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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

Baker Boyer National Bank,

Plaintiff and Appellee,

v.

JPF Enterprises, LLC,

Defendant and Appellant.

Supreme Court No. 20180222

Appeal from Order Granting Plaintiff's Motion for Summary Judgment (dated March 13, 2018) and Summary Judgment (dated March 21, 2018)

McKenzie County District Court
Northwest Judicial District
The Honorable Daniel S. El-Dweek
Case No. 27-2016-CV-00392

BRIEF OF APPELLEE

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I. STATEMENT OF THE ISSUES

[1] The district court did not err in granting the Plaintiff's Motion for Summary Judgment.

II. STATEMENT OF THE CASE

[2] Plaintiff/Appellee Baker Boyer National Bank (the "Bank") filed this suit on September 20, 2016. *Appellant's App. 1, 6-23.* On October 10, 2016, Defendant/Appellant JPF Enterprises, LLC ("JPFE") served its Answer and Counterclaim ("Counterclaim") alleging that JPFE was not responsible to the Bank based on fraud in the inducement. *Appellant's App. 24-31.* The Bank answered the Counterclaim on October 27, 2016, denying JPFE's allegations. *Appellant's App. 1, 32-37.*

[3] On October 6, 2017, the Bank moved for Summary Judgment (the "Motion for Summary Judgment"). *Appellee's App. 32-80.* On November 6, 2017, JPFE filed a brief in opposition to the Motion for Summary Judgment and the Bank filed its reply in support of the Motion for Summary Judgment on November 16, 2017. *Appellee's App. 230-253.* A hearing on the Motion for Summary Judgment was held on December 13, 2017, where both the Bank and JPFE appeared through counsel. *Appellee's App. 269-289.*

[4] By letter dated January 25, 2018, the district court indicated it was granting the Motion for Summary Judgment and dismissing JPFE's Counterclaim. *Appellant's App. 68-69.* The Bank filed its form of proposed order on February 12, 2018. *Appellant's App. 4.* JPFE did not file a proposed order but instead moved for reconsideration on March 2, 2018 (the "Motion for Reconsideration"), before any order or judgment had actually been entered by the district court. *Appellee's App. 254-268.* The Bank opposed the Motion for Summary Judgment and the district court denied said motion by order dated April 16,

2018. *Appellee's App. 290-309, 316.* The Order Granting Plaintiff's Motion for Summary Judgment was entered on March 13, 2018. *Appellee's App. 269-289.* The Summary Judgment was entered on March 21, 2018, with Notice of Entry filed and served on April 4, 2018. *Appellant's App. 70-71; Appellee's App. 310-315.* JPFE appeals from the Summary Judgment. *Appellant's App. 72-73.*

III. STATEMENT OF FACTS

[5] Following months of its own due diligence, on September 24, 2013, JPFE, as buyer, and Vindans, LLC ("Vindans") and Jason Sundseth ("Sundseth"), as sellers, entered into an asset purchase agreement (the "Purchase Agreement") whereby JPFE agreed to purchase thirty (30) mobile homes (the "Mobile Homes"). *Appellee's App. 19-24.* On October 17, 2013, the Bank loaned JPFE $1,077,600.00 (the "Loan"), and took a Promissory Note (the "Note"). *Appellee's App. 1-3, 82; Appellant's App. 24.* The Bank and JPFE also entered a Business Loan Agreement, Security Agreement, and a UCC Financing Statement (collectively, along with the Note, the "Loan Documents"). *Appellee's App. 4-18.* JPFE used the Loan proceeds to purchase the Mobile Homes under the Purchase Agreement. *Appellee's App. 92; Appellant's App. 24.* On October 17, 2013, James P. Foust Jr., the manager and sole member of JPFE ("Foust"), executed a Commercial Guaranty (the "Guaranty"), absolutely and unconditionally guaranteeing the indebtedness of JPFE. *Appellee's App. 8-11, 82; Appellant's App. 25.* Among other things, Foust agreed in the Guaranty that the Bank had no obligation to provide him with information that it learned in its relationship with him. *Appellee's App. 9.*

[6] JPFE had an obligation to make monthly installment payments on the Note to the Bank and Foust guaranteed payment. *Appellee's App. 1-3, 8-11; Appellant's App. 25.*

JPFE defaulted by failing to timely pay. *Appellee's App. 86.* The last payment received was November 2, 2015. *Appellee's App. 86, 111.*

[7] On December 6, 2016, the Bank commenced an action in the Superior Court of Washington in and for Walla Walla County against Foust for his breach of the Guaranty (the "Washington Action"). *Appellee's App. 97.* On July 20, 2017, the Washington Superior Court entered a Judgment for the Bank and order denying reconsideration against Foust in the Washington action. *Appellee's App. 98-99, 187-191.* The Washington Judgment found that Foust breached the Guaranty. *Appellee's App. 187-191.* The Washington Judgment is currently on appeal to the Court of Appeals Division III in Washington. *Appellee's App. 99.* While the defendant in the Washington action was Foust and the defendant in the North Dakota action was JPFE, the underlying facts giving rise to the Bank's claims against Foust and JPFE, and JPFE's and Foust's counterclaims against the Bank, are the same.

IV. STANDARD OF REVIEW

[8] Summary judgment is reviewed de novo. Hild v. Johnson, 2006 ND 217, ¶ 6, 723 N.W.2d 389, 392. On appeal, the North Dakota Supreme Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Id.

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V. ARGUMENT

A. The district court did not err in granting the Motion for Summary Judgment.

[9] In granting the Motion for Summary Judgment, the district court properly determined there were no genuine issues of material fact that would render a trial necessary on either the Bank's breach of contract claim or JPFE's counterclaim for fraud.

> A party resisting a motion for summary judgment may not simply rely upon the pleadings or upon unsupported, conclusory allegations. "Factual assertions in a brief do not raise an issue of material fact satisfying Rule 56(e)." "Nor may a party merely reassert the allegations in his pleadings in order to defeat a summary judgment motion."
>
> The resisting party must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record by setting out the page and line in depositions or other comparable documents containing testimony or evidence raising an issue of material fact.
>
> In summary judgment proceedings, neither the trial court nor the appellate court has any obligation, duty, or responsibility to search the record for evidence opposing the motion for summary judgment. The opposing party must also explain the connection between the factual assertions and the legal theories in the case, and cannot leave to the court the chore of divining what facts are relevant or why facts are relevant, let alone material, to the claim for relief.

Zuger v. State, 2004 ND 16, ¶¶ 7-8, 673 N.W.2d 615 (citations omitted).

[10] JPFE did not present competent admissible evidence by affidavit or other comparable means to raise an issue of material fact on the elements of the breach of contract claim. JPFE did not present competent admissible evidence for the district court to conclude, as a matter of law, that the Bank owed any duty to JPFE. Mere speculation is not enough to defeat a motion for summary judgment, and a scintilla of evidence is not sufficient to support a claim. Zuger, 2004 ND 16 at ¶¶ 7-8. In fact, it is difficult to

understand exactly what information JPFE alleges the Bank knew but did not disclose given that JPFE did not undertake any discovery, including service of any written discovery or any depositions, in connection with the district court action. JPFE is therefore apparently asserting that the Bank knew certain things despite never actually inquiring through discovery or otherwise whether or what the Bank, if anything. If no pertinent evidence on an essential element is presented to the trial court in resistance to a motion for summary judgment, it is presumed that no such evidence exists. Id. Here, there is no evidence of a duty, so JPFE's fraud claim does not lie against the Bank, and summary judgment was appropriate.

1. The district court did not err in dismissing JPFE's Counterclaim.

[11] The district court did not err in disposing of JPFE's Counterclaim on summary judgment. A claim for fraudulent inducement is an assertion by a party that it did not freely consent to a contract. See Golden Eye Res., LLC v. Ganske, 2014 ND 179, ¶ 14, 853 N.W.2d 544, 550. The party alleging fraud must prove fraud by clear and convincing evidence. See Kary v. Prudential Ins. Co. of Am., 541 N.W.2d 703, 705 (N.D. 1996); see also Rule 9(b), N.D.R.Civ.P. (requiring a party alleging fraud to "state with particularity the circumstances constituting fraud . . ."); Am. Bank Ctr. v. Wiest, 2010 ND 251, ¶ 12, 793 N.W.2d 172, 178.

[12] Fraud can be actual or constructive. N.D.C.C. § 9-03-07. Actual fraud 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:
>
> 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.

N.D.C.C. § 9-03-08. "Actual fraud requires either an intent to deceive a party to the contract, or an intent to induce that party to enter into the contract." West v. Carlson, 454 N.W.2d 307, 310 (N.D. 1990).

[13] Constructive fraud consists:

1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault or anyone claiming under that person, by misleading another to the other's prejudice or to the prejudice of anyone claiming under the other; or
2. In any such act or omission as the law specially declares to be fraudulent without respect to actual fraud.

N.D.C.C. § 9-03-09. "[A] claim [for constructive fraud] can succeed only if a party was misled before or while entering a contract." Erickson v. Erickson, 2010 ND 86, ¶ 9, 782 N.W.2d 346, 349. As such, "analyzing a claim of constructive fraud requires reviewing the circumstances leading to the formation of the contract and determining if one party breached a duty-that is, they were misled, by representations of another." Id.

[14] In sum, actual fraud requires either a finding of actual intent to deceive or a finding of intent to induce another to enter a contract. Constructive fraud requires a finding that one party breached a duty owed to another party or misled another party before entering a contract. Foust conceded in his deposition he is not claiming the Bank fraudulently induced him by making affirmative misrepresentations. *Appellee's App. 130, 134.*

[15] JPFE's Counterclaim is based on the Bank's alleged nondisclosure to JPFE of information that the Bank allegedly knew. *Appellant's App. 30.* The district court concluded that, based on the undisputed material facts:

> Defendant's Counterclaim fails as a matter of law and the Bank is entitled to a judgment of dismissal of Defendant's Counterclaim because the Court finds there was no special circumstance between the Bank and Defendant giving rise to imposition of any fiduciary duties, including a duty to disclose, being owed by the Bank to the Defendant which is an essential element of Defendant's Counterclaim.

Appellee's App. 286.

[16] Ordinarily "the relationship between a bank and its customers is viewed as a debtor-creditor relationship which does not ordinarily impose a fiduciary duty upon a bank." Union State Bank v. Woell, 434 N.W.2d 712, 721 (N.D. 1989). In order for such a fiduciary duty to exist, "a showing of special circumstances demonstrating a departure from the ordinary lender-borrower relationship" is required. Prod. Credit Ass'n of Fargo v. Ista, 451 N.W.2d 118, 121 (N.D. 1990); see also First Nat'l Bank and Trust Co. of Williston v. Brakken, 468 N.W.2d 633, 637 (N.D. 1991). A bank has no affirmative duty to disclose a customer's financial condition to anyone. E.g., id. A duty of disclosure also arises if a fiduciary relationship exists, however, routine underwriting practices do not convert an arm's length banking relationship into a "special circumstance" that imposes a fiduciary duty on the bank. Union State Bank, 434 N.W.2d at 721.

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a. The undisputed material facts show that the lending relationship between JPFE and the Bank created by the Loan Documents was an arm's length banking transaction and nothing more than a typical debtor-creditor relationship.

[17] The district court did not err in coming to the foregoing conclusion. This Court has recognized that a 'special circumstance' constituting a departure from the ordinary lender-borrower relationship may arise "under circumstances which reflect a borrower's reposing of faith, confidence and trust in a bank with resulting domination, control or influence exercised by the bank over the borrower's affairs." Union State Bank, 434 N.W.2d at 721. There are two separate requirements here: (1) the borrower must place its faith, confidence, and trust in the lender, and (2) the lender must then exercise domination, control, or influence over the borrower's affairs. Neither is present on these facts.

i. JPFE presented no competent admissible evidence demonstrating that JPFE placed its faith, confidence, and trust in the Bank or that the Bank exercised domination, control, or influence over JPFE's affairs.

[18] **First**, for a special circumstance to exist, the borrower must have placed its faith, confidence, and trust in the lender. Specifically, the party "reposing the confidence must be in a position of inequality, dependence, weakness, or lack of knowledge." Union State Bank, 434 N.W.2d at 721. JPFE failed to present evidence, or even argue, that JPFE was in a position of "inequality, dependence, weakness, or lack of knowledge" vis-à-vis the Bank. See Zuger, 2004 ND 16 at ¶¶ 7-8 (citations omitted) (noting that if no pertinent evidence on an essential element is presented to the trial court in resistance to a motion for summary judgment, it is presumed that no such evidence exists). Foust, the sole member and manager of JPFE, is a sophisticated and experienced businessman who did

his own due diligence on behalf of JPFE before signing the Note, taking the Loan, and purchasing the Mobile Homes. *Appellee's App. 104-106, 119.* JPFE had plenty of time to investigate and walk away from the Purchase Agreement and the Note if it did not like what it discovered. Foust even travelled to Texas to examine a Greenflex mobile home just like the Mobile Homes prior to closing on the Loan. *Appellee's App. 125.*

[19] Given his background and experience, Foust is hardly a person that the law is concerned with being in a position of inequality or weakness such that a special fiduciary duty should arise. The Bank had no prior relationship with JPFE or Foust before the Loan. *Appellee's App. 113.* Foust admits that the Bank provided no services to him other than "regular banking business." *Appellee's App. 113.* JPFE nevertheless baldly asserts that it justifiably relied on the Bank's "specialized knowledge of this particular property manager" and that the Bank "had made several similar loans." *Appellant's Br., ¶ 31.* But JPFE cites nothing in the record to support these assertions because there is no such evidence in the record.

[20] The district court also correctly concluded that "[t]he Loan Documents did not create a contractual duty on the Bank to disclose financial or other information about third parties to" JPFE. *Appellee's App. 286.* JPFE admitted Foust executed the Guaranty in which he agreed the Bank did not need to provide him with information it learned in its relationship with him. *Appellee's App. 82, 272-273; Appellant's App. 25.* The district court did not err.

[21] **Second**, there is no special circumstance unless the lender also exercises domination, control, or influence over the borrower's affairs. To demonstrate the requisite level of control, the lender must be part of the "actual day-to-day involvement in

management and operations of the borrower or [have] the ability to compel the borrower to engage in unusual transactions." Union State Bank, 434 N.W.2d at 721. The Loan Documents set forth the relationship between the Bank and JPFE vis-à-vis the Loan. The Loan Documents are typical loan documents evidencing debt and granting a security interest in certain collateral, among other things. They do not get the Bank involved in JPFE's "management and operations," nor do they grant the Bank the "ability to compel [JPFE] to engage in unusual transactions." Moreover, JPFE failed to present any evidence that the Bank actually got involved in JPFE's day-to-day management and operations and the district court correctly found no "domination, control, or influence" by the Bank.

ii. JPFE failed to present any competent admissible evidence demonstrating that the Bank forced it to contract with Greenflex and imposed a specific lease agreement on it.

[22] JPFE tries to create something more than an arm's length relationship by asserting that the Bank required it to contract with Greenflex[1] and imposed a specific lease agreement as a condition of the Loan. *Appellant's Br., ¶¶ 15, 21, 24, 26, 28.* JPFE argues that a special circumstance was created because the Bank "provided its customer JPFE with the "extra service" of picking for him his property manager" which placed the

[1] As an initial matter, the argument that the Bank required JPFE to enter a contract with Greenflex Housing LLC (the entity to which JPFE leased the Mobile Homes) ("Greenflex") was not advanced in the Counterclaim. The Counterclaim alleged only that the Bank failed to disclose what it knew about a company called Badlands Housing, LLC (an entity with which Greenflex contracted for property management services in North Dakota) ("Badlands") and the physical condition of the Mobile Homes. *Appellant's App. 30.* In his deposition, Foust testified that the only thing the Bank failed to inform him about was a lawsuit between Badlands and Greenflex. *Appellee's App. 130-131.*

Bank "in the role of an adviser." *Appellant's Br., ¶¶ 21, 26.* However, these are nothing more than conclusory allegations by JPFE, unsupported by any competent admissible evidence.

[23] **First**, there is no evidence that the Bank forced JPFE to work with Greenflex or that the Bank "picked" Greenflex for JPFE. JPFE wrongly suggests the Bank actively solicited JPFE and introduced JPFE to Sundseth, Vindans, and Greenflex. *Appellant's Br.,* ¶ 6. In fact, Foust admits he was exploring housing investment opportunities in the Bakken in May of 2013, well before the Loan. *Appellee's App. 113.* He also admits a third-party named Cameron Jones ("Jones"), not the Bank, introduced him to Greenflex, and to Sundseth, the manager of Vindans (the prior owner of the Mobile Homes). *Appellee's App. 113-114.* Nothing in the record shows that the Bank came up with the idea for JPFE to purchase the Mobile Homes; rather, the evidence shows it was Jones's idea, and he had no connection to the Bank. *Appellee's App. 113-114.* JPFE paid Jones a sales commission as part of the sale from Sundseth and Vindans to JPFE under the Purchase Agreement. *Appellee's App. 19-24, 97.*

[24] Moreover, Foust and JPFE knew and expected for months that they would be doing a deal with Greenflex. Starting in May 2013, nearly five (5) months before the Loan, Foust began receiving detailed financial and operational information from Greenflex including rent rolls. *Appellee's App. 115.* On June 4, 2013, Foust e-mailed the Bank, telling it he expected to enter into a lease with Greenflex. *Appellee's App. 194-195.* The Bank then laid out financing terms that assumed a contract with Greenflex based on Foust's representations. Foust had actually entered a contract with Greenflex on June 1, 2013, three (3) days before his June 4, 2013, e-mail to the Bank. *Appellant's App. 59-62.*

[25] This is not a case where Foust contends it was inappropriate to contract with Greenflex. At his deposition, he admitted it made sense for JPFE to align with Greenflex given Greenflex's experience with the Mobile Homes and North Dakota market, nor did he ever object to leasing the Mobile Homes to Greenflex. *Appellee's App. 119.*

[26] Foust also admitted that it was ordinary underwriting for the Bank to require a borrower to have a contract that would provide revenue needed to repay the Loan. *Appellee's App. 111, 113.* In other words, Foust himself agrees that it was perfectly understandable for the Bank to want to understand the finances of the venture before it loaned over $1,000,000. This is no different than a bank wanting commercial space to be pre-leased before loaning money to a developer. Such prudent banking practices are part of the ordinary underwriting process. By asking for the contract with Greenflex, the Bank was only ensuring it could underwrite the Loan. There is no evidence that the Bank told JPFE that it *had* to contract with Greenflex; rather, the Bank's underwriting process led it to conclude it could approve the Loan.

[27] **Second**, the record does not show that the Bank imposed a specific lease agreement on JPFE. Rather, at least two (2) months before the Loan closed, the Bank told JPFE and Foust to negotiate directly with Sundseth and Greenflex. *Appellant's App. 48.* The Bank asked JPFE to disclose the final terms of the contracts as those terms may affect the Bank's final decision about financing:

> Below is an updated/current expression of interest. If you have any questions please don't hesitate to get in touch with me. **I am going to request that you and Jason work together directly from this point forward**. Once you have agreed upon and "signed" a purchase agreement, please provide me with a copy. The purchase agreement will determine our loan amount and the numbers stated below are subject to change based upon the final signed purchase agreement. I have also talked with GreenFlex and there could be some changes to verbiage in

> the lease for management of units in North Dakota. I suggest you speak with John regarding any possible changes as that contract could influence changes to the financing as well.

Appellant's App. 48 (emphasis in original).

[28] JPFE apparently worked with them because the deal came together. In a September 4, 2013, e-mail, the Bank told JPFE that the loan process was still moving forward and the Bank needed certain information to analyze the loan decision. *Appellant's App. 51.* The requested information included "[a] copy of the FINAL GreenFlex Lease." *Appellant's App. 51* (emphasis in original). The Bank also asked whether the final lease was a "percentage, fixed monthly rate . . . I need to know what to expect for income?" *Appellant's App. 51.* This e-mail shows the Bank did not know what the terms of the final lease agreement were or would be, and that the Bank did not dictate those terms. The terms of the final version were negotiated and agreed to directly between JPFE, Foust, and Greenflex. If JPFE did not like or trust the terms it negotiated, it had plenty of time to either renegotiate with Greenflex, or not enter into the Loan Documents with the Bank and instead decline the Loan. The Bank advised JPFE at least twice to consult with Greenflex about the details of the venture. Foust did so for months before the Loan closed.

[29] Without any competent admissible evidence to contradict the evidence presented by the Bank, JPFE left the district court with the unsupported allegation that the Bank forced it to contract with Greenflex and required JPFE to enter a specific lease agreement. The district court did not err in rejecting JPFE's claims.

iii. JPFE's reliance on Am. Bank Ctr. v. Wiest as support for a special circumstance is misplaced.

[30] JPFE's reliance on Am. Bank Ctr. v. Wiest, 2010 ND 251, 793 N.W.2d 172, as support for the existence of a special circumstance is misplaced. *Appellant's Br., ¶¶ 15, 20, 21, 26, 27, 28.* In Wiest, a third-party connected a debtor with a loan officer. Wiest, 2010 ND 251 at ¶ 3. The third-party had known the debtor for 15 years and had arranged over $12 million of loans through the loan officer for other entities. Id. at ¶ 2, 4. The court found that the third-party, with the loan officer's assistance, was a promoter under a scheme for raising funds where the third-party arranged for investors in his various business entities to pay obligations made to prior investors. Id. at ¶ 4. As part of the scheme, the third-party would pledge collateral it did not own or that was previously pledged on other obligations. Id. The court found that the loan officer was part of this scheme and both he and the third-party met with the potential debtor to get him to borrow $250,000 from the bank, the proceeds of which would go to one of the third-parties' entities. Id. at ¶ 5. The court found that the loan officer had fabricated a backstory to get the loan approved and that his presentation was "devoid of almost any truthful statement." Id. at ¶ 7.

[31] On those facts, the court easily found fraudulent inducement and a 'special circumstance' giving rise to a fiduciary relationship between the debtor and the bank (as imputed based on the loan officer's employment with the bank). Id. at ¶ 38. Specifically, the court found that the loan officer's role "went beyond that of merely a lender" as he was present at all meetings between the third-party and the debtor, formulated "methods of financing in concert with" the third-party, that he knew of the lack of collateral, and

that he did not inform the debtor of the same. Id. at ¶ 34. The facts giving rise both to the fraudulent inducement of the debtor in Wiest or to a finding of a special circumstance imposing a fiduciary duty on the bank are unrecognizable and distinguishable from the instant facts. The conduct of the rogue loan officer in Wiest plainly differs from anything the Bank did here.

[32] There is no showing of special circumstances demonstrating a departure from the ordinary lender-borrower relationship based upon the record before the district court and the benefit of any favorable inferences to JPFE to be drawn from such facts. The district court did not err in concluding that (a) the undisputed material facts show that the Bank engaged in a regular underwriting process with JPFE ahead of approving it for the Loan, and (b) there was no "special circumstance" giving rise to imposition of any fiduciary duties being owed by the Bank to JPFE. Without fiduciary duties (including a duty to disclose), fraud could not lie, as a matter of law, against the Bank. Thus, the district court did not err by dismissing JPFE's Counterclaim.

2. The district court did not err in granting judgment for the Bank on its breach of contract claim.

[33] The district court did not err in granting judgment for the Bank on its breach of contract claim against JPFE. The district court's order determined numerous facts were undisputed. *Appellee's App. 271-278.* JPFE's counsel agreed during oral argument with many of them, including that JPFE defaulted: "[t]he loans were made, the documents were signed, the payments were not made, the collateral was sold, the proceeds applied to the loans and we don't have any argument with that. We don't have any particular reason to dispute their math on that problem ..."). *Hearing Transcript 26:16-25, 27:1, Dec. 13,*

2017. JPFE has not changed that position in its briefing here or at the district court. These agreed facts establish, among other things, that the Loan Documents were binding and legally enforceable contracts between the Bank and JPFE, JPFE breached the Loan Documents by failing to repay the Loan to the Bank per the terms of the Loan Documents, and JPFE's breach of the Loan Documents damaged the Bank and such damages flow from JPFE's breach and are ascertainable in both nature and origin.

[34] The Bank's claim against JPFE is for breach of the Loan Documents. The elements of a prima facie case for breach of contract are: (1) the existence of a contract; (2) breach of the contract; and (3) damages which flow from the breach. E.g., WFND, LLC v. Fargo Marc, LLC, 2007 ND 67, ¶ 12, 730 N.W.2d 841, 848. A contract is breached when a contractual duty is not performed when due. Id. A contract is binding and legally enforceable if all of the following elements are present: (1) parties capable of contracting; (2) the consent of the parties; (3) a lawful object; and (4) sufficient cause or consideration. N.D.C.C. § 9-01-02. The measure of damages for the breach of an obligation arising from contract is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby. N.D.C.C. § 32-03-09. No damages can be recovered for a breach of contract if they are not clearly ascertainable in both their nature and origin. Id.

[35] Based on the undisputed material facts, the district court was right to make the following conclusions, among others, and enter judgment for the Bank on its claim for breach of contract:

> 53. The Loan Documents were binding, legally enforceable contracts between the Bank and JPFE.

55. JPFE defaulted under the terms of the Loan Documents and on March 18, 2016, the Bank properly accelerated the Loan as a result the entire unpaid principal balance owed under the Note, plus fees, charges, accrued unpaid interest, and other costs is due and owing from JPFE.

56. JPFE has not cured the existing events of default under the Loan Documents.

57. JPFE breached the Loan Documents by failing to repay the Loan to the Bank on the terms and conditions set forth in the Loan Documents and pursuant to JPFE's obligations thereunder.

58. The Bank has been damaged by JPFE's breach of the Loan Documents in the unpaid amount of the Loan, plus accrued interest, plus late charges, plus expenses of obtaining insurance for the Mobile Homes, plus the expenses paid to Ritchie Bros. to locate, repossess, and sell the Mobile Homes.

59. The damages the Bank is entitled to recover are ascertainable in both nature and origin as such damages are allowed by the terms of the Loan Documents.

65. As a result of JPFE's default under the terms of the Loan Documents, the Bank is entitled to an order granting it immediate possession of the Collateral.

66. The Bank was authorized by North Dakota law and the terms of the Security Agreement to locate, repossess, and sell the Mobile Homes following JPFE's default under the Loan Documents.

67. North Dakota law and the terms of the Security Agreement permit the Bank to recover a deficiency judgment—being the amount remaining on the total indebtedness of JPFE after application of the all amounts received from the disposition of the Mobile Homes—against JPFE and Foust.

Appellee's App. 283-285. The district court did not err in granting judgment as a matter of law for the Bank on its breach of contract claim against JPFE.

a. The district court did not err in concluding that JPFE waived its right as a matter of law to seek rescission of the Loan Documents.

[36] JPFE's Counterclaim purports to be for fraudulent inducement. *Appellant's App. 29-31.* The remedy for fraudulent inducement is either money damages or rescission of the underlying contract. See N.D.C.C. § 9-09-02(1) (stating that a party to a contract may rescind the contract "[i]f the consent of the party rescinding . . . was given by mistake or obtained through duress, menace, fraud, or undue influence exercised by or with the connivance of the party as to whom the party rescinding rescinds . . ."); Bourgois v. Montana-Dakota Utilities Co., 466 N.W.2d 813, 816 (N.D. 1991) (noting that as an alternative to rescission, a party may "affirm the contract, retain its benefits and obtain damages for injuries from the fraud"). The Counterclaim makes no reference to rescission and JPFE has failed to seek it as is required by law.

[37] An action at law for rescission requires the party seeking it to elect to rescind promptly upon discovering facts which entitle it to rescind and to then "restore to the other party everything of value which the party rescinding has received from the other party under the contract" or offer to restore the same. N.D.C.C. § 9-09-04; see Donovan

v. Dickson, 164 N.W. 27, 30 (N.D. 1917) (party seeking rescission must return all value and consideration received in order to restore the other party to status quo). Compliance with these statutory requirements is a condition precedent to the maintenance of an action to rescind. E.g., Alton's, Inc. v. Long, 352 N.W.2d 198, 199 (N.D. 1984). "A party who fails to promptly exercise the right of rescission upon discovery of the facts necessary to rescind waives that right." E.g., Lindemann v. Lindemann, 336 N.W.2d 112, 116 (N.D. 1983) (holding that a plaintiff who did not act to rescind a contract until two and one-half years after it knew of facts giving rise to a right to rescind waived that right); Fedorenko v. Rudman, 71 N.W.2d 332, 339 (N.D. 1955) (rescission waived after sixteen months).

[38] To maintain an action at law for rescission, JPFE would have had to restore the Bank to its status quo before it issued the Loan, meaning that JPFE would have had to return the Loan proceeds to the Bank. The Bank never received the Loan proceeds back from JPFE. JPFE presented no evidence it complied with these requirements. The district court was right to conclude that because "Defendant failed to comply with the requirements to seek rescission whether at law, under section 9-09-04, N.D.C.C., or in equity under section 32-04-21, N.D.C.C.[,] Defendant waived its right as a matter of law to seek rescission due to its failure to promptly exercise such right." *Appellee's App. 286.*

[39] Regarding the allegations JPFE made in the district court about the Equal Opportunity Credit Act (the "Act"), JPFE makes the same general assertions that the Bank's "actions were contrary to federal law" and that the Bank initially declined the loan based on what the Bank knew about "Badlands, LLC (Badlands), the underlying RV park leaseholder." *Appellant's Br., ¶¶ 16, 17.* The Bank does not fully address these issues here because JPFE's Appellant's Brief does not argue that they precluded the

district court from granting the Motion for Summary Judgment, and does not contend they create a genuine issue of material fact. Should JPFE change course and argue in its reply brief or otherwise that either of these matters are relevant to this appeal, then the Bank notes that the Loan was made, so there was no "adverse action" under the Act. See 15 U.S.C. §§ 1691(d)(6), 15 U.S.C. § 1691(d)(2). Further, there is no allegation of discrimination, so the Act does not even apply. See 15 U.S.C. § 1691(a). The Bank otherwise incorporates by reference its arguments on these matters contained in the Bank's Appellee's Appendix. *Appellee's App. 68-75, 241-244.*

VI. CONCLUSION

[40] The Bank respectfully requests this Court affirm the Summary Judgment in its entirety, including the Order Granting Plaintiff's Motion for Summary Judgment.

[41] DATED this 13th day of August, 2018.

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VII. CERTIFICATE OF SERVICE

[42] I, Trevor A. Hunter, one of the attorneys of the law firm of CROWLEY FLECK PLLP, hereby certifies that on this 13th day of August, 2018, true and correct copies of the **BRIEF OF APPELLEES** and **APPENDIX OF APPELLEES** were served **by E-mail** as follows:

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