FROM CHAMBERS

OCT - 9 2002

ORIGINAL

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

U S BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
OCT - 9 2002
TAWANA C. MARSHALL, CLERK
By
Deputy

IN RE:	§	
	§	
VEIGEL FARM PARTNERS	§	CASE NO. 00-20858-SAF-11
TERRA XXI, LTD.	§	CASE NO. 00-20877-SAF-11
DEBTORS.	§	
	§	
VEIGEL FARM PARTNERS and TERRA XXI, LTD.,	§	
PLAINTIFFS,	§	
	§	
VS.	§	ADVERSARY NO. 01-2007
	§	
AG SERVICES OF AMERICA, INC., and AG ACCEPTANCE CORPORATION,	§	
DEFENDANTS.	§	

MEMORANDUM OPINION AND ORDER

AG Services of America, Inc., and AG Acceptance Corporation, the defendants, at times collectively referred to as Ag Services, move the court for partial summary judgment on the claims of negligent misrepresentation, Deceptive Trade Practice Act violations, and Bank Holding Company Act violations. Veigel Farm Partners and Terra XXI, Ltd., the plaintiffs, oppose the motion. The court conducted a hearing on the motion on September 13, 2002.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

132

the affidavits, if any, and other matters presented to the court show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986); Washington v. Armstrong World Indus. Inc., 839 F.2d 1121, 1122 (5th Cir. 1988). On a summary judgment motion the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Anderson, 477 U.S. at 255. A factual dispute bars summary judgment only when the disputed fact is determinative under governing law. Id. at 250.

The movant bears the initial burden of articulating the basis for its motion and identifying evidence which shows that there is no genuine issue of material fact. Celotex, 477 U.S. at 323. The respondent may not rest on the mere allegations or denials in its pleadings but must set forth specific facts showing that there is a genuine issue for trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

Negligent Misrepresentation

The plaintiffs contend that by making false statements about a loan calculation formula the defendants misled the plaintiffs into thinking that the parties would enter a contract for the defendants to loan them at least $1,000,000. The plaintiffs

premise their claim for negligent misrepresentation on this contention.

The parties do not disagree on the elements in Texas for negligent misrepresentation. See Fed. Land Bank Ass'n of Tyler v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991), cited by the plaintiffs and quoted in the citations provided by the defendants. However, the Texas appellate courts recognize the claim exists in lieu of a breach of contract claim. The claim cannot usually be maintained where a contract had been entered between the parties. Bluebonnet Sav. Bank, F.S.B. v. Grayridge Apartment Homes, Inc., 907 S.W.2d 904, 908 (Tex. App.--Houston [1st Dist.] 1995, writ denied); Airborne Freight Corp. v. C.R. Lee Enters., Inc., 847 S.W.2d 289, 295 (Tex. App.--El Paso 1992; writ denied).

In his affidavit, Steve Veigel averred that Melodie Taylor, on behalf of the defendants, told him that the defendants would make a loan based on 70% of the equity in the real property of Terra XXI, based on the fair market value of the real estate, less existing secured debt. He averred that he entered a contract with the defendants dated May 22, 1998, relying on that representation. Veigel anticipated receiving a loan for at least $1,000,000, but actually received only an advance of $150,000. He claims that the defendants never prepared or tendered a note or "final contract" for the loan.

Taylor, in her deposition, originally testified to that formula. She acknowledged the conversation with Veigel. She testified that for the real estate, once they had the value, they would subtract the secured debt, and then make a loan on 70% of the equity. However, after a discussion off the record, Taylor testified that she had misstated the formula used by Ag Services.

Nevertheless, the parties entered a written agreement, dated May 22, 1998, that provides, in relevant part:

> 8. Provided there is sufficient equity in the property titled to Terra XXI, and after completion of a title opinion, outstanding debt verification and execution of a mortgage by Terra XXI, ASA agrees to loan, at its discretion and as determined by its normal credit policy, an amount not to exceed 70% of the equity value of the Terra XXI property to Veigel Farm Partners (hereinafter referred to at times as the 'Intermediate Loan.').

Paragraph 9 of the agreement then provides for an advance of $150,000 to Veigel Farm Partners.

The parties entered a written contract directly addressing the subject of their discussions. The plaintiffs' claim asserts a breach of that contract. The plaintiffs contend, in effect, that the loan to be made under paragraph eight of the contract, which they anticipated would be for at least $1,000,000, was never made by the defendants. The breach of contract claim precludes the plaintiffs' claim of negligent misrepresentation. Thus, the defendants' motion for partial summary judgment on the claim of negligent misrepresentation will be granted.

Deceptive Trade Practices Act

The plaintiffs contend that the defendants violated the Texas Deceptive Trade Practices Act (DTPA) for services provided in connection with a 1999 crop loan. The defendants move for summary judgment dismissing this claim. The defendants assert that the DTPA does not apply, that the plaintiffs lack standing to prosecute the claim, and that, if the DTPA applies, an exemption precludes recovery.

The DTPA does not apply to transactions involving the extension of credit or the borrowing of money. Riverside Nat'l. Bank v. Lewis, 603 S.W.2d 169, 175 (Tex. 1980). In his affidavit, Veigel averred that the defendants provided services to the plaintiffs, ancillary to the 1999 crop loan, including crop advice from Rodney Rottinghouse and Jerry Criswell. In his deposition, Veigel stated that the advice included chemical and fertilizer recommendations. Services provided in connection with credit or other financial transaction may be covered by DTPA. See, for example, Herndon v. First Nat'l Bank of Tulia, 802 S.W.2d 396, 399 (Tex. App.--Amarillo 1991, writ denied); First Fed. Sav. & Loan Ass'n of San Antonio v. Ritenour, 704 S.W.2d 895, 900 (Tex, App.--Corpus Christi 1986, writ ref'd n.r.e.). Consequently, there are genuine issues of material fact that must be decided at trial to determine the applicability of DTPA.

To have standing to prosecute a DTPA action, the plaintiffs must be consumers. To be a consumer, the plaintiffs must have acquired by purchase goods or services. Tex. Bus. & Com. Code § 17.45(4). The plaintiffs contend that they acquired services by purchase, including crop advice. The defendants contend that they gratuitously provided the crop advice. A gratuitous act would not be considered a purchased service within the meaning of the DTPA. Schmueser v. Burkburnett Bank, 937 F.2d 1025, 1029 (5th Cir. 1991).

Veigel averred in his affidavit that Ag Services required the plaintiffs to acquire the services in connection with the loan. The services, according to Veigel, came with the loan, which had to be paid with interest as consideration. In his deposition, Veigel stated that he paid a fee for the advice. Ag Services charged a program fee. Veigel agreed that the program fee was charged up front, with an ability to earn back the payment. Veigel believed that the fee constituted a source of income for the defendants that allowed them to provide the crop service. The plaintiffs were charged a fee, and, in return, Veigel opined, the defendants provided their crop advice service. Veigel did not consider that the defendants provided the service for free. He stated "I don't know anything that's free." However, Veigel conceded that Ag Services never billed him for the services.

In his affidavit, Shawn Smeins, a senior executive officer of Ag Services, averred that the program fee "is not a charge for, and bears no relation to, any services that may be provided by [AG Services], if any, ancillary to a loan transaction." He recognized that the defendants charged the customer a "program fee" of 3% of the customer's closed credit limit, assessed at the closing of the loan transaction. The customer may earn back all or a portion of the fee based on the date of loan repayment. He averred that the fee is assessed "as a loan origination and loan structuring fee." The program fee agreement does not define the fee as a loan origination or loan structuring fee.

Drawing inferences in favor of the party opposing the motion, the court would assume that a loan origination fee or a loan structuring fee would be so named, and that a program fee means something different. The written agreement begins by stating that "most, if not all, of the products financed by Ag Services are sold to the undersigned [Veigel Farm Partners] at prices determined by Ag Services." Veigel agrees, in the written document, that the price of the product "shall be as identified on the invoice." In the final paragraph of the agreement, Veigel "agrees to pay Ag Services a Program Fee of three percent (3%) of the greater of (a) the total of all advances made to the undersigned, or (b) the credit line established . . . .The Program Fee . . . will be advanced on the undersigned's Master

Promissory Note." The fee may, however, be recouped as provided in the note. The note, in turn, provides that Veigel may obtain a discount of the program fee based on the timing of its repayment of the note.

Again, drawing inferences in favor of the party opposing the motion, the program fee may be consideration for the program of purchasing products from Ag Services with financing from Ag Services, and with crop advice a part of the program. At the hearing, the plaintiffs stated that they do not rely on the program fee for summary judgement purposes. The plaintiffs stated that they know what the program fee is, but they did not withdraw the claim. On this record, the court cannot determine whether or not the fee relates to the services. Therefore, the court must conclude, on the summary judgment record, that there is a genuine issue of material fact as to whether the plaintiffs purchased the services or the defendants gratuitously provided the services. Consequently, there are genuine issues of material fact requiring a trial on the standing issue.

Nevertheless, the defendants contend that an exemption to the DTPA coverage applies. The DTPA does not apply to a written contract for a transaction, project or set of transactions related to the same project involving total consideration by the consumer of more than $100,000, when the consumer had been represented by legal counsel not affiliated with the defendant,

and the contract does not involve the consumer's residence. Tex. Bus. & Com. Code § 17.49(f). Veigel holds a law degree. The transaction involves consideration for more than $100,000. The contract does not involve Veigel's residence. The defendants contend, therefore, that the exemption applies. However, Veigel also averred that he is not licensed to practice law and was not licensed to practice law in 1999. The statutory requirement that the consumer be "represented" by counsel connotes a person licensed to practice law. The exemption does not apply.

However, the DTPA also exempts claims arising from a transaction, a project, or a set of transactions relating to the same project, involving total consideration by the consumer of more than $500,000, other than a claim involving a consumer's residence. Tex. Bus. & Com. Code § 17.49(g). The Master Promissory Note, dated May 18, 1999, states that Veigel Farm Partners promises to pay Ag Services $785,000. In his affidavit, Smeins averred that Veigel Farm Partners received consideration in excess of $500,000. However, in his affidavit, Veigel averred that "the defendants made a loan to the plaintiffs for the 1999 crop in the approximate amount of $497,500."

Ag Services argues that the Veigel affidavit cannot be accorded evidentiary weight. The note states that Veigel promises to pay Ag Services "$785,000 or, if less, the outstanding principal balance of all loans and advances made

hereunder." If the note merely stated that Veigel promised to pay $785,000, then, as to the amount of the transaction or project, for purposes of the DTPA, the note would be unambiguous. In that situation, the statement in the Veigel affidavit would be in conflict with the note and the affidavit would be disregarded. In re Pillon-Davey & Assoc., 52 B.R. 455, 459 (Bankr. N.D. Cal. 1985).

But the note says "$785,000 or, if less." The amount due on the note depends on advances made by Ag Services. The note states "advances of principal hereunder are all discretionary and shall only be made from time to time until the maturity date, if the undersigned is in compliance with all conditions and procedures described herein or otherwise required by Ag Services." The note provides that requests for advances may be made orally or by telephone, and that Ag Services may refuse to make advances. Because the note states that the amount may actually be less than $785,000, depending on advances made by Ag Services, the note may be susceptible to more than one reasonable interpretation concerning the amount of the transaction. Since the note is ambiguous as to the actual amount of the transaction, the court may consider the Veigel affidavit. Vineberg v. Brunswick Corp., 391 F.2d 184, 190 (5th Cir. 1968). Considering the affidavit, there is a genuine issue of material fact regarding the amount of the transaction.

The defendants' motion for partial summary judgment on the claim of a violation of the Texas Deceptive Trade Practices Act will be denied.

Bank Holding Company Act

The plaintiffs allege that the defendants functioned as a bank, thereby making the anti-tying provisions of the Bank Holding Company Act applicable. 12 U.S.C. § 1972(1)(A). The plaintiffs allege that Ag Services tied crop inputs and crop advice to the extension of credit in violation of the anti-tying prohibition. In their motion for summary judgment, the defendants assert that they do not constitute a "bank" under the Bank Holding Company Act.

In order to be a bank, the statute provides that Ag Services must "(i) accept[s] demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others; and (ii) [be] engaged in the business of making commercial loans." 12 U.S.C. § 1841(c)(1)(B). Ag Services makes commercial loans. Ag Services contends, however, that it does not accept deposits. The plaintiffs counter that there is a genuine issue of material fact as to whether Ag Services accepts deposits.

The defendants are not banks as commonly understood. The defendants do not accept deposits by customers as commonly understood. The definition of a "bank" under the Bank Holding

Company Act, however, may embrace "nonbank banks." See Bd. of Governors v. Dimension Fin. Corp., 474 U.S. 361, 363 (1986). Congress applied anti-tying safeguards to guard "against the possibility of misuse of the economic power of a bank." Swerdloff v. Miami Nat'l Bank, 584 F.2d 54, 58 (5th Cir.1978). A business that makes commercial loans and that also accepts deposits may possess the type of economic power warranting the anti-tying safeguards.

As explained by the United States Court of Appeals for the Ninth Circuit, Congress intended a broad definition of "deposits." S & N Equip. Co. v. Casa Grande Cotton Fin. Co., 97 F.3d 337, 343 (9th Cir. 1996). A "deposit," according to the Ninth Circuit, includes money held by an institution that may be withdrawn on demand, regardless of the means of withdrawal. Id. at 343-44. See, also, 12 C.F.R. § 204.2. Yet, the definition appears to be narrower than in previous versions of the statute. At one time, the statute merely provided that the depositor have a legal right to withdraw the funds on demand. Dimension Fin., 474 U.S. at 363. Now, the statute provides for withdrawal by check or similar means for payment to third parties or others. See 12 U.S.C. § 1841(c)(1)(B).

The plaintiffs contend that Ag Services accepts "over-payments" on Veigel's account, which Ag Services pays to Veigel on request. The plaintiffs maintain that the "overpayments"

amount to deposits. Taylor testified in her deposition that Ag Services received payments from government programs. Ag Services deposited those payments, crediting them against the Veigel loan. On request from Veigel, Ag Services would release those funds to Veigel. In addition, Taylor testified that if Ag Services received payments in excess of the amount needed to pay on the advance loan to Veigel, the funds would be paid to Veigel. Taylor testified that the payments to Veigel could be by check. In his affidavit, Veigel averred that Ag Services released funds to Veigel and made disbursements requested by customers. Veigel averred that Ag Services would release funds upon his request.

In his deposition, Veigel testified that each time Ag Services received money from the government, Ag Services applied the funds to the loan balance. If requested, Ag Services released the funds to Veigel, paying Veigel by check. If Veigel needed money or Ag Services held or obtained funds in excess of what Ag Services figured as collateral, Ag Services would, on request from Veigel, issue a check to Veigel and then put the amount back in the note to offset the prior credit. Veigel did not direct that the money be paid to anyone else for Veigel's benefit, as Veigel attempted to keep the cash and pay its creditors itself.

On this record, there is a genuine issue of material fact about how the government payments and other payments received by

Ag Services actually worked. Until those factual disputes can be resolved at trial, the court cannot determine whether Ag Services accepted deposits as provided under the Bank Holding Company Act. Consequently, the motion for summary judgment on this count must be denied.

For example, one reading of the summary judgment evidence suggests that Ag Services received payments that did not constitute collateral and/or were in excess of the amounts needed to service the loan. If so, those funds may have been held for the plaintiffs to be paid to the plaintiffs. Veigel requested payments directly to Veigel, but Veigel may have been able to direct payment to others. As the court understands the argument by plaintiffs, the payments may have been by teller's checks. If non-collateral or overpayments, those funds may have been deposits under the Bank Holding Company Act. On the other hand, they may have been collateral subject to release by Ag Services as part of the commercial loan transaction.

The plaintiffs also argue that funds available to be advanced under the credit agreement at some point become deposits. The plaintiffs argue that the funds become deposits when Ag Services issued the teller's checks; that is, that an outstanding teller's check becomes a demand deposit. The plaintiffs further contend that unadvanced portions of the credit agreement must be considered deposits, since Ag Services must

hold funds to honor the credit agreement. Loan proceeds, whether advanced or held for future advances, are necessarily part of the commercial loan transaction. As such, they are different than deposits. The credit arrangement must be distinguished from the deposit component of the definition of a bank, because Congress included both a commercial loan component and a deposit component in the definition. If part of the loan, then the funds should not be considered a deposit, for purposes of determining whether the lender is a bank. Otherwise, Congress need not have required both the acceptance of deposits and the engagement in the business of making commercial loans to constitute a bank.

The court therefore concludes that it cannot determine the questions of law under the Bank Holding Company Act until it decides the contested fact issues.

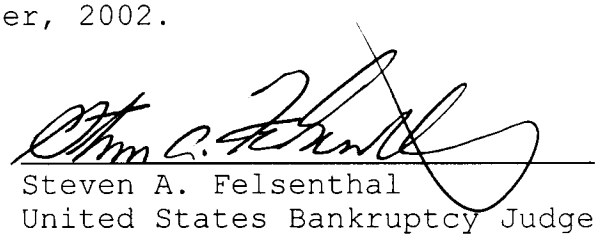
Order

Based on the foregoing,

IT IS ORDERED that the motion for partial summary judgment is **GRANTED** as to the claim of negligent misrepresentation and **DENIED** as to the claims for violations of the Texas Deceptive Trade Practices Act and Bank Holding Company Act.

IT IS FURTHER ORDERED that the claim of negligent misrepresentation is **DISMISSED.**

Dated this 7th day of October, 2002.



Steven A. Felsenthal
United States Bankruptcy Judge