U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
MID-CITIES TEMPORARIES, INC.,	§	
Debtors.	§	CASE NO. 02-41344-DML-13
	§	
MID-CITIES TEMPORARIES, INC.,	§	
Plaintiff	§	
	§	
vs.	§	ADV. NO. 02-04178
	§	
WEATHERFORD NATIONAL BANK,	§	
Defendants	§	

MEMORANDUM OPINION AND ORDER

Before the court is the Motion for Summary Judgment (the "Motion") filed by Weatherford National Bank ("WNB" or "Defendant") together with WNB's Supplement to Motion for Summary Judgment (the "Supplement" where appropriate to the context, a reference to the Motion will include the Supplement) by which Defendant seeks summary judgment as to all causes of action stated against it by Mid-Cities Temporaries, Inc. ("MCT", "Plaintiff" or "Debtor") in Plaintiff's Amended Complaint (the "Amended Complaint"). The Motion was filed asking for judgment as to Plaintiff's Complaint (the "Complaint"). The Complaint was filed on June 19, 2002 and subsequently dismissed without prejudice after Defendant filed the Motion and Plaintiff failed to respond timely. The Amended Complaint followed, in which Plaintiff abandoned certain causes of action and stated other, new ones. Defendant then reasserted the Motion through the Supplement.

The Court therefore has before it the Amended Complaint[1], the Motion, the Supplement and Plaintiff's response to the Motion (the "Response"). The parties have each provided the court with authorities in their pleadings. Defendant has submitted as summary judgment evidence the affidavit of Brooks Worthington ("Worthington"), the affidavit of Larry Mangrem ("Mangrem"), deposition testimony of Carol Friend ("Friend"), the account agreement between WNB and MCT (the "Agreement") and materials relating to activity in MCT's bank account at WNB. Plaintiff has submitted affidavits made by Friend and Paula Pricer and has relied on Worthington's affidavit and the Agreement.

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and 157(c).[2] This memorandum opinion comprises the court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052.

I. Background

MCT is in the business of providing temporary employees to companies in the Dallas-Fort Worth area. The temporary employees are on MCT's payroll, and MCT is responsible for trust-fund taxes for them. Friend is MCT's president and owner. Both MCT and Friend have banked with WNB since 1992. At some time during the 1990's MCT apparently fell behind on payment to the Internal Revenue Service ("IRS") of trust-fund taxes. Friend was successful in working out a pay-back arrangement with the IRS that, by 2001, required weekly payments of $5,000.

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1 Defendant has also answered the Amended Complaint.

2 WNB has raised no objection to bankruptcy court jurisdiction and in fact has asked this court to enter judgment in this adversary proceeding.

In the summer of 2001, Friend attempted to persuade the IRS to accept $1,000 per week in repayments.

Recognizing that the months of September through January were traditionally slow for MCT's business, Friend, in August, 2001, responded to instances in which WNB had bounced insufficient fund checks by approaching Worthington about a $50,000 line of credit. Friend was concerned not only about ensuring that MCT's checks were honored but also by the potential accumulation of bank fees for bounced checks. As MCT's cash needs did not coincide with its receipts, the line of credit would provide the business with necessary protection.

At a meeting attended by Friend, Worthington and MCT's vice president, Kim Westbrook, Worthington allegedly assured Friend no line of credit was required. Instead he promised to contact MCT before WNB dishonored any of MCT's checks. He further assured Friend that MCT would not be charged fees for insufficient funds checks.

On at least two occasions thereafter WNB honored insufficient funds checks presented against MCT's account. MCT, however was sent notices of overdraft and charged fees.

On September 21, 2001, WNB began dishonoring insufficient funds checks drawn on MCT's account. MCT was given no notice before the checks were dishonored. In each case dishonor fees were charged. Through September 26, 2001, MCT was charged over $20,000 in fees for overdrafts and insufficient funds checks.

Having learned that WNB would not perform as she understood Worthington had represented, Friend moved MCT's account to another bank and borrowed money to cover cash flow deficiencies. The damage, however, was done. Checks to the IRS had bounced, frustrating renegotiation of MCT's repayment scheme, and some payroll checks were dishonored, leading to

MCT's loss of at least one major customer. By early 2002 MCT filed for chapter 11 relief. At this writing, Debtor's plan of reorganization has recently been confirmed.

II. Plaintiff's Causes of Action

Plaintiff asserts three claims against Defendant. First, Plaintiff claims that WNB's failure to perform as represented by Worthington constituted a deceptive trade practice under the Deceptive Trade Practices Act (TEX. BUS. & COMM. CODE §§ 17.01, *et seq.*). Plaintiff claims Worthington had actual or apparent authority to promise WNB would honor insufficient funds checks and would waive associated fees. The failure of WNB to do so and its denial of Worthington's authority, Plaintiff asserts, amounts to a deceptive trade practice under TEX. BUS. & COMM. CODE § 17.46(b)(2)(5)(12).

Next, Plaintiff alleges that Worthington's promises amounted to a negligent misrepresentation. Plaintiff argues that MCT relied on Worthington's representation that he had the "authority to cover MCT's" insufficient funds checks (Amended Complaint, p. 7). Plaintiff also argues that Worthington's promise to waive fees and his assurance that MCT did not need a line of credit were negligent misrepresentations. The court, however, considers the latter of these duplicative of any statement that insufficient funds checks would be honored.

Finally, Plaintiff claims WNB owed a fiduciary duty to MCT. Allegedly, WNB breached this duty by failing to honor Worthington's promises as well as by failing to advise MCT of Worthington's lack of authority. Plaintiff also argues that WNB's failure to monitor Worthington amounted to a breach of fiduciary duty.

III. Standard for Summary Judgment

Summary judgment is proper when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c). *Jenkins v. Chase Home Mortg. Corp.*, 81 F.3d 592, 595 (5th Cir. 1996). It is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," when viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Summary judgment is inappropriate when conflicting inferences and interpretations may be drawn from the evidence. *Askanase v. Fatjo*, 130 F.3d 657, 665 (5th Cir. 1997); *James v. Sadler,* 909 F.2d 834, 836-37 (5th Cir. 1990). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson*, 477 U.S. at 247.

In making its determination, the court must draw all justifiable inferences in favor of the non-moving party. *Id* at 255. Once the moving party has initially shown "that there is an absence of evidence to support the nonmoving party's case," the non-movant must come forward, after adequate time for discovery, with significant probative evidence showing a triable issue of fact. FED. R. CIV. P. 56(e); *State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 118 (5th Cir. 1990). Conclusory allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation are not adequate substitutes for specific facts showing that there is a genuine issue for trial. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc); *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1993). To defeat a properly

supported motion for summary judgment, the non-movant must present more than a mere scintilla of evidence. *See Anderson*, 477 U.S. at 251. Rather, the non-movant must present sufficient evidence upon which a jury could reasonably find in the non-movant's favor. *Id.* at 1097.

IV. The Merits

A. Breach of Fiduciary Duty

The court will first address Plaintiff's cause of action for breach of fiduciary duty. Plaintiff does not allege that there was between MCT and WNB the sort of relationship that would give rise under Texas law to a fiduciary duty on WNB's part as a matter of law.[3] Thus, the claim of breach of fiduciary duty must rest upon a showing that MCT and WNB had developed the sort of special – or confidential – relationship that would impose such a duty upon WNB.[4]

As a general rule, Texas courts hold that an arms-length relationship will not be found to satisfy the test for a fiduciary relationship. This is so regardless of the trust placed in one party by the other. Specific to the case at bar, the banking relationship between the parties does not give rise to a relationship imposing fiduciary responsibilities on WNB.[5]

While it may be that a bank depositor relationship could, on proper facts, rise to a level

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3 *See e.g.* Mims v. Kennedy Capital Management, Inc. (*In re* Performance Nutrition, Inc.), 239 B.R. 93, 110 (Bankr. N.D. Tex. 1999); Fagan v. LaGloria Oil and Gas Co., 494 S.W.2d 624, 628 (Tex. Civ. App. – Houston 1973, *no writ*).

4 *See e.g.* Torrington Co. v. Stutzman, 46 S.W.3d 829, 837 (Tex. 2001).

5 *See* Greater Southwest Office Park, Ltd. v. Texas Commerce Bank, N.A., 786 S.W.2d 386, 391 (Tex. App. – Hous. 1990); Bank One, Texas, N.A. v. Stewart, 957 S.W.2d 419, 442 (Tex. App. – Houston 1998).

which would support a cause of action for breach of fiduciary duty, those facts are not present here. The only evidence Plaintiff offers to support its assertion that MCT and WNB were so linked as to impose fiduciary duties on Defendant is the length of their banking relationship, which has been held insufficient in Texas to establish for MCT the sort of rights it seeks to invoke against WNB.[6] Based on the evidence offered in support of and opposition to the Motion, the court concludes no finder of fact could determine other than that WNB owed no fiduciary duty to MCT. With respect to Plaintiff's fiduciary duty claim, therefore, the Motion must be GRANTED.

B. Negligent Misrepresentation

A cause of action for negligent misrepresentation must satisfy several tests to justify recovery in Texas. Besides a showing of loss, a plaintiff must show that (1) a representation was made by the defendant in the course of business; (2) the representation was false and would be relied on by others; (3) defendant did not exercise care in disseminating the content of the representation; and (4) plaintiff reasonably relied on the representation.[7]

In the instant case, the court believes, based on the summary judgment evidence, that a finder of fact could conclude that Worthington, as an officer of WNB, made a misrepresentation in the course of business. Worthington could be found – and, by extension, WNB could be found – to have known Friend would be guided by his representations. WNB clearly knew

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6 Consolidated Bearing & Supply Company, Inc. v. First National Bank at Amarillo, 720 S.W.2d 647, 649 (Tex. App. – Amarillo 1986). This case, like *Stewart* and *Greater Southwest*, involved a borrower—lender relationship, where a party might expect more from a bank than should an ordinary depositor. However, even a long-standing borrowing relationship, absentee other factors such an exercise of control, will not give rise to a fiduciary duty.

7 Federal Land Bank Ass'n of Tyler v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991).

Worthington lacked the authority to give Friend the assurances he allegedly did (and Worthington's affidavit reflects he knew he could not give Friend such assurances) and, therefore, WNB would have known (and Worthington should have known) the representation was false and recklessly made.

This leaves two questions. First, was Plaintiff damaged? Second, did MCT and Friend reasonably rely on Worthington's representations? The court considers it appropriate to deal with these issues as appropriate in connection with two representations: first, regarding the representation WNB would honor insufficient funds checks and second, the representation WNB would waive overdraft fees.

1. Honoring Checks

The court recently has addressed whether an oral promise to advance funds could reasonably be relied upon.[8] The court is convinced that no finder of fact could find that Friend, an experienced business woman, could have reasonably relied on an unwritten promise by WNB to, in effect, loan money to MCT. In the first place, the Agreement clearly provides that WNB has no obligation to honor overdrafts and that any "variations from [the Agreement] must be agreed to in writing . . ." In the second place, any agreement to lend funds must be in writing under Texas law. TEX. BUS. & COMM. CODE § 26.02.[9] Third, a negligent representation cannot

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8 *See* 02-41005 - Adv. 03-4024 - The Estates of Crescent Machinery and E. L. Lester Inc. -v- Mark Roberson, Jeffrey Stevens, Gerald Haddock, Rick Knight, and Crescent Operating, Inc., at http://www.txnb.uscourts.gov/opinions/dml/02-41005_Adv03-4024_20030605.pdf.

9 The instant case differs from Federal Land Bank v. Sloane, 825 S.W. 2d 439 (Tex. 1991). In that case it was represented that plaintiff's loan application was approved. Here, the alleged misrepresentation was that no lending formalities were required at all.

ordinarily apply to future conduct.[10] Given the facts before it, the court concludes that as to the cause of action for Worthington's negligent misrepresentation that WNB would cover insufficient funds checks, the Motion must be GRANTED.

2. Service Charges

The representation regarding service charges for overdrafts, however, is another matter. The Agreement does not specify overdraft charges will be made unless waived. Rather it permits charges to be made. It is likely that bank officers often waive such charges – even prospectively. Such a waiver may reasonably be expected to fall within their authority. The court is unable to hold, based on the summary judgment evidence, that a finder of fact would be unable to conclude that Friend reasonably relied on Worthington's assurance that MCT would not be charged for insufficient funds checks.

That MCT could have been damaged by this alleged misrepresentation is manifest. The charges were paid, and that payment is one possible measure of damages. Thus, as to Plaintiff's cause of action based on Worthington's representation that there would be no overdraft charges to MCT, the Motion must be DENIED.

C. Deceptive Trade Practices

1. Notice

Defendant argues in the Supplement that it is entitled to summary judgment as to Plaintiff's deceptive trade practice cause of action because statutory notice was not given. The court is not prepared to accept this argument, at least at this stage of these proceedings.

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10 Allied Vista, Inc. v. Holt, 987 S.W.2d 138, 141 (Tex. App.--Houston [14th Dist.] 1999, *pet. denied*) (citing Fed. Land Bank Ass'n v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991)).

Plaintiff purports to attach proper notice to the Response as Exhibit E. The court's copy of the Response does not include an Exhibit E (possibly as a result of limitations in the court's new electronic filing system). In any case, even if the Complaint, the Amended Complaint and other pleadings served by Plaintiff on Defendant do not meet statutory requirements, Plaintiff has ample time to follow the proper procedures. *See* 11 U.S.C. § 108(a). It seems to the court that requiring further compliance with a technicality would serve no purpose at this time other than to grant form a place ahead of substance.

2. Lending Transaction Defense

Next, Defendant argues that Plaintiff does not qualify as a consumer under the Deceptive Trade Practices Act. Defendant's argument is based on the Texas Supreme Court decision in *Riverside National Bank v. Lewis*.[11] In *Lewis*, the plaintiff sought damages under the Deceptive Trade Practices Act on the basis that he was misled about approval of a loan application. The Supreme Court held the Deceptive Trade Practices Act did not apply because Lewis sought money from the defendant bank. The court said (603 S.W. 2d at 174), "[M]oney is not a 'tangible chattel,' or 'goods' as defined by the [Act]. Rather, money is properly characterized as currency of exchange . . .. Thus Lewis . . . did not seek to acquire . . . any 'goods' as defined by the [Act]."

The Court finds Defendant's reliance on *Lewis* misplaced. As stated by Plaintiff in the Response, MTC, at least in part, sought "services," not money, from WNB. While seeking

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11 603 S.W. 2d 169 (Tex. 1980).

overdraft privileges would fall within the ambit of *Lewis*, requesting notice of presentment of insufficient funds checks and waiver of service fees would not.

The Court has some doubt whether the "services" MCT points to are of a type within the scope of the Deceptive Trade Practices Act. The court also questions if MCT qualifies in this case as one "who [sought] . . . by purchase or lease, any . . . services." TEX. BUS. & COM. CODE, § 17.45(4). Nevertheless, these questions have not been addressed adequately at this time, and the court is not prepared to go beyond Defendant's position as stated in the Motion and Supplement. Therefore, as to Plaintiff's claim under the Deceptive Trade Practices Act, the Motion will be DENIED.

V. Conclusion

Except as specifically granted herein, the Motion is DENIED. To the extent the Motion is granted, this decision shall be incorporated in any final judgment of the court.

It is so ORDERED.

Signed this the 18th day of June 2003.

DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE

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