20100027

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
APRIL 19, 2010
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

American Bank Center, Plaintiff/Appellant, vs. David L. Wiest, Defendant/Third Party Plaintiff, Appellee, vs. Howard Palmer, Third Party Defendant, Appellee and Louis Burckhardsmeier, Third-Party Defendant.	)	Supreme Court No. 20100027 Cass County District Court No. 07-C-1721

APPEAL FROM THE JUDGMENT ENTERED NOVEMBER 16, 2009,
PURSUANT TO FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
ORDER FOR JUDGMENT DATED SEPTEMBER 17, 2009
IN THE CASS COUNT DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT

THE HONORABLE FRANK L. RACEK, PRESIDING

BRIEF OF APPELLEE HOWARD PALMER

David J. Hogue (ID #04486)
PRINGLE & HERIGSTAD, P.C.
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702-1000
(701) 852-0381

ATTORNEYS FOR APPELLEE
HOWARD PALMER

TABLE OF CONTENTS

TABLE OF CONTENTS, Continued

¶1 **TABLE OF AUTHORITIES**

Cases, Cont. **Paragraph No.**

Statutes

¶2 I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

¶3 A. Is the Trial Court's Conclusion of Law That the Fraud of an Employee/Loan Officer is Imputable to the Employer/Bank Under the Facts of This Case a Correct Ruling?

¶4 Brief Answer: Yes. The trial court relied on two North Dakota cases involving imputation of fraud from a bank employee to the bank employer. Given the facts as found by the trial court as the finder of fact, the trial court did not err in imputing fraud from the employee/agent/loan officer to the employer/principal/bank.

¶5 B. Is the Trial Court's Finding of Fact Regarding the Creation of a Fiduciary Relationship Between Loan Officer and Borrower a Dispositive Issue on This Appeal?

¶6 Brief Answer: No. The trial court's findings of fact regarding creation of a fiduciary relationship represents a second, alternative grounds for granting the borrower relief from the second promissory note in this case. If this Court upholds the trial court decision regarding imputation of fraud from the loan officer to his employer/bank, there is no reason to address whether a fiduciary relationship was created.

¶7 C. Is the Trial Court's Finding of Fact Regarding the Creation of a Fiduciary Relationship Between Loan Officer and Borrower Clearly Erroneous?

¶8 Brief Answer: No. The Trial Court understood the borrower lender relationship is a debtor creditor relationship that does not ordinarily impose a fiduciary obligation. However, in the instant case, the Trial Court found that the loan officer's "role went beyond that of a lender." (App. 85, mem op 21)

¶9 **II. STATEMENT OF THE CASE**

¶10 Plaintiff/Appellant American Bank Center ("Bank") appeals from a judgment permitting Bank to recover only $76, 678.65 of the $414,325.94 it sought to recover from Defendant/Appellee David L. Wiest ("Borrower"). Bank initiated a collection action against Borrower in March 2007 to recover from Borrower the outstanding principal and interest on two promissory notes executed in October of 2005 ("Loan I") and January of 2006 ("Loan II"). (App. 12, Complaint)[1]. Borrower answered the complaint in April 2007 denying he was obliged to repay Bank. (App. 19, original answer) Borrower submitted an amended answer alleging Third Party Defendant/Appellee Howard Palmer ("Loan Officer") fraudulently induced Borrower to enter Loan I. (App. 23, amended answer)

¶11 Borrower sought and received leave to amend his pleading to add Loan Officer as a third party defendant. (App. 24, third party complaint) Borrower also named his friend, neighbor, and business associate, Louis Burckhardsmeier ("Lou"), as an additional third party defendant. (App 24-26, third party complaint) The third party complaint alleged Loan Officer and Lou fraudulently induced Borrower to borrow from Bank. Id.

¶12 Loan Officer answered the third party complaint, denying that he "induced" Borrower to borrow money by making false statements. (LOA 2, answer of Loan Officer) Loan Officer further pled that he was not a proper party to the collection lawsuit and that if his communications with Borrower were deemed fraudulent, such statements were within Loan Officer's scope of employment with Bank for which Loan Officer was entitled to indemnification. (Id., ¶ 11) Third Party Defendant Lou did not participate at trial or discovery, except as a witness at trial.

[1] References to Bank's appendix are "APP ___"; references to Loan Officer's Appendix are "LOA __"

¶13 The parties waived a jury trial on issues of fact and the case was tried as a bench trial from July 14-17, 2009 before the Honorable Frank L. Racek, District Court Judge, East Central Judicial District ("Trial Court") (App 65, memorandum opinion) Following submission of post-trial briefs by Bank, Borrower, and Loan Officer to the Trial Court, the Trial Court issued his decision by written opinion dated September 17, 2009. (Id.) After the Trial Court issued his decision, the parties submitted further briefing over which party was the prevailing party for the purpose of recovering allowable costs and disbursements. The Trial Court permitted Borrower to tax a portion of his costs and disbursements against Lou, but no other costs or disbursements were authorized by the Trial Court. (LOA 6, order re costs) This appeal followed.

¶14 III. STATEMENT OF FACTS

¶15 Bank's description of the dollars, dates and other specifics of the loan documents of Loan I and Loan II are accurately set forth in ¶¶ 7-8 of Bank's brief to this Court. Additional factual information about the history and purpose of the both loans is helpful to understanding the dispute.

¶16 A. Background of Glast Blast Media and its Owners.

¶17 Borrower and four other natural persons were equity owners of a company named Glast Blast Media ("GBM"). (App 67, mem. Op. ¶ 10) Borrower, Dr. Howard Bergland, a partner of Borrower's in an unrelated medical practice group, Fargo attorney Craig Johnson, and Mr. Kevin Johnson, the brother of attorney Craig Johnson became minority shareholders in GBM. The majority owner of GBM was Duane Miller, a certified public accountant from Bismarck. (App. 67, ¶ 9, mem. Op)

¶18 GBM's principal business was obtaining and recycling the raw glass ordinarily bound for municipal landfills. GBM's recycling process involved exposing the raw glass to high temperatures and producing new glass materials useful for industrial applications such as sandblasting. The discarded raw glass had to be hauled primarily from Minneapolis to Fargo, North Dakota for processing. (Tran. 167, ll. 1-5) GBM hauled substantial quantities of raw glass into West Fargo but had no one to sell the finished product to. (App. 70, mem. op ¶ 19) Not surprisingly, at no time in GBM's brief history did it ever cash flow. (Tran. 88, 11-15)

¶19 The absence of a reliable buyer of its finished product was not the only obstacle to GBM's success. Over the road trucks was the only viable mode of transporting the raw glass into Fargo and the finished, recycled product out of Fargo. (Tran. 166, ll. 13-24) The volume and weight of the incoming raw glass and outgoing finished product meant GBM had a substantial need for trucks, trailers and truck operators. (Tran. 158, ll. 11-25) When fully operational, GBM was projected to bring in 360 semi loads of raw glass per month and ship out 400 semi loads of finished product per month. (Tran. 158-59) Clearly, GBM's demand for transportation assets was significant.

¶20 During the summer of 2006 (approximately 9 months after Loan I execution and 5 months after Loan II execution), the investors of GBM realized the proposed major purchaser of the finished glass would not accept delivery and pay for the finished product. (Tran. 160, ll. 17-18) Meanwhile, GBM was contractually obligated to continue accepting and transporting raw glass from urban landfills to its facility in West Fargo. (Tran 161, ll. 15-20)

¶21 Before investing in GBM, Borrower and three other equity owners of GBM bought a "glass burner" at an auction sale for approximately $ 10,000. GBM bought the glass burner from the four investors for $180,000 and gave each of the four investors a five percent (5%) equity interest in GBM. (App 67, ¶ 10, Mem. Op.)

¶22 In addition to selling the glass burner to GBM and taking an equity position as partial payment for the glass burner, Borrower and the three other GBM investors invested in GBM in two other ways. First, when GBM defaulted on making any payments to the building contractor constructing the new manufacturing facility in West Fargo, Borrower and the other three investors formed an LLC, bought the new manufacturing building that was under construction and attempted to lease it back to GBM. (App. 68, ¶ 11-12, mem. Op.). Borrower and the investors built a new 100' X 200' steel building in Fargo to accommodate GBM's operations. Id, ¶ 11. Without revenue from a customer, GBM could not pay rent to its Landlord/investors and was evicted from its new facility. (Tran. 217, ll. 1-4) Second, each of the minority investors took out a line of credit at Bank and drew on the line to inject capital into GBM. In return for the capital injections via the lines of credit, each investor/minority shareholder's equity stake in GBM increased. (Tran. 113, ll.6-20) Borrower's $200,000 line of credit loan is one of two loans at issue in this case.

¶23 B. Loans I and II.

¶24 Loan I is evidenced by a promissory note in the amount of $250,000. (App 15) Loan I was a single advance note dated October 27, 2005. In his original answer, subsequent amended answer, and trial testimony, Borrower acknowledged that the loan proceeds for Loan I, was to be deposited into the account of GBM. (App 19, *Original*

answer, ¶ 4(a); testimony of Wiest at Tran.. 564, 7-9; 573,4-6.) Pursuant to Borrower's direction, the loan proceeds for Loan 1 were deposited in the account of GBM. (App. 61)

¶25 Borrower acknowledged GBM shareholders anticipated making capital infusions in GBM for one to two years. (Tran. 89, 1-3.) Indeed, Borrower's original answer, dated April 13, 2007, states the loans were "to provide working capital for said corporation." (App. 19, Borrower original answer at ¶ 4(a)) There is no dispute in this case that Loan I went into the general corporate checking account of GBM and was in fact used to pay current obligations of GBM. Borrower understands the distinction between borrowing money for working capital and borrowing money to buy assets such as trucks and trailers. (Tran. 88, ll. 1-10)

¶26 Borrower maintains in his third party complaint and trial testimony that he was informed by Lou and Loan Officer that the loan proceeds from Loan I would be used to buy semi trucks and trailers and that the loan would be for approximately three weeks, pending permanent financing through a loan program administered by the US Small Business Administration. (App 24, Third Party Complaint, ¶ 6; Tran. 580, ll. 19-22) Trucks and trailers were not purchased with the $250,000 of loan proceeds from loan I.

¶27 Borrower admits Loan Officer has no authority to buy trucks and trailers with loan proceeds and is not in the business of buying assets for his loan customers. (Tran. 588, ll. 9-11)

¶28 Three months after Loan I was executed by Borrower, Borrower executed another promissory note dated January 26, 2006 in the amount of $200,000 ("Loan II"). Unlike the first note, the second loan was a "multiple advances" loan referred to as a "line of credit." (App. 16). In his third-party complaint brought against Loan Officer and Lou,

Borrower references the alleged deceit with respect to Loan I, (App. 5, third party complaint ¶¶ 6-10), but makes no explicit reference to Loan II, nor does he allege that he was misled with respect to the purpose(s) of Loan II.[2] However, Borrower maintains he would not have agreed to Loan II, had he known of the alleged deceit about the purpose of Loan 1. This alleged lack of knowledge formed his legal defense for asking the Trial Court that he not be obligated to repay Loan II or, in the alternative, that Loan Officer and Lou indemnify him for Loan II.

¶29 Borrower drew on his line of credit to finance the operational expenses of GBM, including trucking charges, fuel (App 51), and equipment . (App 53) Borrower received an increased equity stake in GBM for tendering a portion of his draw requests to GBM. (Tran. 113)

¶30 From discovery through trial, Borrower remained unaware of any motive Loan Officer would have to mislead him about Loans I and II. (Tran. 95, 5-11) Bank contends Loan Officer mislead Bank not Borrower. Bank brief at 30, ¶ 64. Bank though, also acknowledges the lack of any evidence Loan Officer had a motive to intentionally mislead: "Animated by some still-unknown motive, Palmer intended to deliberately deceive the Bank." Id. For a significant portion of Loan II proceeds, Borrower acknowledges he could not have been defrauded because the money advanced was used to pay off other debt of Borrower, e.g., WBJ Partnership ("WBJ" or the "Building Partnership") or to buy an asset for Borrower, e.g., additional equity in GBM. (Tran. 114-115) The Building Partnership leased the new manufacturing facility to GBM.

[2] Loan Officer made a motion for partial summary judgment with respect to Loan II because of the absence of allegations or evidence that Borrower was misled about Loan II. The Court denied the partial summary judgment motion of Loan Officer.

¶31 Loan Officer denied that he misled Borrower. He testified that the purpose of Loan 1 was complex, but was created to permit Wiest to buy trucks and trailers. (Tran. 341-43) GBM was positioning itself to qualify for a long term, U.S. Small Business Administration loan ("SBA 504 loan"), but its tenuous financial condition and its shareholders' unwillingness to guarantee all of GBM's debt made qualifying for the SBA 504 loan problematic for two reasons. First, as a start up company, the SBA required GBM to have an equity ratio of 20%. If GBM bought the trucks (acquired assets) but then financed them (incurring a liability), GBM's equity would not increase and GBM would remain ineligible for the 504 loan. Id. Second, if GBM sold more stock to Borrower to increase equity within GBM, Borrower's equity ratio in GBM would push him over the twenty percent equity holder threshold that required a guaranty of the entire GBM debt, a condition neither Borrower nor the other minority shareholders were willing to accept. Id.; Tran. 350, 18-22. The SBA 504 loan requirements thus drove the structure of Loan I: Borrower borrows money and immediately transfers loan proceeds to GBM; GBM issues no debt and no equity in return for Loan I proceeds from Borrower.

¶32 There is no provision in the loan agreements between Borrower and Bank obligating the Bank to obtain the semi truck titles on Borrower's behalf. Loan Officer denies telling Borrower he would obtain possession of vehicle titles on Borrower's behalf. (Tran. 352, 15-23) The only evidence that supports the assertion that Bank/Loan Officer would obtain the titles is Borrower's testimony.

¶33 C. The Trial Court Decision

¶34 The Trial Court's written decision reviewed the events and conversations leading up to Loans I & II and analyzed each loan separately. For Loan I in the principal amount

of $250,000, the Trial Court concluded Bank could not collect the outstanding amount of Loan I because Borrower's consent to Loan I was induced by fraud of Loan Officer and Lou. (App. 76, mem op. 12) The alleged fraud related to assurances made to Borrower by Lou and Loan Officer that the purpose of Loan I was to purchase semi trucks and trailers to be used by GBM instead of being used to pay on going operational expenses of GBM. The Trial Court declared he found clear and convincing evidence that Loan Officer and Lou committed acts to deceive Borrower to enter into Loan I. (App. 78, mem op. 14) With respect to Loan Officer, the Trial Court stated: "[Loan Officer] was not oblivious to the financial situation of GBM and the true purpose of [Loan I] (to cover overdrafts and pay bills for various 'Lou' related entities)." (App. 78, mem. Op. 14)

¶35 Relying on this Court's decision in Dewey v. Lutz, 462 N.W.2d 435, 443-44 (N.D. 1990), the Trial Court imputed Loan Officer's alleged fraud to Bank. (Id. at 79) The Trial Court thus granted Borrower the remedy of equitable rescission from Loan I. Because the loan proceeds from Loan I went directly into the account of GBM and not to Borrower, Borrower "received no benefit under the loan agreement and has nothing of value to return to the Bank upon rescission." (Id. at 80) The Trial Court also excused Borrower's obligation to repay based on failure of consideration. (Id, 81)

¶36 The Trial Court reached a mixed result with respect to Loan II. With respect to Loan II, the Trial Court first found a fiduciary relationship existed between Borrower and Bank. (Id. 84) The Trial Court then separated the specific draw requests on Loan II between requests that were made by Borrower for Borrower's benefit, and draw requests made by others that did not benefit Borrower. Id. The Trial Court concluded Bank could recover those sums advanced by Bank on Loan II that were made by Borrower that

benefitted Borrower but not the draw requests initiated by Loan Officer to pay the debts of GBM and others. (Id, 86)

¶37 In its conclusions of law the Trial Court permitted judgment in favor of Bank against Borrower only for the loan sum in Loan II that Borrower requested and went for the benefit of Borrower. (Id, 89) The Trial Court permitted Borrower to take judgment against Lou for $75,000 and dismissed the personal claim made by Borrower against Loan Officer. (Id.)

¶38 IV. LAW AND ARGUMENT

¶39 A. The Trial Court Correctly Imputed the Alleged Fraud of Loan Officer to Bank.

¶40 Though he strongly disagrees with Trial Court's findings with respect to fraud, Loan Officer has not appealed from the Judgment in this case and the underlying memorandum opinion of the Trial Court. Loan Officer concludes Trial Court reached the right result in absolving Loan Officer of personal liability for Loans I and II. The Trial Court properly dismissed the personal claim against Loan Officer, finding that his alleged fraud was the Bank's fraud. That legal conclusion should not be disturbed on appeal because it represents adherence to longstanding North Dakota precedent. The conclusion is also in accord with the law of agency.

¶41 There was no dispute at trial or during the pleadings that Loan Officer was an employee and agent of Bank. Trial Court concluded all of Borrower and Loan Officer's communications were in Loan Officer's capacity as a loan officer for Bank. (App. 78, mem op 14) But Trial Court also found Loan Officer's role in the loan transactions "went beyond that of a lender." (App. 85) The Trial Court found Loan Officer knew

Lou and GBM would not be acquiring trucks and trailers with loan proceeds of Loan I as was represented to Borrower. (Id., 85)

¶42 In concluding Loan Officer's fraud was imputed to Bank, Trial Court discussed the facts at bar with Dewey v. Lutz, 462 N.W.2d 435 (N.D. 1990). The Trial Court first recited the specific holding of McIntosh v. Dakota Trust Co., 52 N.D. 752, 204 N.W. 808 also cited in Dewey: "A banking corporation is liable to innocent third persons where the representation is made in the course of its business and by an agent while acting within the general scope of his authority, even though, in the particular case, he is secretly abusing his authority and attempting to perpetrate a fraud upon his principal, or some other person, for his own ultimate benefit. In such a case, the bank is chargeable with the knowledge of its agents, and the exception to the rule of imputed knowledge does not apply." (App 79, mem. Op *quoting* Dewey at 443 *quoting* McIntosh at 818).

¶43 Dewey involved the sale of farm real estate in southwest North Dakota. Id at 437. The bank in Dewey was located in Regent, North Dakota, and the bank president was serving as the loan officer for the disputed loan transaction. The bank president inserted himself as a party to the land transaction and failed to disclose his personal interest in the transaction. Dewey at 438. The Dewey Court concluded the actions of the bank president were properly imputed to the bank and any jury instruction to the contrary was error. Dewey at 443. The Dewey Court concluded fraud of the bank president could be imputed to the bank, particularly when the bank benefitted from the fraud.

¶44 Bank in the instant case attempts to distinguish Dewey by claiming Bank did not benefit from the alleged fraud of Loan Officer. According to Bank, Borrower benefitted from the loan transactions but Bank did not. Bank brief at 30. The Trial Court found

otherwise, and simple analysis of Loan I affirms the correctness of Trial Court's factual finding.

¶45 Loan I in the amount of $ 250,000 was made by Borrower and immediately the loan proceeds of Loan I was deposited into the checking account of GBM. GBM's checking account was at Bank too, and the checking account was approximately $38,000 overdrawn at the time the Loan I proceeds were deposited into the GBM checking account at Bank. (App. 71, mem. Op. 7) Bank was thus able to get creditworthy Borrower to assume the unsecured debt of insolvent GBM.

¶46 That is not the only benefit Bank received from Loan I and Loan II. Portions of the Loan II proceeds were used to pay other delinquent loans from other delinquent Bank borrowers. As Trial Court observed, loan proceeds were needed by Lou to "keep the many loans at the Bank current." (App. 70, mem. Op. 6) In this Ponzi pattern, Bank was able to procure loans from Borrower with a net worth of $ 5.6 million (App. 37, balance of Borrower) and pay down loans from defaulting, insolvent borrowers. (App. 70, mem. op. 6) Loan I and II were initiated because "Lou needed additional capital to keep all these various entities afloat, and keep the many loans at the Bank current.")

¶47 This is substantially similar to the benefit received by the Dewey bank. In Dewey, the bank received not only a portion of fraudulently induced loan proceeds, but its third mortgage security position on real estate was improved when a portion of the fraudulently induced loan proceeds paid down the first mortgage. Dewey at 443. "Under these facts, [bank president/loan officer's] fraud and deceit could have been imputed to the Bank." Dewey at 444.

¶48 Basic principal & agency law supports Trial Court's decision to impute alleged fraud of Loan Officer to Bank as well. This Court recognizes that false statements made by an agent in the scope of apparent authority bind the principal. This Court's decision in Diemert v. Johnson, 299 N.W.2d 546 (N.D. 1980) is on point. Diemert involved the sale of land on a contract for deed. Id. at 547. One question in Diemert was whether the seller of real estate misled or concealed facts from the buyer about the status of billboards on the subject property. Id. At trial the trial court did not find fraud on the part of the sellers of the real estate. The Diemert Court reversed and instructed the trial court to consider whether the agent of the sellers made false statements to the buyers about the status of billboards located on the property. Id. at 549. The Diemert Court observed: "The findings of fact and the memorandum decision reflect that there was an agency relationship between [real estate agent] and the [sellers]. The trial court should have considered the agency relationship, and the binding effect of any statements made by the [agent] in his capacity as [sellers'] agent to [buyers] concerning the signs." Id. at 549. Diemert affirmed "the general rule of law that the principal is generally held liable for statements made by the agent acting within the apparent scope of authority." Id.

¶49 This general principle of law is codified in § 3-03-01, NDCC, which reads:

3-03-01. Rights and Liabilities accruing to principal. An agent represents the agent's principal for all purposes within the scope of the agent's actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from the transactions within such limit, if they had been entered into on the agent's own account, accrue to the principal." [Emphasis supplied.] § 3-03-01, NDCC. False statements made by an agent that are within the scope of the agent's actual or ostensible authority may be

imputed to the principal if such statements could impose liability on the agent were the agent a party to the transaction. Trial Court found Loan Officer's statements about the alleged promises to procure truck titles for Loan I and promises to obtain the SBA 504 loan were within the scope of Loan Officer's duties for Bank. (App. 70-71, 79)

¶50 The Trial Court's decision is not informed by an erroneous view of the law with respect to fraud and deceit, nor the high standard of proof needed to make findings of fraud or deceit. The Trial Court asked for and received briefing on the definition of and standard of proof for fraud and deceit. Deceit and fraud are defined by statutory law. The definition of each is similar. Section 9-10-02, NDCC reads:

¶51 "A deceit within the meaning of section 9-10-02 is:

1. The suggestion as a fact of that which is not true by one who does not believe it to be true;
2. The assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true;
3. The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or
4. A promise made without any intention of performing."

¶52 Actual Fraud is defined in § 9-03-08, NDCC: "Actual fraud within the meaning of this title consists in any of the following acts committed by a party to the contract, or with the party's connivance, with intent to deceive another party thereto or to induce the other party to enter into the contract:

¶53

1. The suggestion as a fact of that which is not true by one who does not believe it to be true;
2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true though that person believes it to be true;
3. The suppression of that which is true by one having knowledge or belief of the fact;
4. A promise made without any intention of performing it; or
5. Any other act fitted to deceive."

¶54 While the definitions of fraud and deceit are similar, one of the significant distinctions between fraud and deceit focuses on whether the alleged wrong-doer is a party to a contract. The evidentiary standard for both fraud and deceit require proof by the "clear and convincing" evidentiary standard. Fargo Foods, Inc. v. Bernabucci, 1999 ND 120, ¶ 19, 596 N.W.2d 38. Fraud is never to be presumed. Kary v. Prudential Insurance Co. 541 N.W.2d 703, 705 (N.D. 1996). Deceit is also different from fraud in the remedies available under each theory. Fraud generally permits rescission as a contract remedy, while deceit permits money damages; nonetheless, both require the same high standard of clear and convincing evidence. Erickson v. Brown 2008 N.D. 57, 747 N.W.2d 34; WFNB, LLC v. Fargo Marc, LLC, 2007 N.D. 67, ¶ 25, 730 N.W.2d 841.

¶55 The Trial Court applied this law to the facts of the case, observing that fraud must be proved by clear, satisfactory, and convincing evidence. (App. 77, mem op *citing* Sergeant County Bank v. Wentworth, 500 N.W. 2d 862, 875 (N.D. 1993)) The Trial Court found Lou and Loan Officer led Borrower to believe that: (1) Loan I proceeds

would be used to purchase trucks and trailers; (2) the loan would be of a short duration because an SBA loan would be processed and take out Loan I; (3) Loan Officer would secure the titles to the trucks and trailers to collateralize Loan I. (App. 77, mem op. 13) From these factual findings, the Trial Court "finds clear and convincing evidence that [Loan Officer] committed acts, and Lou committed acts with [Loan Officer's] connivance, with intent to deceive [Borrower] and induce him to enter into the loan agreement." (App. 78, mem op 14)

¶56 These factual findings of fraud are subject to the "clearly erroneous" standard of review by this Court. A finding of fact is clearly erroneous if it is not supported by any evidence, if, although there is some evidence to support the finding, a reviewing court is left with a definite and firm conviction a mistake has been made, or if the finding is induced by an erroneous conception of the law." Pfeifle v. Tanabe , 2000 ND 219, ¶ 7 , 620 N.W.2d 167. As this Court has noted a "trial court's choice between two permissible views of the weight of the evidence is not clearly erroneous, and simply because we may have viewed the evidence differently does not entitle us to reverse the trial court." Edward H. Schwartz Constr., Inc. v. Driessen , 2006 ND 15, ¶ 6 , 709 N.W.2d 733 (quoting Brandt v. Somerville , 2005 ND 35, ¶ 12 , 692 N.W.2d 144).

¶57 The clearly erroneous standard of appellate review applies to a trial court's determination regarding fraud. A trial court's determination of fraud will not be set aside on appeal unless clearly erroneous . West v. Carlson, 454 N.W.2d 307 (N.D. 1990) D.G. Porter, Inc. v. Fridley, 373 N.W.2d 917 (N.D. 1985). Trial Court's finding of fraud in the instant case is not clearly erroneous.

¶58 B. The Trial Court's Factual Finding That a Fiduciary Relationship was Created Between Borrower and Bank is Not a Dispositive Issue on Appeal.

¶59 The Trial Court also found that a fiduciary relationship was created between Borrower and Loan Officer. (App 82, mem or 18) The Trial Court recognized that creation of a fiduciary duty in the relationship between a bank and its customer is clearly the exception and not the rule. Id. The Trial Court acknowledge this Court's decision in First Nat. Bank & Trust Co. of Williston v. Brakken, 468 N.W.2d 633 (N.D. 1991) and Union State Bank v. Woell, 44 N.W.2d 712 (N.D. 1989) set forth a general rule that the borrower lender relationship is typically an arms length, debtor/ creditor relationship. Id.

¶60 The Trial Court's analysis of Loan II is different from Loan I because Loan II is a line of credit in which Borrower made multiple draws and directed the draws to different payees. Each draw request under Loan II had a distinct purpose. The Trial Court's fiduciary analysis occurs only in the discussion of Loan II, not Loan I. The conduct of Loan Officer for procuring Loan II is also regarded by the Trial Court as fraud in the inducement. (App. 85, mem op 21)

¶61 What motivated the Borrower to make each draw request under Loan II is scrutinized by the Trial Court. For the draw requests that Borrower initiates and receives a direct benefit, the Trial Court permits Bank to make recovery. Id. For the draw requests in which Trial Court perceives Loan Officer is directing Borrower to make draw requests in order to shore up the loans of other Bank borrowers, the Trial Court concludes Bank cannot recover.

¶62 The Trial Court was persuaded by the analysis of First Nat. Bank in Lenox v. Brown, 181 N.W.2d 178 (Ia. 1970) in which a borrower was "lured" into borrowing from the bank to buy a gas service station. The owner of the service station was also a customer of the bank and the service station was failing. Id. at 181. The service station owner had several outstanding delinquent loans with the bank and the bank saw a sale of the service station as a way to pay off the service station owner's delinquent debt to the bank. The Brown Court found that the bank went beyond its role as a lender and in so doing had an obligation to "alert defendants to the true situation, . . ." Brown at 182.

¶63 The Trial Court concluded Loan Officer went beyond the role of a bank and induced further borrowing on Loan II in order to shore up other loans of Bank to other Bank customers:

¶64 "[Loan Officer's] role went beyond that of a lender. [Loan Officer] was present at all meetings and formulated the methods of financing GBM, in concert with Lou. During the course of these transactions, [Borrower] placed his trust and confidence in [Loan Officer]. [Loan Officer] told [Borrower] he was actively pursuing an SBA loan for GBM. [Loan Officer] knew of the nature and amount of the loans taken out by GBM, the lack of collateral for the loans, and the involvement of all of the [Lou] related companies. [Loan Officer] also knew that the promised collateral had not been forthcoming on [Borrower's Loan I], the $288,000 NDDF loan, and dozens of other loans he made to entities affiliated with Lou. . . . [Loan Officer] continued to represent that it was necessary to keep the obligations of GBM current to prevent 'red flags' in obtaining the SBA loan.

These payments only benefitted the Bank, and were, under the circumstances, of no benefit to [Borrower]. (App. 86, mem op 22).

¶65 This is the same reasoning that led the Trial Court to grant Borrower the remedy of equitable rescission of Loan I. However, the draw requests under Loan II were factually distinct because of who requested the draw and who received the draw proceeds. The Trial Court found Loan Officer led Borrower to believe certain draw requests were necessary to facilitate eligibility for a SBA 504 loan but that the Loan Officer knew GBM would not qualify for the SBA loan. And, the same draw requests benefitted Bank by paying off delinquent loans of other Bank borrowers. *See e. g.,* May 31, 2006 draw request of $54,339.54 disbursed to 17 separate entities, most of which were Bank customers. (App. 62)

¶66 The facts as found by the Trial Court for those offending draws on Loan II make those draw requests subject to the same remedy of equitable rescission as the entire Loan I proceeds. The critical facts found by the Trial Court is that Loan Officer misled Borrower by knowingly making false statements to induce the Borrower to execute loan documents and obtaining an improper benefit for the Bank by using those loan proceeds to payoff other delinquent loans.

¶67 C. The Trial Court's Factual Finding That a Fiduciary Relationship Was Created Between Loan Officer/Bank and Borrower is Not Clearly Erroneous.

¶68 Whether a fiduciary relationship is created is a question of fact to be determined by the finder of fact. Production Credit Ass'n of Fargo v. Ista, 451 N.W.2d 118, 121 (N.D. 1990). However, this Court rejected the claim of establishing a fiduciary duty in Ista. Id. The claim of a fiduciary relationship in Ista was based on the contention that the

borrower was a shareholder of the lending bank. Id. The Ista Court clarified that a fiduciary relationship between borrower and lender arises upon a "showing of special circumstances." Id. There must be a "departure from the ordinary lender-borrower" relationship. Id. citing Federal Land Bank of Spokane v. Stiles, 700 F.Supp. 1060, 1066 (D.Mont. 1988); Kolb v. Naylor, 658 F.Supp. 520, 526 (N.D.Iowa 1987); Mantooth v. Federal Land Bank of Louisville, 528 N.E.2d 1132, 1138-1139 (Ind.Ct. App. 1988); PCA of Lancaster v. Croft, 143 Wis.2d 746, 423 N.W.2d 544, 546-548 (Ct. App. 1988).

¶69 This departure from the ordinary relationship to impose a fiduciary duty is described in Union State Bank v. Woell, 434 N.W.2d 712, 721 (N.D. 1989). In Woell, this Court noted the general rule that the borrower lender relationship is a debtor creditor relationship which ordinarily does not impose a fiduciary relationship. Id. Woell noted in the commercial loan context, that the giving of advice by the lender does not transform the relationship into a fiduciary relationship. Id. Rather, the Court noted, "actual day-to-day involvement in management and operations of the borrower or the ability to compel the borrower to engage in unusual transactions is required for the purpose of showing that a lending institution had 'control' over a borrower." Id. citing NCNB Nat'l Bank of North Carolina v. Tiller, 814 F. 2d 931, 936 (4th Cir. 1987).

¶70 Woell offered another method of analyzing whether a fiduciary duty will be imposed upon a lender in the context of a borrower lender relationship: "under circumstances which reflect a borrower's reposing faith, confidence and trust in a bank with the resulting domination, control or influence exercised by the bank over the borrower's affairs. [citations omitted.] Furthermore, the borrower or party reposing the confidence must be in a position of inequality, dependence, weakness, or lack of

knowledge." citing Nicoll v. Community State Bank, 529 N.E.2d 386, 389 (Ind.Ct.App.1988).

¶71 Borrower is educated, wealthy, and an experienced businessman. (Tran. 17 ; App 36-37, personal balance sheet) His credentials do not inspire an assumption that he would repose extraordinary faith and confidence in Bank or that he occupies a "position of inequality, dependence, weakness, or lack of knowledge." [Emphasis supplied] Woell at 721.

¶72 The Trial Court found a fiduciary relationship, however. The Trial Court concluded Borrower placed faith in Loan Officer and that Borrower lacked knowledge over the loan transactions for GBM. (App 87) According to the Trial Court, Loan Officer asked borrower for two draw requests totaling $102,362.54 for the ostensible purpose of keeping GBM eligible for the SBA loan. Id. Specifically, the Trial Court found that Loan Officer knew or should have known the SBA 504 loan was "futile" at the time he was asking Borrower for the two draw requests to support SBA 504 loan eligibility. (App 87, mem op 23).

¶73 The Trial Court was aware Borrower did not fit the conventional description of a disadvantaged borrower who necessarily relied on the sophisticated lender to complete a loan transaction as part of a larger business transaction.

¶74 V. CONCLUSION

¶75 The Trial Court's factual findings that Borrower was fraudulently induced to enter into Loan I are not clearly erroneous. There is some evidence to support such findings in the testimony of Borrower. The legal conclusion that Loan Officer's fraud is imputable

to Bank is supported by the facts and North Dakota legal precedent. Dewey, supra. Therefore, the Trial Court's rulings on Loan I should be affirmed.

¶76 The Trial Court's factual finding that Borrower was misled about several draw requests for Loan II is also not clearly erroneous. Trial Court's decision to deny Bank recovery for a portion of Loan II should be upheld under the same analysis as Loan II, to wit, Borrower was fraudulently induced to authorize certain draw requests and those certain draw requests benefitted Bank. In addition, Trial Court had ample evidence to impose a fiduciary relationship and imposition of the fiduciary relationship and its subsequent breach represents and additional legal basis to uphold Trial Court on its disposition of Loan II.

Dated this 20th day of April, 2010.

PRINGLE & HERIGSTAD, P.C.

/s/ David J. Hogue_____
David J. Hogue (ID #04486)
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702-1000
(701) 852.0381
Attorneys for Appellee Howard Palmer

¶77 **CERTIFICATE OF SERVICE**

I hereby certify that on the 20th day of April, 2010, true and correct copies of the Brief of Appellee and the Appellee's Appendix were served electronically on the following:

Joseph A. Turman, Attorney for David L. Wiest – jturman@turmanlaw.com

Richard P. Olson, Attorney for American Bank Center – olsonpc@minotlaw.com

A true and correct copy of the Brief of Appellee and the Appellee's Appendix was mailed to Lou Burkhardsmeier on April 20th , 2010, at the following address:

Lou Burkhardsmeier
P.O. Box 7122
Fargo, ND 58106

/s/ David J. Hogue_____
David J. Hogue (ID #04486)

¶78 **CERTIFICATE OF COMPLIANCE**

The undersigned, as attorney for Appellee Howard Palmer and as the author of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the brief was prepared with proportional typeface (Times New Roman) and that the brief, excluding the table of contents, the table of citations, and certificate of compliance, does not exceed 10,500 words.

Dated this 20th day of April, 2010.

PRINGLE & HERIGSTAD, P.C.

/s/ David J. Hogue
David J. Hogue (ID #04486)
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702-1000
(701) 852.0381
Attorneys for Appellee Howard Palmer