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Dean Johnson and Nadine Johnson v. Dean R. Morgan, dba Polar Bear Homes; Charlie Teams, dba Polar Bear Homes; and First Security Bank of Utah, N.A.; and John Does 1 through 20 : Reply Brief

Utah Court of Appeals

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900380-CA

DOCKET NO. _____ IN THE UTAH COURT OF APPEALS

DEAN JOHNSON and NADINE JOHNSON, Plaintiffs/Appellants, vs. DEAN R. MORGAN, dba POLAR BEAR HOMES; CHARLIE TEAMS, dba POLAR BEAR HOMES; and FIRST SECURITY BANK OF UTAH, N.A.; and JOHN DOES 1 through 20, Defendants/Respondents.	Case No. 900380-CA Priority No. 14(b)

APPELLANTS' REPLY BRIEF

APPEAL FROM A FINAL JUDGMENT
OF THE THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE CONTY,
HONORABLE DAVID S. YOUNG

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Dean and Nadine Johnson borrowed money from First Security Bank of Utah, N.A. to build a house. They were concerned that money from their construction loan might be improperly disbursed. They therefore told First Security that they wanted to review all draw requests before disbursements were made. First Security denied this request. It told the Johnsons that it was an experienced construction lender with special expertise in the area of draw requests. It promised the Johnsons that it would ensure that the loan proceeds were properly disbursed.

The Johnsons believed First Security. Unfortunately, First Security betrayed the Johnsons' trust and breached its promise by disbursing funds that the building contractor converted to his own use. These facts, which must be taken as true for purposes of this proceeding, support claims for breach of contract, negligence and breach of fiduciary duty. This Court should therefore reinstate the Johnsons claims against First Security.

I. The District Court erred by dismissing the Johnsons' claims based on the contract between the parties.

This case is before the Court on appeal of the District Court's dismissal for failure to state a claim. At the motion to dismiss stage, the Court must take as true all of the factual statements contained in the Johnsons' Complaint.

The Complaint states a cause of action for breach of the written contract between the Johnsons and First Security as modified or for breach of a subsequent oral contract between them.

First Security breached its written contract as modified by disbursing funds without verifying that draw requests it received from Polar Bear Homes were for labor and materials used in the Johnsons' home. The District Court dismissed this claim on the ground that the written contract unambiguously required the Johnsons to guarantee Polar Bear's draw requests. The District Court erred when it dismissed this claim.

The written contract between the Johnsons and First Security is ambiguous. First Security correctly states that a contract is ambiguous if "the words used to express the meaning and intention of the parties are insufficient in a sense that the contract may be understood to reach two or more plausible meanings." , cited at p. 6 of First Security's Brief. In addition, a contract is ambiguous when the writing leaves uncertain or incomplete the parties' rights and duties. Barnes v. Wood, 750 P.2d 1226 (Utah App. 1988).

This agreement is ambiguous under both standards. First Security relies on the final paragraph of the document which reads:

> In consideration of the sum of $1.00 and for the purpose of inducing the First Security Bank of Utah, National Association, to accept the foregoing Agreement the undersigned hereby guarantee the performance of said Agreement.

Even hindsight does not penetrate the armor of unintelligibility that shields this paragraph from meaningful interpretation. The words lead the reasonable reader to multiple plausible interpretations. The paragraph may have been intended to make Polar Bear responsible to First Security if the Johnsons defaulted on their agreement to repay the construction loan. This form contract may have been generally intended to be used for corporate transactions and the guarantee was added to impose personal liability. As used in this transaction, the paragraph would simply require the Johnsons to guarantee their own performance.

In addition, the guarantee renders ambiguous the meaning of the term "undersigned" which, in the Building and Loan Agreement, refers only to the Johnsons. Because only the Johnsons are "undersigned" within the meaning of the Building and Loan Agreement, First Security is not insulated from contract liability for disbursing funds in violation of the terms of the agreement. The interpretation urged by First Security--that Polar Bear was a party to both the Building and Loan Agreement and Guarantee--is the single most implausible of all interpretations, and cannot be adopted at the motion to dismiss stage.

This "guarantee" paragraph also leaves uncertain the Johnsons' rights and duties. It does not even suggest by inference, much less state unambiguously, that the Johnsons have the duty to verify Polar Bear's draw requests. First Security drafted this agreement. If it had wanted the Johnsons to free First Security of its own duties under the Agreement and to guarantee the draw requests or the actions of Polar Bear, it could have at least found words to clearly achieve this objective. Because the contract is ambiguous, the District Court must take evidence to determine its intended meaning. Jarman v. Reagan Outdoor Advertising, 794 P.2d 492 (Utah App. 1990); Redevelopment Agency of Salt Lake City v. Daskalas, 785 P.2d 1112, 1118 (Utah App. 1989).

The Johnsons' complaint alleges that First Security agreed to review the draw requests and safeguard that the proceeds were distributed properly. This allegation is not the product of a tortured reading of the contract or mere statements uttered by Bank personnel, but rather emanates from obligations expressly assumed by First Security. Paragraph 5 of the Agreement imposes an express duty on the Bank to disburse funds only for labor and materials used on the project. First Security's argument that it owed the Johnsons no duty simply ignores the express language of paragraph 5 of its Agreement. The last sentence of paragraph 5 states:

> Such disbursements may be made to any of the undersigned, or, at the option of the Bank, may be made to contractors, materialmen and laborers, or any of them, for work or labor furnished in connection with such improvements."

Having exercised its option to pay contractors directly and to bypass the Johnsons, the Bank cannot disregard its duty to pay only for work provided for construction of the Johnsons' house. By paying the draw requests without review, First Security breached this unambiguous duty.

Irrespective of considerations of contract ambiguity, the District Court was obligated to consider testimony about the existence and terms of the subsequent agreement by First Security to verify the draw requests. A written contract may be modified by oral agreement between the parties. Cordillera Corp. v. Heard, 592 P.2d 12 (Colo.App. 1978). Parol evidence is proper to show subsequent oral agreements to modify a written contract. Silver Dollar Club v. Cosgriff Neon Company, 389 P.2d 923 (Nev. 1964).

II. The District Court erred by dismissing the Johnsons' negligence claim.

The Johnsons' Complaint alleges that First Security owed them a duty to use reasonable care in disbursing funds from their construction loan. First Security takes the position that its common law duty is subsumed by its duty as spelled out in the contract. This position is contradictory

since First Security also argues that it owes no duty under the contract.

In addition, First Security's position is unsupported by the law. A bank is obligated to act reasonably in advising its customers about their financial transactions. In Nevada Nat'l. Bank v. Gold Star Meat Company, 89 Nev. 427, 514 P.2d 651 (1973), the Nevada Supreme Court held:

> where a bank office through its officer undertakes to give advice, even gratuitously, that officer is bound to use the skill and expertise which he has or which he could be presumed to have. When that officer negligently or carelessly attempts to discharge that duty by misrepresenting facts within his knowledge, the bank should be held responsible for those misrepresentations.

514 P.2d at 654. See also, Bank of Nevada v. Butler Aviation-O'Hare, Inc., 616 P.2d 398 (Nev. 1980).

The law has progressed past the point where a party will be heard to assert the existence of boilerplate disclaimers to defend actions where the conduct of the parties was contrary to the standardized provision asserted. Courts will no longer enforce even unambiguous provisions in standardized contracts which are contrary to a party's separate representation of intent which is reasonably relied upon.

This principle was acknowledged in Darner Motor Sales v. Universal Underwriters, 140 Ariz. 383, 682 P.2d 388, (1984), wherein the Court expressly rejected the notion that provisions of a standardized contract could be set up as a defense to a

negligence claim. In response to the assertion that failure to read and understand a contract provision precluded an action for negligence, the Court stated this this nation

> prides itself on a tradition of allowing a person to rely upon the words of another who, because of special knowledge, undertakes to act as an advisor. If an agent has an economic self-interest in imparting information, sound policy does require that the agent's duty to speak without negligence be reinforced in basic tort principles inherent in the common law.

682 P.2d at 402.

Whether the Agreement required First Security to supervise and verify the draw requests of Polar Bear or whether it did not, when the Bank chose to do so and informed the Johnsons that it was undertaking that responsibility, it was obligated to exercise reasonable care in performing such services.

III. The District Court erred in dismissing the Johnsons' claim for breach of fiduciary duty.

First Security assumed a fiduciary duty to the Johnsons when it undertook to perform special services based on its special knowledge and expertise. The Johnsons' Complaint alleges that First Security told them it had special expertise in the area of draw requests and that it would ensure the loan proceeds were disbursed fairly. In reliance on these representations, and at the express instruction of First Security, the Johnsons did not review the draw requests.

A fiduciary or confidential relationship may be created by circumstances where equity will imply a higher duty in a relationship because the trusting party has been induced to relax the care and vigilance he would ordinarily exercise. Hal Taylor Associates v. Unionamerica, Inc., 657 P.2d 743 (Utah 1982). Whether such a relationship exists is necessarily a fact issue that cannot be decided on a motion to dismiss. Such issues generally require factual development to determine whether a plaintiff will be able to prove a set of facts entitling them to relief for breach of fiduciary duty. In Re Nat. Mortg. Equity Corp. Mortg. Pool Cert., 682 F.Supp. 1073 (C.D.Cal. 1987).

The Johnsons' Complaint states a claim for breach of fiduciary duty. "[A] claim for breach of fiduciary duty is sufficient if it alleges the fiduciary relationship and its breach, as these two elements alone would establish liability." Young v. Colgate-Palmolive Co., 790 F.2d 567 (7th Cir. 1986) with reference to Restatement (Second) of Torts, § 874 and comment b. See also Giroir v. MBank Dallas, N.A. 676 F.Supp. 915 (E.D.Ark. 1987) (the elements of a claim for breach of a fiduciary duty are the existence of a fiduciary relationship, a breach of the defendant's duty, and damages.) The Johnsons' Complaint alleges that First Security was its fiduciary, that First Security breached its fiduciary duty, and

that the Johnsons were damaged. Whether such issues can be proven will require factual development.

CONCLUSION

First Security Bank seeks to hide behind a boilerplate document. It wants to interpret the document to mean that the Johnsons are liable for any action of Polar Bear Homes and that the Bank is free of any responsibility for its disbursement of the Johnsons' loan proceeds. Yet, even the Bank's own boilerplate cannot shield it from its wrongdoing. Both the express language of the Agreement and the subsequent oral agreements require First Security to scrutinize Polar Bear's actions and be responsible for its failure to so do. First Security took upon itself this obligation and must now stand up for its shortcomings.

Respectfully submitted this 7th day of FEBRUARY, 1991.

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MAILING CERTIFICATE

I hereby certify that, on the 8TH day of FEBRUARY, 1991, I caused to be mailed, postage prepaid, four true and correct copies of the foregoing Appellants Reply Brief to the following:

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