

64342-8

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No. 64342-8-I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

RAY MACLEOD,

Appellant,

v.

CORNERSTONE EQUIPMENT LEASING, INC.,

Respondent.

REPLY BRIEF OF APPELLANT

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 DIVISION I
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INTRODUCTION.

Plaintiff-Respondent Cornerstone Equipment Leasing, Inc. (“Cornerstone”), has attempted to frame the issues in this case as simple, straightforward and undisputed. In doing so, however, it has ignored critical evidence that establishes the defenses of Defendant-Appellant Ray MacLeod (“MacLeod”) and makes clear that there are genuine issues of material fact.

For example, Cornerstone contends that its president, James Chevigny (“Chevigny”) made mere promises of future action when he induced MacLeod to sign the 2005 Note, and then simply changed his mind later on, which Cornerstone argues cannot constitute fraud as a matter of law. However, the evidence establishes that Chevigny made misrepresentations of *existing* facts. Most significantly, Chevigny knew that MacLeod did not agree that he owed the money when he asked MacLeod to sign the 2005 Note, so he assured MacLeod that their dispute would be worked out in a future deal. Two years before that, however, Chevigny had made the “conscientious decision” that Cornerstone would not consider any new deals from that point forward. Thus, at the time the agreement was made, Chevigny knew that Cornerstone would never fulfill its promise to work out the dispute over the debt in a future business pursuit with MacLeod.

Additionally, Cornerstone argues that upon receipt of Chevigny’s June 22, 2007 letter, a reasonable person could only infer that Cornerstone had retracted its December 2006 express waiver of the 2005 Note.

However, Cornerstone does not even address the fact that Chevigny and MacLeod had a discussion at the same time that the letter was sent, during which Chevigny stated that he still agreed with MacLeod that MacLeod had no further obligation to pay Cornerstone. In light of Chevigny's conflicting statements, a reasonable person could have concluded that the parties' existing agreement—that MacLeod owed nothing more to Cornerstone—was still in effect. Consequently, the letter failed to give the “definite and specific notice” required by law in order to revoke Cornerstone's express waiver of the 2005 Note.

These are but two discrete instances in the parties' long history of oral communications and casual dealings. Because MacLeod's defenses of fraud, waiver and estoppel all turn on these communications and the reasonableness of MacLeod's reliance on them—which involve questions of fact—this is a classic example of a case that ought to be resolved—not by summary judgment—but rather by live testimony and the credibility of the witnesses.

ARGUMENT IN REPLY.

A. The 2005 Note Is Voidable Because MacLeod's Signature Was Fraudulently Induced.

Cornerstone argues that MacLeod cannot establish that Chevigny made misrepresentations of existing fact when he induced MacLeod to sign the 2005 Note, and that MacLeod's reliance on Chevigny's statements was not reasonable as a matter of law. (Brief of Respondent Cornerstone Equipment Leasing, Inc. (“Resp. Brief”) at 13-14.) However,

the evidence establishes that Chevigny's statements were not in accord with the facts at that time and that, under the circumstances, MacLeod's reliance on Chevigny's statements was reasonable.

1. Chevigny Made False Statements of Existing Facts.

Cornerstone contends that none of Chevigny's statements were misrepresentations of existing fact, and that, therefore, MacLeod's defense of fraudulent inducement fails. (Resp. Brief at 15-22.) Specifically, Cornerstone contends that "Chevigny promised to take a future action, *i.e.*, to appease his business partners or work out a new deal with MacLeod[.]" which constituted a "'mere estimate' or a promise of future performance." (Resp. Brief at 17.)¹ However, the record clearly establishes that both aspects of Chevigny's statement were misrepresentations of existing facts.

Specifically, the evidence establishes that when Chevigny presented MacLeod with the 2005 Note, he represented as a then-existing fact that he needed MacLeod to sign the 2005 Note "because his partners

¹ Cornerstone also asserts that this theory was not advanced by MacLeod on summary judgment and should be disregarded by the Court under RAP 9.12. (Resp. Brief at 18-19.) RAP 9.12 provides in relevant part: "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." On summary judgment, MacLeod properly raised the issue, arguing that Chevigny fraudulently induced MacLeod's signature: "in order to persuade Mr. MacLeod to sign the note, Mr. Chevigny exploited Mr. MacLeod's trust in him, using as leverage their ongoing commitment to pursue lucrative investments together; he told Mr. MacLeod that the note was for 'internal purposes only,' that he just needed something to show his partners, and that the dispute over the money would be worked out in a future deal." CP 132. Additionally, MacLeod relies only on the evidence submitted together with his opposition to Cornerstone's motion for summary judgment, *i.e.*, MacLeod's declaration and excerpts of deposition transcripts of Chevigny, MacLeod and Timothy Lee. Accordingly, this issue and the relevant evidence may properly be considered by this Court on appeal under RAP 9.12.

were giving him a hard time.” CP 214 (¶ 50). However, Chevigny’s partner Timothy Lee testified that he never questioned nor expressed dissatisfaction with the status of MacLeod’s alleged debt with Cornerstone, and that he never asked Chevigny to obtain a reiteration of MacLeod’s promissory note.² CP 401:24-402:16, 414:20-416:10. Additionally, Chevigny testified that his partners did “literally nothing” with regard to Cornerstone’s business, and neither had any involvement in the management of Cornerstone’s affairs. CP 164:11-16, 164:24-165:8, 165:19-24. Thus, the evidence establishes that Chevigny’s partners had not given Chevigny a hard time about MacLeod’s alleged debt and had not urged him to obtain a reiterated note. Accordingly, Chevigny’s statement was clearly fraudulent.

More significantly, Cornerstone asserts that Chevigny’s statement that the parties would work out their dispute in a future deal could not be true or false at the time it was made. (Resp. Brief at 17-18.) However, Chevigny testified that he began winding down Cornerstone in 2000, and made the “conscientious decision” in 2003 to stop looking for other business opportunities. CP 154:9-18. Accordingly, the evidence establishes that at the time of his statement in 2005, Chevigny had no intention of pursuing new business opportunities through Cornerstone. As

² The fact that the record only contains testimony from Timothy Lee and not from Chevigny’s other partner, Rhoady Lee, Jr., does not make the evidence inconclusive, as Cornerstone suggests. (Brief at 17, n.11.) Rather, Chevigny himself testified that both of his partners did “literally nothing” with regard to Cornerstone’s business, and neither had any involvement in the management of Cornerstone’s affairs. CP 164:11-16, 164:24-165:8, 165:19-24.

such, Chevigny’s statement to MacLeod that they would work out their dispute in a future deal was a clear misrepresentation. *See Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1218 (9th Cir. 1983) (Washington law recognizes promissory fraud when a promise of future action is made with a “present intent not to attempt the future fulfillment of the promise[.]”).

2. MacLeod Reasonably Relied Upon Chevigny’s Statements.

Cornerstone contends that, as a matter of law, a promisee cannot establish the right to rely on contemporaneous statements that are inconsistent with a written agreement. (Resp. Brief at 14.) In support of this position, it cites two cases in which the courts applied California’s *Pendergrass* rule, which—even if it were applicable to this case—would not preclude MacLeod’s defense of fraudulent inducement. Moreover, under the circumstances of this case, MacLeod’s reliance on Chevigny’s statements was reasonable.

(a) The Parol Evidence Rule Does Not Bar Evidence of Chevigny’s Fraudulent Inducement.

In support of its assertion that a party’s reliance upon contradictory oral statements is unreasonable as a matter of law, Cornerstone cites to *Casa Herrera, Inc. v. Beydoun*, 32 Cal. 4th 336, 346, 9 Cal. Rptr. 3d 97, 83 P.3d 497 (2004) and *Brinderson-Newberg Joint Venture v. Pacific Erectors, Inc.*, 971 F.2d 272, 281 (9th Cir. 1992), both of which are

distinguishable from the present case.³ In *Casa* and *Brinderson-Newberg*, the parties' contemporaneous oral agreement was found to be in direct contradiction with the terms of the parties' written agreement.⁴ Additionally, the parties' written agreements in *Casa* and *Brinderson-Newberg* were found to be integrated.⁵ Accordingly, the courts followed the holding of *Bank of America Nat'l Trust & Sav. Ass'n v. Pendergrass*, 4 Cal.2d 258, 48 P.2d 659 (1935), in which the court stated:

Our conception of the rule which permits
parol evidence of fraud to establish the
invalidity of the instrument is that it must
tend to establish some independent fact or
representation, some fraud in the

³ Cornerstone also cites *Mellon Bank Corp. v. First Union Real Estate Equity & Mortg. Inv.*, 951 F.2d 1399, 1412 (3d Cir. 1991). However, as set forth in greater detail in MacLeod's Brief at page 24, n.1, this case is also distinguishable. Mellon was a "major banking institution" that "consult[ed] with counsel at all stages of the transaction and closing on detailed written documents." 951 F.2d at 1412. Under those circumstances, the court held that Mellon could not justifiably rely on the parties' contemporaneous gentlemen's agreement. *Id.* Here, however, MacLeod is an individual, was not represented by the counsel, and had a prior history of dealing informally with Cornerstone and Chevigny, in which they would enter into written agreements calling for a specified performance and then orally agreed to and accepted inconsistent and/or partial performance. (See Brief at 23-24.)

⁴ For example, in *Brinderson-Newberg*, the court noted that the defendant's fraud claim rested on the plaintiff's "alleged promise to interpret the contract as limiting [the defendant's] obligations to work that [the defendant] had customarily performed despite the explicit language" contained in the contract regarding the defendant's obligations, which "was not reasonably susceptible to such an interpretation[.]" 971 F.2d at 281. In *Casa*, the defendant's fraudulent misrepresentation claim was based on its assertion that the plaintiff stated that an oven it sold to defendant was capable of producing 1,500 dozen 16-ounce tortillas per hour, while the contract explicitly provided that the oven would produce 1,500 dozen 10-ounce tortillas per hour, 1,800 dozen 8-ounce tortillas per hour and 2,000 dozen 6-ounce tortillas per hour.

⁵ In *Brinderson-Newberg*, the parties expressly agreed that they "shall not be bound by, or liable for, any statement, representation, promise, or agreement not specifically set forth in this subcontract." 971 F.2d at 281 ("An integrated contract is given legal significance under California law, and [Defendant] cannot introduce parol evidence of fraud if the evidence contradicts the integrated contract."). In *Casa*, the Court noted that "by applying the parol evidence rule, the Court of Appeal, in effect, held that the written sales agreement was the only existing agreement of the parties." 32 Cal. 4th at 344.

procurement of the instrument or some breach of confidence concerning its use, and not a promise directly at variance with the promise of the writing.

In this case, Cornerstone has not even attempted to argue that the 2005 Note was a complete, integrated agreement between the parties. In Washington, “the parol evidence rule only applies to a writing intended by the parties as an ‘integration’ of their agreement; i.e., a writing intended as a final expression of the terms of the agreement.” *Emrich v. Connell*, 105 Wn.2d 551, 556, 716 P.2d 863 (1986). “In making this preliminary determination, of whether the parties intended the written document to be an integration of their agreement, which is a question of fact, the trial court must hear all relevant, extrinsic evidence, oral or written.” *Id.*

Here, although the contract states that it “amends and restates the Previous Loan Documents, which are superseded and replaced hereby,” it does not contain an integration clause or any language indicating that the 2005 Note was intended to encompass the parties’ complete understanding and agreement.⁶ CP 242. Moreover, Cornerstone accepted as true that Chevigny stated that his partners had given him a hard time, that the 2005 Note was for internal purposes only and that the parties would work out their dispute in a future deal. (Resp. Brief at 13.) However, there is no language in the 2005 Note to that effect. Accordingly, the note cannot be construed as a final representation of the parties’ complete agreement.

⁶ Even if the Court were to find that this language constituted an integration clause—which MacLeod contends that it does not—“[p]arol evidence of a contemporaneous oral agreement is not necessarily excluded by an integration clause[.]” *Equitable Life Leasing Corp. v. Cedarbrook, Inc.*, 52 Wn. App. 497, 505, 761 P.2d 77 (1988).

In any event, even if California's *Pendergrass* rule were applicable to this case, it would not preclude the evidence relied upon by MacLeod in support of his defense of fraudulent inducement, because the evidence establishes that Chevigny's misrepresentations were independent of MacLeod's alleged promise to pay the debt, i.e., that Chevigny's partners had given him a hard time about the alleged debt and that the parties would continue to work together to pursue business opportunities in the future. While these misrepresentations induced MacLeod to sign the 2005 Note, they do not contradict the terms of the 2005 Note. Accordingly, parol evidence of Chevigny's fraudulent statements would be admissible. "Proof that a written agreement was induced by fraud is a universally recognized exception to [the parol evidence rule] that is as well established as the rule itself." *Mele v. Cerenzie*, 40 Wn.2d 123, 125-126, 241 P.2d 669 (1952).

(b) MacLeod's Reliance Was Reasonable Under the Circumstances.

As set forth more fully in Brief of Appellant ("Brief"), MacLeod's reliance upon Chevigny's statements was reasonable under the circumstances. (Brief at 22-24.) Chevigny was the President of Cornerstone, the sole person responsible for negotiating terms of its contracts, and, most significantly, the person who held the authority to forgive loans. CP 164:11-16, 165:14-18, 360:14-17, 369:6-14. Also, the parties had a long pattern and history of dealing informally during which they entered into written agreements calling for a specified performance

and then orally agreed to and accepted inconsistent performance. CP 212 (¶¶ 37-39), 77-78 (¶¶ 4-6), 210-211 (¶¶ 29-32), 50:13-22, 171:9-17. In view of their history of dealing and Mr. Chevigny's authority within Cornerstone, MacLeod's reliance was reasonable.

B. Cornerstone Failed to Revoke Its Express Waiver of the 2005 Note.

1. The June 22, 2007 Letter Failed to Give Definite and Specific Notice of Cornerstone's Changed Intent.

Cornerstone contends that only one reasonable inference can be drawn from the June 22, 2007 letter sent to MacLeod—that Cornerstone retracted its waiver of the 2005 Note. According to Cornerstone, Chevigny “expressly demand[ed] payment ‘in full[.]’” (Resp. Brief at 27.) However, that argument ignores Chevigny's statements to MacLeod in the parties' telephone conversation at that same time.

In his June 22, 2007 letter, Chevigny stated, “please contact me with your plan to pay the balance off in full.” CP 244. However, during the parties' conversation about the letter in the summer of 2007, Chevigny re-acknowledged the parties' December 2006 agreement that MacLeod owed nothing more to Cornerstone, and Chevigny stated that he still agreed with MacLeod that MacLeod did not owe anything more. CP 217 (¶ 65). Chevigny explained that his partners, however, did not have the same relationship with MacLeod that Chevigny did, and that Chevigny had to answer to them. CP 217 (¶ 65).

In light of Chevigny’s contradictory statements, a reasonable person could infer that the letter was sent simply to provide documentation to appease Chevigny’s partners, but had no impact on the parties’ preexisting oral agreement and the belief that Chevigny continued to express—that MacLeod owed no more money to Cornerstone. Additionally, even if Chevigny’s subjective intent had changed such that he wanted to revoke his waiver of the 2005 Note, one could reasonably infer from Chevigny’s communications that this was just another instance of the parties’ pattern of dealing in which Chevigny would call for a specified performance in writing, and then orally agree to inconsistent performance. (*See* Brief at 23-24.) Both of these interpretations are supported by the record, and, therefore, Chevigny failed to give “definite and specific notice” of any intent on Cornerstone’s part to enforce the 2005 Note. *Douglas v. Hanbury*, 56 Wash. 63, 65, 104 P. 1110 (1909) (Waived rights are “capable of being reinstated only by giving definite and specific notice of an intention to act under them.”).

2. The November 6, 2007 Letter Failed to Give a Reasonable Opportunity to Comply.

Cornerstone argues that the November 6, 2007 letter sent by Cornerstone’s counsel to MacLeod “further confirmed the debt obligation of MacLeod.” (Resp. Brief at 27.) While MacLeod acknowledges that the letter contains—for the *first* time since before the note was waived—a definite and specific demand for payment on the 2005 Note, the letter failed to provide a reasonable opportunity to comply with that demand,

and, as a consequence, it failed to reinstate the debt. *Crutcher v. Scott Pub. Co.*, 42 Wn.2d 89, 97, 253 P.2d 925 (1953) (in order to retract a waiver, the waiving party “must allow the [other party] a reasonable opportunity to comply” with a demand of strict compliance with previously waived terms). Specifically, the letter demanded payment within 30 days of the disputed balance, 20 percent compounded interest and attorneys’ fees, together totaling \$187,144.61. As set forth in MacLeod’s Brief, such a demand was unreasonable in light of the substantial sum demanded and the fact that the 2005 Note only provided for monthly payments of \$5,000. (Brief at 31-32.) Notably, Cornerstone has not even attempted to argue that it provided a reasonable opportunity to comply.

3. Reinstatement of the Waived 2005 Note Would Be Unjust and Should Therefore Be Barred.

a. Reinstatement Would Be Unjust Because of the Accrual of Significant Interest.

Cornerstone argues that the accrual of interest between December 2006 and November 2007 was inevitable and foreseeable, and, therefore, that the total sum demanded by Cornerstone in November 2007 was “hardly a surprise.” (Resp. Brief at 29.) However, this argument overlooks the fact that the entire balance had been expressly waived by Cornerstone in December 2006, which Cornerstone accepts as true. (Resp. Brief at 23.) No amount of interest—let alone the tens of thousands of dollars in interest and penalties that allegedly accrued between December 2006 and November 2007 in this case—would be

inevitable or foreseeable when the principal due is zero. (*See* Appellant Brief at 33, fn.4 (explaining calculation of accrued interest).) A demand for payment of a sum that had been previously waived would come as a surprise to any reasonable person, and, indeed, MacLeod stated that he “was surprised to receive Mr. Chevigny’s call and letter [in June 2007], as [the parties] had already agreed that [he] did not owe Cornerstone any money.” CP 217 (¶ 64).

Additionally, Cornerstone argues—without support of any authority—that the accrual of interest on the waived debt does not constitute a change in MacLeod’s position such that reinstatement should be barred. However, such a proposition misses the clear objective of the bar to reinstatement. It is inherently unjust when a lender expressly waives a lender’s debt, then, after waiting many months—during which time 20 percent compounded interest accrues—the lender demands payment of the waived debt, plus interest accrued in the intervening period since the debt was expressly forgiven.

(b) Reinstatement Would Be Unjust Because MacLeod Invested His Money Elsewhere.

Cornerstone contends that no reasonable person could find from the evidence that MacLeod’s investment in his wind farm effected a change of MacLeod’s position. To the contrary, the evidence supports a reasonable conclusion that MacLeod’s investment rendered him unable to pay Cornerstone, and, therefore, reinstatement of the waived 2005 Note would be unjust.

For example, MacLeod stated in his declaration that he “focused [his] energy and resources on developing the wind farm,” and that “[r]ather than making payments to Cornerstone, [he] put the money towards the wind farm, buying all of the necessary equipment and obtaining the necessary permits[.]” CP 216-217 (¶ 62). Additionally, he explained that “had [his] dispute with Cornerstone not been resolved, [he] would not have been able to [invest in the wind farm].” Thus, the record supports the reasonable conclusion that payments to Cornerstone and MacLeod’s investment in the wind farm were mutually exclusive.

Similarly, the evidence supports the inference that the wind farm is a long-term investment, contrary to Cornerstone’s argument that there is no evidence that establishes that MacLeod’s funds are no longer readily available. (Resp. Brief at 33, n.18.) As MacLeod stated in his declaration, the development of the wind farm began in 2006, CP 217 (¶ 61), however, he does not expect it to be operational until 2010, CP 217-218 (¶ 62). In light of this and evidence establishing that MacLeod’s investment in the farm was mutually exclusive of payments to Cornerstone, a reasonable person could infer that funds MacLeod might have been in a position to remit to Cornerstone had the waiver not occurred were reasonably and understandably committed elsewhere once the waiver was made. Consequently, MacLeod’s position has materially changed since the 2005 Note was waived, and a reinstatement would therefore be unjust.

C. Cornerstone Should Be Estopped From Enforcing the 2005 Note.

Cornerstone contends that MacLeod “does not meet the required showing of detrimental reliance[,]” and, therefore, his estoppel argument fails as a matter of law. However, the evidence establishes that MacLeod invested his resources in the wind farm in reliance upon his agreement with Cornerstone that he had no further obligation to them, and that investment has worked to his detriment with respect to Cornerstone’s decision to renege on the parties’ agreement. MacLeod stated: “Having finally put my dispute with Mr. Chevigny and Cornerstone behind me, I focused my energy and resources on developing the wind farm Rather than making further payments to Cornerstone, I put the money towards the wind farm[.]” CP 216-217 (¶ 62).

One can reasonably infer from the evidence that MacLeod’s investment in the wind farm rendered him unable to make payments to Cornerstone. MacLeod stated that he would not have been able to invest in the wind farm had he not resolved his dispute with Cornerstone. CP 216-217 (¶ 62). Thus, viewing the evidence in the light most favorable to MacLeod and drawing all reasonable inferences in his favor, the record supports a finding that whatever funds MacLeod might have had available to make payments to Cornerstone were committed to MacLeod’s investment in the wind farm, which is not profitable at this point, as the wind farm is not expected to be operational until 2010. CP 216-217 (¶ 62). Accordingly, one can reasonably infer from the evidence that when

Cornerstone reneged on its agreement that the dispute over the debt was behind them and that MacLeod owed nothing more, MacLeod was unable to pay as a result of his reasonable reliance on the agreement.

Cornerstone also argues that the interest and penalties now claimed by Cornerstone are not caused by MacLeod's reliance on the parties' December 2006 agreement, reasoning that MacLeod's payments prior to that agreement were sporadic and late. (Brief at 33-34.) However, MacLeod's payment history is irrelevant to this issue. MacLeod had long disputed whether he owed anything at all to Cornerstone, and they had agreed to set aside the disputed sum and roll it into a future deal from which they both would profit. CP 212 (¶ 37), 214 (¶ 50). Pursuant to that agreement, MacLeod did not make payments, except to the extent that Chevigny pressured him to do so in order to keep his partners happy. CP 214 (¶ 50), 215 (¶ 57).

CONCLUSION.

The 2005 Note upon which this litigation is based is voidable by MacLeod because he was fraudulently induced to sign it. Whatever obligation MacLeod had to pay Cornerstone, if any, was expressly waived in December 2006, when Chevigny told MacLeod that he had no further obligation to Cornerstone. Cornerstone's delayed attempts to reinstate the note failed because they did not give MacLeod definite and specific notice that Cornerstone demanded his compliance with the waived note, and because Cornerstone never allowed MacLeod a reasonable opportunity to comply with the demand. In any event, Cornerstone should be estopped

from recovering any alleged sum due on the 2005 Note because MacLeod reasonably relied to his detriment on the parties' agreement that he and Cornerstone were "even" and that he owed nothing more to Cornerstone.

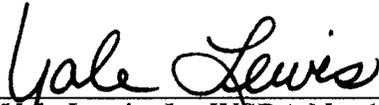
Accordingly, MacLeod respectfully requests that this Court reverse and vacate the Superior Court's summary judgment and remand for trial. MacLeod additionally requests that the Court reverse the Superior Court's order awarding attorneys' fees and costs and the judgment in favor of Cornerstone of \$331,288.96 for the principal amount and attorneys' fees, costs and expenses.

DATED this 2nd day of April, 2010.

Respectfully Submitted,

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