated:

Where there is an inconsistency between oral promises and the written terms of an agreement, the issue is whether there could be reasonable reliance on the promise. *General Corporation v. General Motors Corporation*, 184 F.Supp. 231, 238 (D.C.Minn.1960). We could find that reliance on an oral representation was unjustifiable as a matter of law only if the written contract provision explicitly stated a fact completely contradictory to the claimed misrepresentation. (emphasis added)

See also *Carlson*, 1998 WL 436877 at *7. The District Court in its Summary Judgment

Memorandum stated:

Schoenwetter could not have reasonably relied on a promise to release him from personal liability when he signed the guaranty, a document that directly contradicted that promise. Schoenwetter also could not have reasonably relied on a promise to forbear collection of the loan upon default when he signed the promissory note, which contradicts that promise by enabling BankCherokee to immediately accelerate the note upon default. Schoenwetter cannot show reasonable reliance on the oral promises that BankCherokee allegedly made, an essential element of a promissory estoppel claim. Therefore, Schoenwetter's promissory estoppel defense fails.

(Add-7).

Additionally, Minn. Stat. § 513.33 bars the promissory estoppel claim. In *Greuling v. Wells Fargo Home Mortgage*, 690 N.W.2d 757 (Minn. Ct. App. 2005),

Greuling claimed that the Wells Fargo agent induced him into a home mortgage by promising to refinance the transaction. The court held that “section 513.33 precludes Greuling’s claim of promissory estoppel to establish a new credit agreement.” *Id.* at 762. The court distinguished *Norwest Bank Minn., N.A. v. Midwestern Mach. Co.*, 481 N.W.2d 875 (Minn. Ct. App. 1992) for two reasons; first, that *Norwest Bank* involved a situation which did not fall under one of the enumerated agreements in the statute; and, second that the court relied on *Berg v. Carlson*, 347 N.W.2d 809, 812 (Minn. 1984) which precedes the enactment of Section 513.33. *Greuling*, 690 N.W.2d at 762.

Resolution Trust Corp. v. Flanagan, 821 F.Supp. 572 (D. Minn. 1983), cited by Appellant, was decided prior to *Greuling*. The Federal District Court without any analysis simply applied the holding of *Norwest Bank*.

In sum, the District Court correctly rejected Appellant’s promissory estoppel claim on the basis that there was no reasonable reliance as a matter of law. Separate and apart from the reasonable reliance issue, the claim is also barred outright by Minn. Stat. § 513.33.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT’S MOTION TO COMPEL UNRELATED CONFIDENTIAL DATA RELATING TO AN FDIC EXAMINATION OF THE BANK.

In an unscrupulous effort to leverage the bank and delay the entry of Judgment against him, Appellant latched onto the fact that BankCherokee was subject to a consensual FDIC Cease and Desist Order in the fall of 2008 as a result of a periodic FDIC examination initiated in February of 2008, five months after Schoenwetter signed

his personal guaranty in September of 2007. (Add-12). The highly confidential documents underlying this review and required reporting contain information relating to the bank's entire loan portfolio, capital structure and ownership. The District Court appropriately determined that Appellant's discovery request went well beyond the bounds of any reasonable scope of discovery.

While the Rules of Civil Procedure generally allow liberal discovery, relevancy under Rule 26 is not without bounds.

[T]his often intoned legal tenet [of liberal discovery] should not be misapplied so as to allow fishing expeditions in discovery. Some threshold showing of relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case. *Hofer v. Mack Trucks*, 981 F.2d 377, 380 (8th Cir. 1992).

[N]otwithstanding the liberality of discovery, "we will remain reluctant to allow any party to 'roam in the shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so.'"

Archer Daniels Midland Co. v. Aon Rick Servs. Inc. of Minn., 187 F.R.D. 578, 589 (D. Minn. 1999) (quoting *Onwuka v. Fed. Express Corp.*, 178 F.R.D. 508, 516 (D. Minn. 1997); *Carlson Cos., Inc. v. Sperry & Hutchinson Co.*, 374 F.Supp. 1080, 1080 (D. Minn. 1974))

BankCherokee produced all documents relating to Insignia and Schoenwetter's dealings with the bank, including numerous internal records which are arguably of limited, if any relevancy. The bank, however, drew the line and refused to open its doors to materials generated as part of the FDIC review.

The FDIC notified BankCherokee of its upcoming examination on February 12, 2008. (Add-12). Schoenwetter executed his personal guaranty five

months earlier in September of 2007. Appellant now on appeal advances only one theory as to the relevancy of the FDIC review, e.g. he claims that the FDIC documents are relevant to a “fraud in the execution” theory relating to his claim that the bank employees, motivated by the ongoing FDIC examination, tricked him into signing the September 12, 2007 personal guaranty at issue in this lawsuit.

As to Schoenwetter’s fraud in the execution theory, it is simply impossible for a periodic FDIC review that was initiated in February of 2008 to put pressure on loan officer Platzer in September of 2007 “to do whatever was necessary” to obtain the Schoenwetter guaranty. Additionally, as recited in Appellant’s Brief, Appellant had access to much public data about the bank’s loan portfolio in 2007. Finally, and most obviously, the fact that the bank was motivated, in addition to getting paid, by regulatory concerns has nothing to do with the issues of whether Schoenwetter had a reasonable opportunity to know he was signing a personal guaranty and whether Minn. Stat. § 513.33 bans his claim of an oral credit agreement, which are the basis for the District Court’s decision.

V. THE DISTRICT COURT CORRECTLY DETERMINED THE AMOUNT OWED BY APPELLANT.

It is undisputed based upon Appellant’s own testimony that the \$34,325.43 payment by the corporate debtor Insignia’s check dated September 11, 2007 was to bring the interest current on the then existing Note. (App-247; RApp-9). Additionally, although the Guaranty is dated September 12, 2007, according to Schoenwetter it was not

signed by him until September 26, 2007. The Guaranty specifically guaranties the Note dated September 12, 2007. It is undisputed that no payment was made on this Note.

Finally, the District Court correctly determined that the limitation in the amount of the Guaranty, based upon the language in paragraph 2 of the Guaranty, applies to the principal amount only. (Add-16)

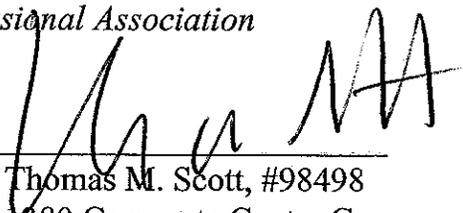
CONCLUSION

The District Court's Judgment should be affirmed.

Respectfully submitted this 5th day of August, 2009.

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NO. A09-876

STATE OF MINNESOTA
IN COURT OF APPEALS

Jeffrey M. Schoenwetter,

Appellant,

v.

BankCherokee, a Minnesota corporation,

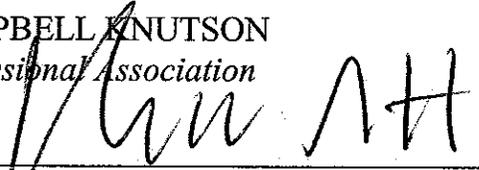
Respondent.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a 13 pt. Times New Roman font. The length of the brief is 7,991 words. This brief was prepared using Microsoft Word software.

Dated: August 5, 2009

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