72529-7

FILED
June 22, 2015
Court of Appeals
Division I
State of Washington

No. 72529-7-1
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BINGO INVESTMENTS, LLC, a Washington limited liability company, FRANCES P. GRAHAM, a single person, SCOTT BINGHAM and KELLEY BINGHAM, husband and wife, CHRISTOPHER G. BINGHAM and CHERISH BINGHAM, husband and wife, and DAVID S. BINGHAM and SHARON G. BINGHAM, husband and wife,
Appellants,

v.

MUFG UNION BANK, N.A., a national banking association,
Respondent.

REPLY BRIEF OF APPELLANTS

R. Bruce Johnston, WSBA #4646
Johnston Lawyers, P.S.
2701 First Ave, Suite 340
Seattle, WA 98121
(206) 866-3230
(206) 866-3234 (Fax)
bruce@rbrucejohnston.com
Counsel for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

Union Bank quotes Judge Bryan[1] for the proposition that: "In *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), the United States Supreme Court enunciated this doctrine [the *D'Oench* Doctrine], which is intended to protect the FDIC .and its assignees from fraudulent schemes by borrowers of failed institutions." It then goes on to assert that Doctrine for exactly the opposite purpose – to inflict the fraudulent conduct of the "failed institution" on the borrower -- the failed institution's fraud having already been inflicted on the FDIC.

The record of this case, at the summary judgment stage (reviewed *de novo* by this Court) supports the following propositions:

1. Union Bank paid "zero" dollars for the Loan Document under which it obtained a summary judgement for over $58 million. (Union doesn't deny this, it simply says "it just doesn't matter.")

[1] It was fully improper for Union Bank to quote Judge Bryan's unpublished opinion in *Kanany v. Union Bank*, not because such a citation could never be enlightening, but because given the facts and circumstances of that case, which is vastly distinguishable from this one, it amounts to a most incomplete statement of the case to this court by Union Bank. The record of that case also shows that before the summary judgment motion was filed, plaintiff's counsel had already moved to withdraw for non-payment of fees, and there was no meaningful response to the summary judgment motion, but only a most incomplete and inadequate response by a pro-se party. Under the circumstances, Union Bank should be embarrassed to rely on this case.

2. Union Bank knew of all of the defenses asserted in respect of the Loan Documents before it acquired them for zero dollars. This litigation had been ongoing, and the defenses were asserted before Union Bank's acquisition on April 30, 2010. (Union doesn't deny this either, it just, again, says "it just doesn't matter.")

3. The Loan Documents were issued as part of an illegal transaction which was designed to, and did, defraud the FDIC and the Defendants in this case.

4. The failed institution, Frontier Bank, had violated specific terms of the Loan Documents (as opposed to oral agreements or promises), and the files acquired by Union Bank for zero dollars demonstrated those breaches—as did this public litigation.

5. Both the FDIC and the Defendants were defrauded by the failed institution acting in concert with others, *i.e.*, Thomas Hazelrigg III,[2] Scott Switzer, Centurion Financial Group, LLC,[3] Barclays North and Patrick McCourt. (Sufficient facts, inferences and applicable law support this proposition).

When a court multiplies the injuries to victims, as is the case here, in favor of a Bank receiving an unearned windfall of over $58 million—with no investment or economic risk—there is something

---

[2] Mr. Hazelrigg is now serving a sentence in a Federal Correctional Institution for tax crimes. *U.S. v. Hazelrigg*, Western District of Washington at Seattle, Cause No. 2:13-cr-00239-TSZ. Judicial notice can be taken under ER 201.

[3] Centurion was sanctioned for improper lending practices by the Washington Department of Financial Institutions on June 9, 2011, in an order of which this Court may take judicial notice under ER 201. *See* Order, available on the Department's website at http://www.dfi.wa.gov/laws-enforcement/dfi-enforcement-actions.

terribly wrong, which a dissection of the Brief of Union Bank demonstrates.

II. REPLY TO UNION BANK'S STATEMENT OF THE CASE

A. Reply Regarding Nature of Appellants' Defense.

Union Bank says (correctly) at page 13 of its Brief: "On March 31, 2008, Christopher Bingham, Frances Graham, and Scott Bingham each executed a Guaranty in favor of Frontier Bank." However, what follows, a parsing of the guarantees, fully misapprehends the basis of the Defendants' defenses and their position on summary judgment.

It is the position of the Defendants that the loans issued by Frontier Bank before March 31, 2008 were fully in default prior to that time, and Frontier knew it. Those loans should have been collected, and any amendment, renewal, restructure, or extension of them was both illegal and fraudulent. ***The Appellants' defenses do not rest on claimed oral agreements or promises, they rest on the fact that the very Change in Terms Agreements relied on by Union Bank were and are illegal and the product of fraud***, and that in any event, the specific written terms of the agreements which provided for interest reserves, were breached by the Bank—all of which caused great damage to the

Appellants. Appellants raised this issue in their Opening Brief at the First Issue on Appeal:

> Do disputes of genuine issues of material fact prevent summary judgment * * * where the evidence supports that; (a) Appellee Bank's predecessor caused, in whole or in part, the alleged defaults by breaching the written, signed terms of the original loan documents, and then using its undue influence over the Appellant Borrower's financial manager to modify the loans, without consideration, into loans sure to fail. App. Br. at 2.

Frontier had attended the "All Lenders" meeting in December 2007,[4] where its borrower, Barclays North, had said it would file bankruptcy on March 31, 2008, if it and Hazelrigg's scheme was not implemented. Switzer testified in his Declaration that the purpose of the meeting was to advise Barclays' many bank creditors, including Frontier Bank, of Barclays' "financial distress," and:

> to seek renegotiated terms for its significant debt. Barclays and Frontier proposed a basic framework whereby virtually all of the debts and assets of Barclays would be paid off and then refinanced with loans by Frontier and other banks to Barclays' mezzanine or secondary lenders like Bingo and Centurion. (CP 911).

At that time, December 2007, a Barclays bankruptcy would have put Frontier Bank into immediate receivership; Barclays was

[4] There is a typographical error in Mr. Switzer's Declaration at CP 911, line 14 – the context makes clear the All Lenders meeting was in December 2007, not December 2008.

Frontier Bank's largest borrower. (CP 911:20-22). Because of the imminent threat to Frontier Bank, it structured a transaction which closed on March 31, 2008, which, according to the Loan Memo, was to: "Approve purchase of the LLC by Centurion, assume loan, and add interest reserve." (CP 582). At that time, the evidence is that the existing loans which were to be increased were in default and the collateral value was deteriorating (CP 911, 913). Nevertheless, with transparently disingenuous reasoning, the Bank was renewing the loan, approving the transfer of the loans (to Centurion/Hazelrigg), and increasing the amount of the loans. The accurate reporting of the loans on the books of Frontier Bank, and in its "Call Reports" (discussed below) is required by federal law, and failure to abide by the strict regulations and statutes carries criminal penalties (also discussed below). The obvious purpose of the shoddy and disingenuous underwriting of the March 31, 2008 transaction was to prevent the required accurate reporting of the serious defaults and likely non-collectability of the Barclays loans to the FDIC.

The Loan Memorandum of Frontier Bank of March 13, 2008, CP 582-596, along with the Declaration of Switzer, CP 910-915, is relied upon by Appellants to establish elements of the illegal and

fraudulent March 31, 2008 transaction. The importance of the Loan Memo was acknowledged by Mr. Arrivey of Union Bank:

> 1 Q. (BY MR. JOHNSTON) Does that appear to be what
> 2 happened here, that we have the loan write-up, which is
> 3 Exhibit 3 dated March 13th, 2008, which discusses this
> 4 transaction, and then the application dated on the 31st
> 5 and then the Loan documents dated on the 31st?
> 6 A. That's how I would interpret this, yes.

(CP 554). Key facts set forth in the Loan Memo are:

1. The Bank knew that Centurion/Hazelrigg/Switzer were fiduciaries to the Binghams:

   > "Centurion Investments [sic] originates and underwrites loans for clients as a supplement to the client's accountants and attorneys. In that regard he has placed loans with Mastro,[5] Agnes Kwan and the Bingham family." (CP 584).

2. The March 31, 2008 transaction was part of a liquidation of the Barclays loans:

   > "He [Hazelrigg] is now helping Barclay's divest their portfolio to the various subordinate lenders during this market slowdown." [6] (*Id.*)

---

[5] Michael Mastro was forced into involuntary bankruptcy in July, 2009, and is currently a fugitive under federal indictment for bankruptcy fraud. *See In re: Mastro*, No. 2:09-bk-16841 MLB, U. S. Bankruptcy Court, Western District of Washington; *and see* CP 561 as to Frontier Bank's knowledge of and involvement in that bankruptcy case.

[6] This is direct evidence that the loans of Frontier (and other banks) were being divested "to the various subordinate lenders." The loans were not

3. Prior to March 31, 2008, Barclays' borrower was in default:

> "Binghams and Hazelrigg have already stepped up to carry Interest as needed." (CP 590.)[7]

That the Barclays loans were in default in the fall of 2007 is specifically established by Switzer's Declaration (CP 911:10-13).

4. For issuance of multi-million dollar loans, the financial information of Hazelrigg was unsubstantiated (self-prepared), and the Bingham information (supplied by Hazelrigg/Switzer) was over three years old.[8] (CP 589-90).

5. The Memo describes the loans' true "Weaknesses":

> 1. The existing borrower Status Corporation was never large enough to build the project and had contracted with Barclay's North Inc. to entitle the plats and be the Construction Manager. In addition, Barclays is no longer able to supervise the project because of downsizing its company. Status is forfeiting any Interest in the project to Centurion and related subordinate lenders.

---

being paid, the properties were not being sold; rather, the form of the debt was being changed to disguise the existing defaults and reduction in value.

[7] The payment of interest on borrowers' loans by Hazelrigg supports the Binghams' assertion that they were the victims of a form of Ponzi scheme by their financial advisor, and that the Bank had reason to know that.

[8] Hazelrigg was also forced into involuntary bankruptcy. *See In Re: Hazelrigg*, U.S. Bankruptcy Court, Western District of Washington, Cause No. 11-bk-22731-TWD; *and see* CP 562-63. The Bank was also aware Hazelrigg was under investigation for criminal activity. CP 562-563.

> 3.[sic] Current slow market but Centurion will not need to market lots until 2009. (CP 592).

6. Interest reserves were to be added to the assumed loans,

i.e., the loan amounts were to be increased:

> Approval of the Assumption and a new 12 month term will be set, with a six month extension option. Interest reserves are added to each loan balance. (CP 585).

Of course, the addition of interest reserves is the fact most indicative of Frontier Bank's fraud against the FDIC. Frontier Bank increased loan balances on loans in default, and then provided interest reserves sufficient to keep the payments current for at least a year – to make the loans appear sound when they were anything but sound. As Switzer testifies:

> Mr. Ries stated to Mr. Hazelrigg and to me that ***"for this to work with Frontier's accounting and regulatory requirements,"*** Frontier would have to include interest reserves and construction costs in the lines of credit. This would ensure that there would be enough cash flow to keep the loans current. (CP 912:13-16) (emphasis added, quotation marks in original.)

It is important that this transaction was not isolated – it was part of a larger transaction on the same day, with other similar changes of borrowers. Mr. Arrivey testified:

> 14 A. Let me clarify. Am I aware that certain of
> 15 these loans were a part of a bigger transaction and
> 16 assumption?

17 Q. (BY: Mr. Johnston) On the same day, yes.
18 A. Yes

(CP 556).

B. Reply Regarding Switzer Declaration and Joby Memo.

Union Bank's assertions regarding the Declaration of Switzer (Resp. Br. 31) are equally misleading, inaccurate, and fully miss the nature of Appellants' position. Again, Appellants are not asserting that oral agreements or promises should be enforced. Appellants are asserting that the statements of fact contained in the Switzer Declaration support a finding of fraud and illegality.

Switzer, as quoted above, establishes the default in the Barclays loans long before March 31, 2008. He further establishes, through admissions of a party opponent, admissible under ER 801, that the interest reserves were intended to create the false impression the loans were amended and performing in line with regulatory requirements. That testimony also establishes that the Bank breached the written terms of the agreements: "In September 2008 Frontier abruptly cancelled the interest reserves on the primary financing for each of the former Barclay's projects." (CP 913:22-24).

Switzer testifies:

> He [Mr. Reis, Frontier Bank's loan officer] said that Frontier was faced with recognizing significant

> losses on the loans or restructuring those loans with someone else unless Frontier could work out an alternative. Frontier had all the properties reappraised, produced a loan plan for each property which included a payoff of the existing Barclay's notes and interest reserves for each of the loans ***because none of them had any existing or future cash flow***, together with unsecured lines of credit to other borrowers to support the construction work to complete the entitlements on two of the properties.

It is obvious that this is the exact type of conduct so roundly criticized by the FDIC in its detailed post-mortem review of the failure of Frontier. (CP 502-07). In the face of this evidence, Union's comment that these loans were not specifically mentioned in the FDIC report, is meaningless – the evidence supports that these were exactly the kind of improper transactions criticized by the FDIC.

In discussing Switzer's Declaration, it is necessary to bring to the Court's attention the Declaration of Mr. Dean (CP-25):

> In reviewing the Defendants' opposition to summary judgment, I noticed that the declaration of Scott Switzer, Docket #16, glossed over Centurion Financial Group, LLC's complicity in the wrongful acts of Frontier Bank, in that Centurion, Bingo's financial adviser, did not inform Bingo of the conflict of interest that led Centurion to work with Frontier Bank to put together the abusive deal he described. Bingo and its principals' trust in Centurion was misplaced, and Frontier Bank knew it; but neither of them informed the Binghams.

Mr. Dean also introduced the undisbursed funds memo of Ms. Joby of Frontier Bank, dated November 19, 2008 (CP 27-28), an internal

document which establishes that there were undisbursed interest reserves and available funds, when the bank cut off funding the loans – *i.e.*, breached the written provisions of the loan documents, as testified to by Mr. Switzer, *supra*.

C. Summary of Reply Regarding Material Facts.

Viewed in the light most favorable to the non-moving party, Appellants, the record establishes that in 2007 the Barclays loans were in default and Frontier Bank was facing huge losses on loans to its largest customer. They establish that Centurion and Frontier Bank constructed a complex series of transactions, all closed on March 31, 2008, to hide those losses, by "paying off" the defaulted loans, and substituting new loans (by assumption of loan documents) which would appear (but which were not) performing and which would appear to (but which didn't – and knowingly so) meet regulatory requirements. In those transactions, the Binghams were not notified, and Centurion by taking over the LLCs got all the upside – and the Binghams got the virtually certain downside. Frontier Bank avoided collapse. The record also establishes that even as the loan documents were reconstructed, the Bank breached those loan documents, by withdrawing the unused portions and the interest reserves.

III. ARGUMENT AND AUTHORITY

Appellants argued the significance of the fraud by Frontier Bank, based on the above-cited records, extensively in oral argument to the trial court. (CP 50:1-61:14, CP 63:12-65:18). The Loan Memo and the Switzer Declaration were a primary focus of the argument, and the fraud against both the Binghams and the FDIC was explained in some detail.

The trial court granted summary judgment, but it appeared to grasp the essence of the Appellants' position, when it said:

> THE COURT: so I guess the thing that bothers me is, so let's assume that they're right, and not your client but Frontier Bank had these people enter into these agreements and they did it fraudulently. You don't find it a problem if somebody was defrauded into entering into an agreement that they're now being asked to be paying millions of dollars on and because they signed a boilerplate document that says you have to waive all of your claims, I mean, that doesn't sit well with me.

(CP 66). This observation by the trial court correctly reflects the purpose of the federal doctrines, to protect the banks and the FDIC from fraud by borrowers, not to provide a windfall to the FDIC (or its transferees) resulting from fraud by a bank.

Because Appellants were convinced by the trial court's comments that it had incorrectly appreciated or weighed the evidence, the Appellants moved for reconsideration. Union Bank's counsel had repeatedly asserted (wrongly) there was no evidence of fraud. The

Defendants' Motion for Reconsideration explained in further detail the facts, and set forth the applicable law, both of which they respectfully asserted established the underlying fraud and illegality, and had not been properly apprehended or applied by the trial court. (CP 29-36). It is submitted that failure to grant the Motion for Reconsideration in the fullness of the circumstances was clear error.

A. The March 31, 2008 Transactions were Fraud, and Loan Documents Made or Continued Thereafter were Infected by Fraud.

Union Bank has argued that the evidence does not support a finding of the nine elements of fraud. For purposes of summary judgment, with all evidence and inferences viewed most favorably to the non-moving party, respectfully, that is wrong.

1. A Representation of Existing Fact. In making a loan, a financial institution necessarily represents that it has the right and power to make the loan. In this case that was simply not true – the loan was made in fraud of the FDIC. Further, Union has misstated, elided, the first element of fraud, because concealment of a material existing fact can also create fraud. In *Oates v. Taylor*, 31 Wn. 2d 898, 902-05, 199 P.2d 924 (1948), the court said: "It is well settled that the suppression of a material fact which a party is bound in good faith to disclose is equivalent to a false representation." Frontier Bank was well aware that

Hazelrigg, the Binghams' and Bingo's agent, was acting in his own interests and against theirs. Even "when the parties are dealing at arm's length," a duty to speak arises "where the facts are peculiarly within the knowledge of one person and could not be readily obtained by the other; or where, by the lack of business experience of one of the parties, the other takes advantage of the situation by remaining silent." *Id.* at 904. Where Frontier Bank knew that the Binghams were being represented by a dishonest agent, it had a duty not to help conceal that fact and the other key facts that, as it also well knew: (a) the transaction was to defraud the FDIC and conceal the actual desperate financial condition of Frontier, (b) the value of the collateral was only a fraction of that represented in the bank's records, and reflected in the loan amounts, and (c) the loan was known to be uncollectable before the transaction and to be issued contrary to federal regulations, including loan to value ratio. The Bank suppressed these facts, and thus made the indirect representation that such facts did not exist. "The concealment of a fact which one is bound to disclose is the equivalent of an indirect representation that such fact does not exist, and differs from a direct false statement only in the mode by which it is made." *Id.* at 904.

2. **Its Materiality**. The receivership of Frontier itself establishes the materiality of the issuance of these loans. The FDIC

postmortem analysis and its Cease and Desist Order punctuate the materiality.

3. Its Falsity. That the loans were issued and later modified upon false premises is established by Frontier Bank's appraisal establishing the low collateral value, by the Cease and Desist Order, by the FDIC's post-mortem analysis, by the bankruptcies of Hazelrigg and Switzer, and by the FDIC takeover of Frontier Bank itself.

4. Speaker's Knowledge of Falsity. The Loan Memo and the Switzer Declaration establish that Frontier Bank knew the true facts which it failed to disclose to the Appellants; the Cease and Desist Order, and the FDIC post-mortem analysis of the bank further confirm that the bank knew it was ignoring vital regulatory restrictions in issuing and maintaining its commercial loan portfolio at this time.

5. Speaker's Intent to Induce Reliance. One need only read the Loan Memo, and its praise of Hazelrigg and touting of the loan, to know that Frontier Bank intended the Binghams to rely on the belief that the loan was properly issued and underwritten, so that the Appellants would guarantee it. The Loan Memo makes clear that the Binghams' guarantees were necessary for the transaction.

6. Recipients' Ignorance of Falsity. The Declaration of Henry Dean (CP 25) establishes this element.

7. Recipients' Reliance. The Appellants' reliance is evidenced by the fact they signed the guarantees of loans which were known by the bank to be uncollectible, at the time of the March 31, 2008 transaction and at all times thereafter.

8. Recipients' Right to Rely. The Appellants were in a business transaction with the Bank, and had no reason or duty to investigate the bank's regulatory compliance. Indeed, the Frontier/Hazelrigg/McCourt scheme was so complex, it was difficult even for experienced counsel to unearth. In this connection, however, the rule quoted in *Fischer v. Hillman*, 68 Wash. 222, 227-28, 122 P. 1016 (1912) is apropos:

> There is no rule of law which requires men, in their business transactions, to act upon the presumption that all men are knaves and liars, and which declares them guilty of negligence, and refuses them redress, whenever they fail to act upon that presumption. The fraudulent vendor cannot escape from liability by asking the law to applaud his fraud and condemn his victim for his credulity. 'No rogue should enjoy his ill-gotten plunder, for the simple reason that his victim is by chance a fool.'

9. **Resultant Injury or Loss.** Being sued for tens of millions of dollars, upon loans which were known by the lender to be uncollectible when they were issued, should be enough to satisfy this element of fraud.

It is respectfully submitted that there is sufficient evidence of fraud that summary judgment should not have been granted on such a factually intensive issue, upon the record as it existed before the trial court.

B. The March 31, 2008 Transactions were Illegal.

While there are several bases for the March 31, 2008 transactions to be found illegal, one will suffice for summary judgment purposes. The March 31, 2008 transactions were designed to understate the troubled loans of Frontier. By doing so, they also would cause the overstatement of the bank's required regulatory capital. False reports to the FDIC are a federal crime:

> Whoever makes any false entry in any book, report, or statement of such bank, company, branch, agency, or organization with intent to injure or defraud such bank, company, branch, agency, or organization, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, company, branch, agency, or organization, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation . . .
>
> Shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C §1005; *and see*, *e.g.*, *United States v. Gallant*, 537 F.3d 1202, 1227 (10th Cir. 2008) (conviction upheld for defendants who were involved in others' filing of false call reports). Under § 1005, moreover, "an omission of material information qualifies as a false

entry." *Id.* (quoting *U.S. v. Flanders,* 491 F.3d 1197, 1214-15 (10th Cir. 2007). A simple review of the Loan Memo and the Switzer Declaration establish that this statute was violated. [9]

Frontier Bank, a state non-member bank insured by the FDIC, was obliged under 12 C.F.R Part 365 Appx. A. to stay within supervisory loan limits of 80 percent for commercial real estate loans except in unusual and carefully documented cases, and to keep records that accurately reflected the risk of excessive LTV loans, and the concentration of risky loans. Frontier Bank used the Binghams' supposedly good credit to delay the need to recognize its **455 percent** LTV Bayside Loan.

Frontier Bank's purpose of defrauding the FDIC puts these instruments squarely into the category of illegal contracts. "A contract that is illegal is void—that is, null from the beginning and unenforceable by either party, even if both parties knew of the illegality at the time of formation." *Bankston v. Pierce Cnty.,* 174 Wn. App. 932, 938-39, 301 P.3d 495 (2013).

[9] An indictment or prosecution, of course, is not necessary to prove predicate illegality in a civil case.

C. The Shield Statutes and Defenses of Union Bank Do Not Apply to This Case.

Union Bank has raised two reasons that the Court should supposedly not even consider illegality, fraud, or lack of good faith: the blanket boilerplate waivers in the Binghams' guarantees, and FDIC avoidance of unsigned agreements of a failed depository institution under 12 U.S.C. § 1821(e). But neither of those excuses apply here. Waiver of the obligations of good faith is prohibited by law: "The obligations of good faith, diligence, reasonableness, and care prescribed by this title may not be disclaimed by agreement." RCW 62A.1-302. The contention of Union Bank that the Uniform Commercial Code does not apply to the notes in this case is, well – wrong. The promissory notes here are negotiable instruments governed by Article 3 of the Uniform Commercial Code as adopted in Washington, which requires good faith. RCW 62A.3.103(d). The incorporated definition is:

> "Good faith," except as otherwise provided in Article 5 of this title, means honesty in fact ***and the observance of reasonable commercial standards of fair dealing***.

RCW 62A.1-201(2) (emphasis added). Likewise, fraud in the inducement is not necessarily waived by an integration clause or by a general declaration that no representations were relied upon. *Stewart v. Estate of Steiner*, 122 Wn. App. 258, 274, 93 P.3d 919 (2004). Rather,

the trial court should have "considered other relevant factors" (and on summary judgment, viewed the evidence most favorably to the Binghams), such as the parties' sophistication, access to the relevant information, the existence of a fiduciary relationship (again, while Frontier Bank would not normally be deemed a fiduciary, it worked with an undoubted fiduciary to conceal the facts, taking advantage of that special trust relationship), concealment, opportunity to detect the fraud, and which party initiated the transaction. *Id.* Other jurisdictions have held that while fraud waivers that are the product of negotiation between specific parties may sometimes be enforceable, boilerplate waivers of fraud in the inducement should not be enforced against a guarantor, especially if they do not expressly address fraud on the particular subject at issue in the case. *Mfrs. Hanover Trust Co. v. Yanakas*, 7 F.3d 310, 315 (2d Cir. 1993); *and see Kronenberg v. Katz*, 872 A.2d 568, 592 (Del. Ch. 2004) (integration clause does not defeat fraud in the inducement defense).[10] This rule is consistent with the traditional

[10] The *Kronenberg* Court cited to, among others: 2 E. Allen Farnsworth, Farnsworth on Contracts § 7.4, at 247 (3d ed. 2003) ("To the extent that evidence of misrepresentation is admissible [under the parol evidence rule] even if the agreement is completely integrated, it is admissible in the face of the usual merger clause, though ... a few courts have countenanced clauses specifically reciting that there have been no misrepresentations."); John Edward Murray, Jr., Murray on Contracts § 84(C)(2), at 440-41 (4th ed. 2001) ("There can be no question that evidence of fraud, mistake or other invalidating causes cannot be precluded by a merger clause.");

doctrine, in Washington as elsewhere, that a guaranty contract is "strictissimi juris," and "the guarantor is entitled to a full disclosure of every point which would be likely to bear upon his disposition to enter into it." *Spokane Union Stockyards Co. v. Maryland Cas. Co.*, 105 Wash. 306, 309, 178 P. 3 (1919) (quoting *Barns v. Barrow*, 61 N. Y. 39 (1974)). Surety contracts must be strictly and narrowly construed—and indeed, Frontier Bank's concealment of truths, although equivalent for purposes of fraud to a representation, is an omission and not an affirmative express representation, such as Frontier Bank purported to

---

Restatement (Second) of Contracts § 214 cmt. c (1981) ("What appears to be a complete and binding integrated agreement ... *may be voidable for fraud*, duress, mistake, or the like, or it may be illegal. Such invalidating causes need not and commonly do not appear on the face of the writing. *They are not affected even by a 'merger' clause.*" (emphasis added)); 11 Richard A. Lord, A Treatise on the Law of Contracts by Samuel Williston § 33:21, at 670-71 (4th ed. 1999) ("Just as is the case with the parol evidence rule itself, a merger or integration clause is ineffectual to exclude evidence of prior or contemporaneous extrinsic representations for the purpose of showing fraud or other invalidating cause by way of defense or in an action for rescission."); *Id.* at § 33:21, at 672-73 ("The better view is ... to ask whether a fraudulent misrepresentation (as opposed to, say, a warranty) has been made and whether the party asserting the fraud would have entered the agreement had he or she known the representation was false; if not, the contract should be voidable to the same extent as if there were no merger clause and, indeed, as if there were no writing, and the parol evidence rule should not be applied."); 2 Ronald A. Anderson, Anderson on the Uniform Commercial Code § 2-202:54, at 286 (3d ed.1997 revision) ("An integration clause does not bar claims for negligent misrepresentation and fraudulent inducement. An integration or merger clause gives rise to a rebuttable presumption that the writing contains the total contract but this presumption can be overcome by a showing of fraud, bad faith, unconscionability, negligent omission or mistake in fact." (footnotes and citations omitted)).

have its guarantors waive. The Binghams could not and did not waive those fundamental obligations of good faith and honesty.

Likewise, the requirements imposed by state law, such as the "implied covenant of good faith and fair dealing," or to "conduct a commercially reasonable sale" are not mere side agreements between a borrower and a failed depository, so they are outside the scope of 12 U.S.C. § 182l(e). *New Bank of New England, NA. v. Callahan,* 798 F.Supp. 73, 77 (D.N.H. 1992). The federal statute does not prevent the court from considering the context of a loan to see that there are issues of fact as to illegality, fraud in the inducement (or otherwise) and failure of good faith.

Further, Union's reliance on *Badgett v. Security State Bank,* 116 Wn.2d 563, 47 P.2d 356 (1991) is misplaced. Appellants are not asking the court to impose a "free floating" contract provision of general good faith. Appellants are asking the Court to recognize that the withdrawal of the contracted interest reserves was an act of bad faith contrary to the specific provisions of the loan document as written and signed. Further, good faith was lacking in connection with the interface between Frontier Bank and Hazelrigg, insofar as the Bank knew Hazelrigg was an unfaithful agent, and helped him act against the Binghams' interest for his own benefit.

IV. CONCLUSION

For these reasons, and those set forth in Appellants' opening brief, and below, the grant of summary judgment by the trial court should be reversed, and this matter directed to trial on the issues joined.

DATED this 22rd day of June, 2015.

/s/ R. Bruce Johnston
R. Bruce Johnston, WSBA #4646
Emanuel Jacobowitz, WSBA #39991
Johnston Lawyers, P.S.
2701 First Ave, Suite 340
Seattle, WA 98121
(206) 866-3230
(206) 866-3234 (Fax)
bruce@rbrucejohnston.com
Counsel for Appellants

PROOF OF SERVICE

The undersigned declares under penalty of perjury that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the above-entitled action.

On June 22, 2015, I served or caused to be served a copy of the foregoing document upon counsel for Respondent to be served by hand and/or email upon counsel of record for Respondent, Joseph E. Shickich, Jr. and Michael David Pierson, at

Riddell Williams PS
1001 4th Ave., Ste. 4500
Seattle, WA 98154-1065
jshickich@riddellwilliams.com

SIGNED this 22nd day of June, 2015,

/s/ Lesley Alvarado
Lesley Alvarado
Paralegal