

IN THE SUPREME COURT OF OHIO

FIRST FEDERAL BANK OF OHIO,

Plaintiff/Appellant,

v.

JOHN ANGELINI, JR., et al., JEFFREY
ANGELINI, and GALION BUILDING &
LOAN BANK,

Defendants/Appellees.

08-0019
CASE NO.

On Appeal from the Crawford
County Court of Appeals,
Third Appellate District,
Case No. 3-07-04, 2007-Ohio-6153

MEMORANDUM OF APPELLANT
FIRST FEDERAL BANK OF OHIO
IN SUPPORT OF JURISDICTION

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I. THIS IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST.

Appellant First Federal Bank of Ohio (“First Federal”) presents the Court with two critical issues of public and great general interest: (1) the duty of a bank dealing with its customer in an arm’s length transaction where there is no special trust or confidence reposed in the bank; and (2) the duty of a bank to complete strangers to the transaction when it is engaged in an arm’s length transaction with customers. The decision below, *First Federal Bank of Ohio v. Angelini, et al.*, 2007-Ohio-6153 (“Opinion,” copy attached as Appendix A), turns Ohio law on its head with respect to the first issue. With respect to the second, the decision creates out of thin air a new duty owed by banks to strangers to particular transactions of which the bank has no knowledge, rendering a bank potentially liable to a third party for fraud in connection with the transaction.

A. There is Public and Great General Interest in Preserving the Long-Standing Rules in Ohio that a Bank and its Customers Deal at Arm’s Length and That no Special Duties are Created Unless Both Parties Understand That a Special Trust and Confidence has Been Reposed in the Bank by the Customer.

The decision below is utterly contrary to a long-standing line of cases in Ohio which limit the duties of a bank engaged in an arm’s length transaction with its customer. Indeed, the opinion goes a step farther than simply turning Ohio law on its head as regards the relationship between a bank and its customers, it even imposes duties on the bank to a party that is merely a guarantor in a transaction. The Ohio Supreme Court has specifically held that “[t]he relationship of debtor and creditor without more is not a fiduciary relationship,’ as a bank and its customer ordinarily stand at arm’s length.” *Ed Schory & Sons, Inc. v. Society Natl. Bank* (1996), 75 Ohio St.3d 433, 442; see also *Groob v. Keybank* (2006) 108 Ohio St.3d 348, 2006-Ohio-1189, ¶ 30. The General Assembly codified this principle in R.C. 1109.15(D), which states, “Unless otherwise *expressly agreed in writing*, the relationship between a bank and its obligor, with

respect to any extension of credit, is that of a creditor and debtor, and creates no fiduciary duty or other relationship between the parties.” (emphasis added). Yet the Third District Court of Appeals decision below does precisely that, throwing into confusion the relationship between a bank and a guarantor of a commercial loan.

B. There is Public and Great General Interest in Preventing the Imposition of Duties on a Bank to Guard the Interests of Parties That are Strangers to the Transaction Between the Bank and its Customer, and Even Unknown to the Bank, Rendering a Bank Potentially Liable to a Third Party for Fraud in Connection With the Transaction.

Even farther off track from Ohio law, the decision below creates for the first time an entirely new duty that banks apparently owe to third parties to transactions, including parties of which it has no knowledge when the bank enters into the transaction. The decision admits of the possibility that First Federal’s application of proceeds to Loan A to a customer rather than to Loan B of the same customer could somehow constitute a fraud against a *future* creditor of the same customer. For the courts to impose duties on banks to unknown third parties can do nothing other than dissuade banks from doing business in Ohio. For this reason in particular, there is a great and general public interest in *not imposing* on a bank an impossible-to-fulfill duty to a third party to a transaction, the existence of which party is unknown to the bank, thereby subjecting it to potential liability. The decision below defies reason.

II. STATEMENT OF THE CASE AND THE FACTS

A. Background

John (“John”) and Joyce (“Joyce”) Angelini operated a used car dealership in Galion, Ohio, and before January 21, 2001, had seven outstanding loans with First Federal, all of which were fully secured by mortgages on real estate owned by John and Joyce. One of their outstanding loans was a line of credit that John and Joyce used to purchase the inventory for their

this particular line of credit (the "Floor Plan Loan") was secured by the titles to certain vehicles in the dealership's inventory.

In early January 2001, Joyce wrote 40 checks totaling \$842,579.19 drawn on an account John and Joyce had at United Bank. N.A., all made payable to First Federal. Joyce presented these checks to First Federal as payments on the Floor Plan Loan. Upon receiving each check, First Federal credited the amount of the check to the outstanding amount of the Floor Plan Loan, and released the titles to the vehicles for which Joyce indicated the check represented payment. First Federal then permitted Joyce to draw down further on the Floor Plan Loan.

When First Federal presented the checks to United for payment, however, the account had insufficient funds to cover those checks. After discovering that Joyce had written bad checks as payments on the Floor Plan Loan and then borrowed more, First Federal's Vice President of Lending telephoned John and requested a meeting between John and representatives of the Bank. When John indicated that he did not have the funds to cover the bad checks, the Bank agreed to lend the money to cover the bad checks to its long-standing commercial customer.

In discussing the terms of the new loan (the "Blanket Loan"), John agreed to grant First Federal a mortgage on several properties he owned together with Joyce. He also agreed to grant First Federal a mortgage on two properties¹ that John and Joyce co-owned with their son, Jeff. John also agreed to deed certain property in Sanibel, Florida (the "Sanibel Property") to First Federal if First Federal agreed to deed the property back to him if he successfully refinanced the Sanibel Property and First Federal recouped at least \$300,000.

¹ In these two properties, 9860 State Route 314, Lexington, OH ("Route 314 Property") and 201 Erie Avenue, Huron, OH ("Erie Avenue Property"), John and Joyce held an undivided 2/3 interest while their son, Jeffrey Angelini ("Jeff") owned the remaining undivided 1/3 interest.

B. The Closing of the Blanket Loan

On January 12, 2001, Joyce, John, and Jeff signed numerous papers, including the Blanket Loan. Joyce and John borrowed \$849,802.78 from First Federal to repay the bank for the bad checks, plus interest, fees, and expenses.² The documents included: (a) a Pledge Agreement with Collateral Security; (b) a Promissory Note with Personal Guarantors and Collateral Pledgors; (c) numerous mortgages; and (d) the deed to the Sanibel Property. It is undisputed that Jeff failed to read the documents before he signed them. First Federal had no extensive discussions with either Joyce or Jeff at the closing.

Of the six mortgages that secured the Blanket Loan, two are relevant here. These are the mortgages on the Route 314 Property and the Erie Avenue Property, in each of which Jeff had a 1/3 undivided interest.

C. The Application of the Funds from the Refinancing of the Sanibel Property

In February 2001, John and Joyce refinanced the Sanibel Property. On February 23, 2001, the refinancing bank wired \$405,203.53 of the proceeds of the refinancing to First Federal. No written agreement governed how the funds from the Sanibel Property were to be applied to the numerous obligations John and Joyce owed to First Federal. First Federal applied \$299,733.32 of the Sanibel Property proceeds to the Floor Plan Loan, which had been called, and thus fully paid off the Floor Plan Loan. The remaining \$105,470.31, First Federal applied to the Blanket Loan. It is the application of a portion of the proceeds from the refinancing of the Sanibel Property to the Floor Plan Loan that is the crux of the dispute in this case.

D. The Involvement of Galion Building & Loan Bank

Galion Building & Loan Bank ("GB&L") claimed to be a third party beneficiary of the Pledge Agreement and Blanket Loan between the Angelinis and First Federal, an argument the

² The Blanket Loan was renewed on five separate occasions and has never been paid off.

Third District Court of Appeals rejected. Opinion at ¶ 12. GB&L also counterclaimed for fraud, a claim the lower court reinstated. *Id.* At ¶ 13. It is from this decision that First Federal appeals.

In its Opinion, the Court states that “[s]ince the Bank was aware of Galion’s interest when the contract was made, an argument could be made that it knew the alleged fraud would have a negative impact on Galion’s interests and the Bank would be liable for those damages...” See Opinion at 10, ¶12. But, on January 12, 2001, when the Angelinis entered into the Blanket Loan with First Federal and when First Federal allegedly made fraudulent statements to the Angelinis, GB&L did not have any interest in any of the real property owned by any of the Angelinis. Because GB&L did not have such an interest, it was impossible for First Federal to foresee that GB&L could be harmed or otherwise negatively impacted by First Federal’s alleged fraud.³

It was also not foreseeable by First Federal that GB&L could have been harmed or otherwise negatively impacted when First Federal applied the proceeds from the refinancing of the Sanibel property to the Floor Plan Loan rather than the Blanket Loan (which is the harm GB&L complains of). At the time that First Federal applied such proceeds, GB&L had only given First Federal notice of GB&L’s mortgage on the real property located at 111 S. Columbus Street. First Federal’s application of a portion of the Sanibel Property proceeds to the Floor Plan Loan did not alter GB&L’s secured position with respect to 111 S. Columbus Street because First Federal’s Floor Plan Loan and the Blanket Loan were both secured by mortgages on 111 S. Columbus Street that had priority over GB&L’s mortgage on that property. Thus, First Federal’s

³ GB&L first received a mortgage/interest in any of the Angelinis’ real property on January 25, 2001. However, it did not receive a mortgage/interest in either of the properties in which Jeff Angelini had an ownership interest until April 12, 2001.

application of the proceeds from the Sanibel Property in no way impacted GB&L's interest in 111 S. Columbus Street.

E. The Progress of The Case

On April 1, 2001, First Federal filed a Complaint in Foreclosure (amended April 8, 2003). On September 17, 2004, First Federal filed a Motion for Summary Judgment which was granted on October 26, 2004. The Angelinis appealed to the Third District Court of Appeals the portion of the trial court's decision granting summary judgment for a specific amount of damages to First Federal on Counts 10 through 15 of the Amended Complaint. They did not appeal the liability portion of the judgment. Similarly, GB&L appealed the amount that the Angelinis still owed on the Blanket Loan. In essence, all the defendants were appealing the trial court's conclusion of the damages due to First Federal under the defaulted loan.

On May 9, 2005, the Third District Court of Appeals reversed the trial court. On remand, the trial court permitted the defendants to file amended answers, affirmative defenses, and counterclaims. It was on remand that the defendants Jeff and GB&L filed their counterclaims for fraud that are the subject of this appeal. Both First Federal and Jeff moved for summary judgment.

The trial court again granted summary judgment on January 9, 2007 in favor of First Federal. By its Opinion dated November 19, 2007, the Third District Court of Appeals overturned for the second time the trial court's conclusion that there remained no genuine issues of material fact to be decided at trial.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.

Proposition of Law No. 1: Ohio law does not impose on banks in arm's length transactions with consumers a duty such that the bank could be liable for fraud or constructive fraud absent a special relationship of trust and confidence between the parties.

The Opinion appealed from imposes on banks engaged in arm's length transactions with customers a duty that exposes the bank to potential liability for fraud even when there is no special relationship of trust and confidence between the bank and the party alleging fraud. In this case, Jeff was not a party to the Blanket Loan transaction, the Pledge Agreement, the deed of the Sanibel Property, or any supposed "understanding" (of which there is no documentation) that the proceeds from the refinancing of the sale of the Sanibel Property would be applied in a particular way.

Jeff was not even a customer of First Federal with respect to the transactions at issue. Rather, he was merely a pledger/guarantor of his parents' loans from First Federal, who allowed his one-third undivided interest in the Route 314 Property and the Erie Avenue Property (which he co-owns with his parents) to be mortgaged to support his parents' loan.

Despite this tenuous relationship, however, the Third District Court of Appeals has ignored a long-standing line of Ohio cases which *refuse* to impose any special duties on a bank in these circumstances, see, e.g., *Ed Schory & Sons, Inc. v. Society Natl. Bank* (1996), 75 Ohio St.3d 433, 442; see also *Groob v. Keybank* (2006) 108 Ohio St.3d 348, 2006-Ohio-1189, ¶ 30, as well as the state law of Ohio set forth in R.C. 1109.15(D), which states, "[u]nless otherwise *expressly agreed in writing*, the relationship between a bank and its obligor, with respect to any extension of credit, is that of a creditor and debtor, and creates no fiduciary duty or other relationship between the parties." (emphasis added). Incongruously, the Third District's Opinion imposes special duties on the bank to a person who is *not even its obligor*, but rather a

mere guarantor. The Supreme Court of Ohio should review the Third District's Opinion as it is in direct conflict with Ohio law.

Proposition of Law No. 2: Ohio law does not require a bank engaged in an arm's length transaction with consumers to protect the interest of parties that are strangers to the transaction between the bank and its customer such that the bank can be liable to the third party for fraud in connection with the transaction.

Perhaps more baffling is the Third District's reinstatement of GB&L's counterclaim for fraud against First Federal. This decision renders First Federal potentially liable to a third party for its multiple transactions with its customer - a third party whose interest (if any) in First Federal's transaction and application of the funds to its loans was *utterly unknown* to First Federal at the time of the supposed harm. The Opinion of the Third District has the potential to hobble all banking business in the state, given that a bank - pursuant to this decision - can be held liable to third parties who are not known to the bank and have no interest in the complained-of transactions at the time they are entered into. This result is not only counter to Ohio law, it is contrary to reason and ordinary business relations. It should plainly be overturned.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. First Federal requests that this Court accept jurisdiction so that the important issues presented in this case can be reviewed on the merits.

Respectfully submitted,



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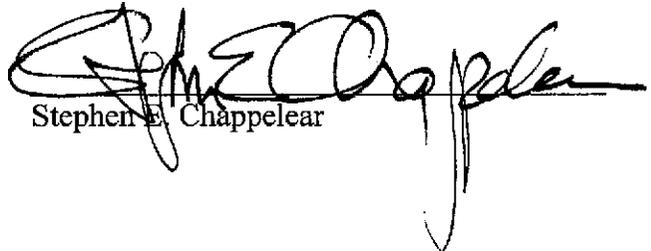
CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum of Appellant First Federal Bank of Ohio in Support of Jurisdiction was sent this 3rd day of January, 2008, by regular U.S. mail, to the following counsel of record:

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**COURT OF APPEALS
THIRD APPELLATE DISTRICT
CRAWFORD COUNTY**

FIRST FEDERAL BANK OF OHIO,

CASE NUMBER 3-07-04

PLAINTIFF-APPELLEE,

v.

JOHN ANGELINI, JR., ET AL.,

OPINION

DEFENDANTS-APPELLEES,

-and-

JEFFREY J. ANGELINI, JR.,

DEFENDANT-APPELLANT,

-and-

GALION BUILDING & LOAN BANK,

DEFENDANT-APPELLANT.

CHARACTER OF PROCEEDINGS: Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed in part and reversed in part and cause remanded.

DATE OF JUDGMENT ENTRY: November 19, 2007

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Willamowski, J.

{¶1} Defendants-appellants Jeff Angelini (“Angelini”)¹ and Galion Building and Loan (“Galion”) bring this appeal from the judgment of the Court of Common Pleas of Crawford County granting summary judgment to plaintiff-appellee First Federal Bank (“the Bank”).

{¶2} On April 1, 2003, the Bank filed a complaint in foreclosure. The complaint alleged in causes of action ten through fifteen that Angelini had signed a promissory note on January 12, 2001. This promissory note was secured in part by mortgages on Angelini’s property. On November 10, 2004, the trial court entered an order of foreclosure, which was appealed. This court reversed the trial court’s decision finding that there were genuine issues of material fact concerning the application of funds to the loans, i.e. whether the parties had intended the Bank to apply the funds to the secured debt or whether it could be applied to the unsecured debt as claimed by the Bank. *First Federal Bank of Ohio v. Angelini et al. [I]*, 160 Ohio App.3d 821, 2005-Ohio-2242, 828 N.E.2d 1064. This court reviewed the contract and found the terms to be ambiguous, meaning that the determination of the intent must be found by a trier of fact after a trial. *Id.* The matter was remanded to the trial court on May 9, 2005. On May 17, 2005, the

¹ This court notes that Angelini filed his notice of appeal “by and through Josiah Mason as Trustee in Bankruptcy for the Estate of Jeffrey J. Angelini.”

matter was stayed for bankruptcy. The stay was lifted on March 15, 2006. On March 20, 2006, Angelini sought leave to amend his answer and add counterclaims, which were done by the bankruptcy trustee. The trial court granted leave to amend on May 4, 2006.

{¶3} On October 25, 2006, the Bank filed a motion for summary judgment against Angelini and Galion. Specifically, the Bank asked for the trial court to grant judgment in its favor on the tenth through the fifteenth causes of action in the amended complaint, to grant judgment in its favor on Angelini's amended counterclaim, and to grant judgment in its favor on Galion's counterclaim. Angelini and Galion both filed memorandums contra to the motion for summary judgment. On January 9, 2007, the trial court entered judgment in favor of the Bank on all claims. Angelini and Galion both filed notices of appeal from this judgment. Angelini raises the following assignment of error.

The trial court erred in granting [the Bank] summary judgment on its claims and on all of [Angelini's] affirmative defenses and counterclaims.

{¶4} Galion raises the following assignments of error.

The trial court committed reversible error, abused its discretion and its decision was against the manifest weight of the evidence which was prejudicial against [Galion] when the trial court granted [the Bank's] motion for summary judgment finding [the Bank] did not act in breach of the promissory note and pledge agreement when it applied \$299,733.32 it received from the proceeds of the refinance of Angelini's Florida property to the Floor Plan loan instead of to the Charge Back Loan.

The trial court committed reversible error and abused its discretion which was prejudicial to [Galion] when the trial court granted summary judgment in favor of [the Bank] and against [Galion] and found that there was no issue of material fact in that [the Bank] did not breach the pledge agreement in the appropriation of a portion of the refinance proceeds from the Sanibel, Florida property while ignoring this Appellate Court's prior finding in this case on the same facts that a material issue of fact does exist as to [the Bank's] appropriation of proceeds collected from the refinance of Anglini's Sanibel, Florida property.

The trial court committed reversible error and abused its discretion which was prejudicial to [Galion] when the trial court granted summary judgment in favor of [the Bank] and found [the Bank] as a matter of law did not extort, convert, and fraudulently coerce [Angelini] into executing the Collateral Pledge Agreement and other documents attendant thereto and did not defraud [Galion] as the subordinate lien holder of [Angelini's] property by misapplying the proceeds from the refinanced Sanibel, Florida property to [the Bank's] under collateralized loan, rather than applying all the proceeds to the charge back loan as required by the loan documents and Collateral Pledge Agreement.

{¶5} When reviewing a motion for summary judgment, courts must proceed cautiously and award summary judgment only when appropriate. *Franks v. The Lima News* (1996), 109 Ohio App.3d 408, 672 N.E.2d 245. "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issues as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the

evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party.” *State ex rel. Howard v. Ferreri* (1994), 70 Ohio St.3d 587, 589, 639 N.E.2d 1189. When reviewing the judgment of the trial court, an appellate court reviews the case de novo. *Franks*, supra.

{¶6} All of the assignments of error claim that the trial court erred in granting summary judgment in favor of the Bank. The trial court’s judgment granted summary judgment on three different claims: 1) the Bank’s tenth through fifteenth causes of action based upon the amount due and owing on the January 12, 2001, promissory note; 2) Angelini’s counterclaims; and 3) Galion’s counterclaims.

{¶7} The first issue to be addressed is whether the trial court properly granted summary judgment on the Bank’s tenth through fifteenth causes of action. This court has previously addressed this same issue when the Bank was awarded summary judgment in October 2004.

Counts 10 through 15 involved the January 12, 2001 promissory note. On appeal, appellants argue that a genuine issue of fact remains as to how certain monies were apportioned by the bank as to that note. Specifically, appellants assert that following the refinancing of a Florida property owned by the Angelinis and specifically referenced in the pledge agreement of the promissory note, proceeds of \$405,203.53 were paid to First Federal. According to appellants, that entire amount was to be used for payment on the January 12, 2001 promissory note only. However, First Federal appropriated \$299,733.32 to other undersecured debts of the Angelinis. According to appellants, that appropriation was improper under the terms of the pledge

agreement. First Federal, on the other hand, contends that it was perfectly within its right to appropriate those proceeds as it did.

*** * ***

*** * * Accordingly, because a material question of fact exists as to the issue of First Federal's appropriation of the \$299,733.32, summary judgment is not appropriate as to counts 10 through 15.**

Angelini I, supra at ¶[27-29]. A review of the record indicates that the same question of material fact, i.e. the issue of the appropriation of the funds, still exists. No new evidence has been presented which, viewed in a light most favorable to the nonmovants, leads to the conclusion that the Bank is entitled to judgment as a matter of law.² Thus, the trial court erred in granting summary judgment on counts 10 through 15.

{¶8} The next issue to be reviewed is whether the trial court properly granted summary judgment as to Angelini's counterclaims against the Bank. Angelini in his amended answer presented the affirmative defenses of extortion, duress and coercion. He also counterclaimed that the Bank had extorted a guaranty agreement, a pledge agreement, and security agreements, thus committing conversion, fraud, constructive fraud, and breach of contract. The subject matter of the conversion claim is the real property. Generally, real property is not a proper subject matter for a conversion claim. *Federal Land*

Bank Ass'n. v. Walton (June 16, 1995), Wyandot App. No. 16-95-9, unreported.,
Thus, the trial court did not err in granting summary judgment on the conversion claim.

{¶9} Angelini's next two claims include fraud and constructive fraud. Angelini claims that the Bank engaged in fraud when it represented to him that it would apply the payments first to the secured loan and then did not do so. The trial court ruled that since the contract was unambiguous, the parole evidence rule prohibited the introduction of extrinsic evidence. However, this court has previously held that the issue of the application of the funds was ambiguous and a question of fact. *Angelini I.* "Terms in a contract are ambiguous if their meanings cannot be determined from reading the entire contract, or if they are reasonably susceptible to multiple interpretations." *Integrity Technical Services, Inc. v. Holland Management, Inc.*, 9th Dist. No. 02CA0009-M, 2002-Ohio-5258, ¶18. Additionally, there is conflicting testimony as to what occurred and when during the time leading up to the signing of the documents. Given these conflicts, the trial court erred in granting summary judgment of the fraud and constructive fraud counterclaims.

{¶10} Finally, Angelini brings a breach of contract claim. The trial court granted summary judgment on this claim because it found that there was no

² In addition, Galion raises questions of fact whether the Bank properly applied insurance costs incurred on other loans that were not secured, as part of the expenses for this loan.

material breach of contract. However, the issue remains whether the Bank appropriately applied the funds paid. Angelini claims that the contract required them to apply the funds to the secured loan and the Bank claims it did not. This question of fact is one for a jury. Thus, the trial court erred in granting summary judgment on this claim.

{¶11} The final issue before this court is whether the trial court properly granted summary judgment to the Bank on Galion's counterclaims. The basis for Galion's counterclaim is a request for declaratory judgment as to the meaning of the contract between Angelini and the Bank as a third party beneficiary. Additionally, Galion brings claims for breach of contract and fraud under the contract. In order to enforce a contract, a party must be an intended beneficiary rather than an incidental beneficiary. *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d 36, 521 N.E.2d 780. "While it is not necessary for a third-party beneficiary to be identified in the contract, the contract must be made and entered into with the intent to benefit the third party." *Doe v. Adkins* (1996), 110 Ohio App.3d 427, 436, 674 N.E.2d 731.

{¶12} In this case, the contract in dispute was between Angelini and the Bank. Although the contract had an effect on Galion, and one interpretation of the contract would benefit Galion while the other would not, Galion is not, by the language of the contract, an intended third party beneficiary. Thus, Galion is not

entitled to enforce the contract and is not entitled to declaratory judgment. Nor is Galion entitled to seek damages for breach of contract because it is not a party to the contract. However, Galion's claim for fraud may be viable if it was foreseeable that Galion's interests would be harmed by the alleged fraud. Since the Bank was aware of Galion's interest when the contract was made, an argument could be made that it knew the alleged fraud would have a negative impact on Galion's interests and the Bank would be liable for those damages. Viewing the evidence in a light most favorable to Galion, reasonable jurors could conclude that the Bank should have known Galion's interests would be harmed by the alleged fraud. Thus, the trial court did not err in granting summary judgment to the Bank on Galion's counterclaims of breach of contract and declaratory judgment. However, the trial court did err in granting summary judgment on Galion's counterclaim for fraud.

{¶13} For the reasons discussed above, the assignments of error are sustained as to the granting of summary judgment on the 10th through the 15th claims of the complaint, on Angelini's counterclaims for fraud, constructive fraud, and breach of contract, and on Galion's counterclaim for fraud. The assignments of error are overruled as to Angelini's counterclaim for conversion and Galion's counterclaims for declaratory judgment and breach of contract.

{¶14} The judgment of the Court of Common Pleas of Crawford County is

Case Number 3-07-04

affirmed in part and reversed in part. The matter is remanded for further proceedings consistent with this opinion.

*Judgment affirmed in part and reversed
in part and cause remanded.*

ROGERS, P.J., and SHAW, J., concur.

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IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO
CRAWFORD COUNTY

FIRST FEDERAL BANK OF OHIO,

CASE NUMBER 3-07-04

PLAINTIFF-APPELLEE,

v.

JOURNAL

JOHN ANGELINI, JR., ET AL.,

ENTRY

DEFENDANTS-APPELLEES,

-and-

JEFFREY J. ANGELINI, JR.,

DEFENDANT-APPELLANT,

-and-

GALION BUILDING & LOAN BANK,

DEFENDANT-APPELLANT.

For the reasons stated in the opinion of this Court rendered herein, it is the judgment and order of this Court that the judgment of the trial court is affirmed in part and reversed in part with costs to be divided equally between the parties for which judgment is rendered and this cause is remanded to that court for further proceedings consistent with the opinion and judgment of this Court.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently

FILED IN THE COURT OF APPEALS
NOV 19 2007
SUE SEEVERS
CRAWFORD COUNTY CLERK

herewith directly to the trial judge and parties of record.

John B. Hillamowski

Stephen R. Shaw

[Signature]

JUDGES

DATED: November 19, 2007

FILED CLERKS OFFICE

2007 JAN -9 PM 12: 32

SUE SEEVERS
CRAWFORD COUNTY

IN THE COURT OF COMMON PLEAS OF CRAWFORD COUNTY, OHIO

First Federal Bank of Ohio,	*	
Plaintiff,	*	Case No. 03 CV 0098
v.	*	
John Angelini, Jr., et al.,	*	Judgment Entry
Defendant.	*	
	*	

This case is before the court on the following motions.

“Plaintiff’s Motion for Summary Judgment on the Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth and Fifteenth Causes of Action of its Amended Complaint.”

“Plaintiff’s Motion for Summary Judgment on Defendant Jeffrey J. Angelini’s Amended Counterclaim.”

“Plaintiff’s Motion for Summary Judgment on Defendant Galion Building and Loan’s Counterclaim.”

“Defendant Jeffrey J. Angelini’s Civ. R. 56(B) Motion for Summary Judgment Against All of the Plaintiff’s Claims Made Against Defendant Jeffrey J. Angelini (To Wit: The Plaintiff’s Tenth, Eleventh, Twelfth, and Thirteenth Causes of Action as Pleaded in the Plaintiff’s Amended Complaint in Foreclosure).”

“Defendant Jeffrey J. Angelini’s Civ. R. 56(A) Motion for Partial Summary Judgment in Favor of Defendant Jeffrey J. Angelini’s Counterclaim No. 5 for Breach of Contract.”

The undisputed facts that are relevant to the issues that are before the court are as follows. On June 26, 1997, Plaintiff First Federal Bank of Ohio (Plaintiff), Defendant John Angelini (John) and his wife Defendant Joyce Angelini (Joyce) executed certain Loan Commitment Agreements. Pursuant to those agreements Plaintiff made one loan to John and Joyce in the amount of \$550,000 and a second loan to Angelini Pontiac –Olds in the amount of \$300,000 (Floor Plan Loan). As part of the transaction for the Floor Plan Loan, John and Joyce executed a promissory note for the principle amount of \$300,000. As security for the Floor Plan Loan, John and Joyce signed a Security Agreement which granted to Plaintiff a security interest in fifty four automobiles as well as open ended mortgages on several parcels of real property located in Morrow and Crawford Counties.

In early January of 2001, Joyce wrote forty checks totaling \$842,579.19, payable to Plaintiff, on an account that they had with United Bank, N.A. (United). Joyce presented these checks to Plaintiff as payment on the Floor Plan Loan. When Plaintiff presented these checks to United for payment, United would not honor them. On January 8, 2001, Plaintiff contacted John and told him that the checks had bounced. Over a period of a few days, discussions took place between John and Plaintiff’s representatives, among whom were, Thomas Moore, President of Plaintiff; Rodney Vose, Vice President of Lending for Plaintiff; and Earl Richard Hottenroth, an attorney for Plaintiff. As a result of those discussions, on January 12, 2001, Plaintiff loaned John and Joyce.

\$849,802.78 (Blanket Loan), so that they could repay Plaintiff the \$842,579.19 for the bounced checks, plus interest, fees and expenses. In return therefore, a "Promissory Note with Personal Guarantors and Collateral Pledgors" was executed by John and Joyce as "Borrowers" and by their son, Defendant Jeffrey Angelini (Jeffrey), as "Collateral/Pledgor". Also executed that day was a "Pledge Agreement with Collateral Security" (Pledge Agreement) which John and Joyce signed as Debtors and Jeffrey signed as Collateral/Pledgor. As security for the Blanket Loan, John and Joyce executed Mortgage Deeds to several parcels of real property.

As additional security for the Floor Plan Loan, John and Joyce also executed an Open Ended Mortgage which granted Plaintiff second and third mortgages on other parcels of property. Upon John and Joyce's execution of this Open Ended Mortgage, Plaintiff released the titles to the vehicles that had been security for the Floor Plan Loan.

John and Joyce also executed a deed to property in Sanibel, Florida which, in accordance with the Pledge Agreement, was to be convey back to John and Joyce upon their payment to plaintiff of \$300,000 from the proceeds of a loan on the Florida property that was, at the time, in the process of being negotiated by John and Joyce.

Also on January 12, 2001, in accordance with the Pledge Agreement, Jeffrey pledged as collateral two parcels of his property. By the terms of the Pledge Agreement Jeffrey's liability to Plaintiff was limited to the value of the additional collateral that he pledged.

On January 19, 2001, United transferred \$101,790.11 to Plaintiff which Plaintiff applied to the Blanket Loan.

John and Joyce did not pay off the Blanket Loan by the maturity date of February 20, 2001, and on February 20, John, Joyce and Jeffrey signed a renewal of the Blanket Loan's Promissory note, which renewal had a maturity date of March 20, 2001.

In February of 2001, John and Joyce obtained a loan on the Sanibel, Florida property from Huntington National Bank and on February 23, 2001, Huntington wired \$405,203.53 of the proceeds from that loan to Plaintiff. Upon receipt of those funds, Plaintiff applied \$299,733.32 to the Floor Plan Loan, which paid that loan in full, and released the mortgages that it held on the properties that secured that loan. In accordance with the Pledge Agreement, Plaintiff deeded the Sanibel property back to John and Joyce. The balance of the funds that Plaintiff received from Huntington was applied to the Blanket loan. It is undisputed that no specific instructions as to how the funds were to be applied accompanied the payment of the proceeds from the refinancing of the Florida property.

John and Joyce did not pay off the Blanket Loan by the maturity date and a second renewal was executed by John, Joyce and Jeffrey on April 2, 2001. Subsequent maturity dates passed without payment and third, fourth and fifth renewals of the Blanket Loan's Promissory Note were executed by John, Joyce and Jeffrey, with the fifth renewal having a maturity date of November 14, 2001.

Meanwhile, on January 25, 2001, John and Joyce borrowed \$513,486.01 from Galion Building and Loan (Galion) and executed a promissory note in that amount. Between January 25, 2001, and April 12, 2001, John and Joyce executed mortgages to secure the loan from Galion on all of the same properties, plus one additional property,

on which they had given mortgages to Plaintiff for the Floor Plan Loan and the Blanket Loan.

On February 22, 2002, John, Joyce and Jeffrey signed a second extension of the loan agreement with Galion. At that time Jeffrey executed mortgages for his interest in three of the properties that John and Joyce had already given mortgages on the Galion Loan.

John and Joyce remained in default on the Blanket Loan and on April 1, 2003, Plaintiff filed its Complaint for Foreclosure in which it named John, Joyce, Jeffrey, Galion, and several other individuals and entities as defendants. All of the defendants filed answers and Jeffrey and Galion filed Counterclaims.

I. Jeffrey's Counterclaims:

Jeffrey's First Counterclaim is for Conversion. In this claim, Jeffrey alleges that, 1) Plaintiff threatened that it would inform authorities about its criminal charges against Jeffrey's father unless Jeffrey pledged collateral to secure obligations that resulted from the checks that had been written by his father with out sufficient funds to cover them; 2) upon Plaintiff's threats to expose his father, Jeffrey pledged two parcels of real property as collateral and guaranteed the loan; 3) after Jeffrey pledged the collateral, Plaintiff did not apply payments made on the loan to his father as it had previously represented it would, knowing that the misapplication of funds would cause default and permit Plaintiff to seize Jeffrey's collateral; 4) upon default, Plaintiff seized Jeffrey's collateral, thereby exercising dominion and control over it; and 5) since Plaintiff had "wrongfully extorted that property" from Jeffrey, it had no legal right to it and therefore it exercised dominion

and control over it in a manner that was inconsistent with Jeffrey's rights of ownership in the property.

Jeffrey's Second Counterclaim is for Fraud. In this claim, Jeffrey alleges that, 1) Plaintiff represented to Jeffrey that if he pledged collateral on the \$850,000 loan that it was making to his father, that it would apply payments made by his father first toward the loans on which Jeffrey had provided guarantees and pledged collateral; 2) Plaintiff concealed from Jeffrey the fact that his father had other obligations with the bank and that it intended to apply payments made by Jeffrey's father to those other obligations rather than to the loan on which Jeffrey had pledged collateral; 3) at the time Plaintiff made the false representations and concealed that information, they knew the falsity thereof or "... made the representations and concealments with such utter disregard and recklessness as to whether they were true or false that knowledge may be inferred;" 4) Plaintiff's false representations and concealments were material to the transaction concerning which they were made; 5) Plaintiff made the false representations and concealed the information with the intent to mislead Jeffrey into relying upon them, and Jeffrey did justifiably rely upon them and pledge collateral and guarantee the loans; 6) thereafter, Plaintiff did not apply the payments that were made as it had represented it would, knowing that this would cause default and permit the seizure of the property that Jeffrey had pledged as collateral; and 7) as a result thereof, Jeffrey was forced to file bankruptcy and incur "compensatory, consequential and incidental damages."

Jeffrey's Third Counterclaim is for Constructive Fraud. In this claim, Jeffrey alleges that, 1) he and Plaintiff were parties to a contract and that they had a special confidential or fiduciary relationship; 2) that relationship afforded the Plaintiff the power

and means to take undue advantage of or exercise undue influence over Jeffrey; 3) Plaintiff's actions were inequitable when, a) it represented to Jeffrey that if he pledged collateral to secure his father's loans that it would apply payments made on those loans first toward Jeffrey's security, b) it concealed the fact that Jeffrey's father had other obligations with the bank and that it would apply payments made on the loan to those other obligations rather than to the loans secured by Jeffrey's collateral, and c) it knew that Jeffrey's reliance on Plaintiff's misrepresentations would result in foreclosure on his collateral; and 4) as a direct and proximate result of Plaintiff's fraud, Jeffrey pledged his property as collateral and Plaintiff seized Jeffrey's collateral upon its misapplication of payments made by Jeffrey's father to the bank, after which Jeffrey was forced to file bankruptcy and "sustained compensatory, consequential and incidental damages."

Jeffrey's Forth Counterclaim is for Breach of Contract. In this claim, Jeffrey alleges that, 1) Plaintiff and Jeffrey entered into an agreement in which Jeffrey pledged certain parcels of property as collateral on the Blanket Loan that Plaintiff made to his father and in exchange Plaintiff agreed "not to foreclose on certain property or bring criminal prosecution against" his father; 2) Jeffrey entered into that agreement and pledged his property as collateral because of Plaintiff's threats that if he did not do so, it would bring criminal charges against his father; 3) after Jeffrey entered into the agreement with Plaintiff and pledged his property as collateral, Plaintiff breached the agreement by not first applying payments that were made by John to portions of the debt collateralized by Jeffrey's property as it had promised and, instead, misapplied the funds received from Huntington Bank from the proceeds of the refinancing of the Florida property to other debts owed by Jeffrey's father; 4) as a result of that misapplication of

payments, Plaintiff foreclosed on Jeffrey's collateral which forced Jeffrey to file bankruptcy because he could no longer pay his other secured and unsecured creditors; and 5) as a result of Plaintiff's breach of the contract with Jeffrey, Jeffrey suffered compensatory, consequential and incidental damages.

Before summary judgment can be granted it must be shown that there remains no genuine issue as to any material fact and that, when construing the evidence most strongly in favor of the non moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ. Rule 56(c). The party seeking summary judgment must specifically delineate the basis upon which the motion is brought and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. When a properly supported motion for summary judgment is made, an adverse party may not rest on allegations or denials in the pleadings but must respond with specific facts showing that there is a genuine issue of material fact.

A. Conversion Claim:

The parties agree that the elements of a claim of civil conversion are, 1) the exercise of dominion or control, 2) over the property of another, 3) in a manner inconsistent with the rights of the owner of the property. Where the parties' agreement as to the elements seems to break down is that the Plaintiff's statement of the elements includes the word "personal" in describing the property that may be converted, while Jeffrey leaves that word out.

Plaintiff offers two primary arguments in support of its motion as to Jeffrey's claim of Conversion. First, that the property that Jeffrey claims was converted was the two parcels of real property that he had pledged as collateral for his father's loan and that

a cause of action for conversion may only be maintained as to personal property, not real property. Second, that Jeffrey cannot show that Plaintiff exercised dominion or control over any of his property. Plaintiff argues that Jeffrey still owns both parcels, that it has not excluded Jeffrey from the property, and that all it has done is, by this foreclosure action, ask the court to determine that, as a result of a default in the loan payments, it has a lawful right to foreclose on the property.

While Jeffrey doesn't assert or present case law in response that suggests that real property may be the subject of a civil claim of conversion, he does argue, 1) that threatening criminal prosecution to gain property is theft by extortion, that conversion is the "civil claim equivalency" of the criminal offense of theft and, therefore, it should be allowed without the requirement that the property converted be personal property; and 2) that included in the property that Jeffrey pledged as collateral was real property and cash, and that his conversion claim "... is not limited in scope merely to realty."

To the best that this court can determine, Jeffrey seems to be arguing that, 1) by foreclosing on the property that Jeffrey had pledged as security for the loan to his father, Plaintiff prevented Jeffrey from using that property to obtain loans with which to meet his other obligations; and 2) since the pledge had been unlawfully obtained by Plaintiff threatening to prosecute Jeffrey's father and because the foreclosure was a result of Plaintiff misapplying funds that had been paid by Jeffrey's father, Plaintiff unlawfully converted that cash which Jeffrey was not able to obtain as a result of his property having been foreclosed upon.

As to the issue of whether or not a cause of action for conversion may be maintain when the property in question is real property, the law is clear that it may not and that

civil conversion, by definition, is the "... exercise of dominion or control wrongfully exerted over personal property of another in denial of or under a claim inconsistent with his rights." *Okocha v. Fehrenbacher* (1995), 101 Ohio App. 3d 309.

As to the issue of whether Jeffrey's Counterclaim for Conversion sets forth a claim for conversion of identifiable, tangible personal property, upon review of the pleadings, the documentary evidence submitted by the parties and the law, this court finds that, 1) it is the property that Jeffrey pledged as collateral that the counterclaim alleges was converted by Plaintiff, and 2) regardless of how much he argues otherwise, there is no evidence before the court that Plaintiff exercised dominion or control over any cash or other personal property belonging to Jeffrey

This court finds further that it is not inclined to create a new Cause of Action of Conversion by Extortion that allows the property that was converted to be real property when no such cause of action has previously existed under Ohio law.

Upon consideration of Plaintiff's Motion for Summary Judgment as to Jeffrey's conversion claim, the documentary evidence that is before the court, the written arguments of the parties and the law, this court finds that there remains no genuine issue as to any material fact and that, when construing the evidence that is before the court in a manner most favorable to the nonmoving party, reasonable minds can only conclude that Plaintiff is entitled judgment as a matter of law.

B. Fraud Claim:

The parties agree that the elements of a cause of action for Fraud are, 1) a representation or, where there is a duty to disclose, a concealment of a fact, 2) which is material to the transaction at hand, 3) made falsely, with knowledge of its falsity, or with

such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, 4) with the intent of misleading another into relying on it, 5) justifiable reliance upon the representation or concealment, and 6) a resulting injury proximately caused by the reliance.

Jeffrey's claim for Fraud alleges two instances of fraudulent misrepresentation and/or concealment; 1) that in oral communications with Jeffrey made prior to his execution of the loan and pledge documents, Plaintiff fraudulently misrepresented to Jeffrey that if he pledged his property as collateral for the loan that it made to his father, that it would apply payments made by his father first toward the loan upon which Jeffrey had pledged the collateral, and that once payments had been made that were equal to or more than the value of the property that he pledged as collateral, that his collateral would be released, and 2) that Plaintiff fraudulently concealed from Jeffrey that his father owed other obligations to the bank and that it intended to apply payments made by Jeffrey's father to those other obligations rather than to the loan upon which Jeffrey had pledged his property as collateral.

As to the fraudulent misrepresentation portion of Jeffrey's Fraud claim, Plaintiff asserts that, 1) while the Parole Evidence Rule does not preclude a party from presenting extrinsic evidence that he was fraudulently induced into entering into a written agreement, he may not do so when the prior oral statements contradict the clear and unambiguous terms of the subsequent written agreement and, since the statements that Jeffrey alleges that Plaintiff's representatives made to fraudulently induce him to pledge his property contradict the clear and unambiguous language of the written agreements, Jeffrey is precluded from bringing his claim for fraudulent inducement, and 2) Jeffrey's

fraudulent misrepresentation claim is barred because he failed to read the loan documents before he signed them.

Jeffrey asserts in response that, 1) Plaintiff "lied" to Jeffrey when they told him that they would use the Florida property as security for the Chargeback Loan and when they told him that they would first apply any payments made by his father to the portion of the loan that was secured by the collateral that he pledged as security for the loan, and 2) that Plaintiff fraudulently represented that "they would prepare a Schedule of Release of Properties that would illustrate that Jeffrey's properties would be released first.

Jeffrey argues in support thereof that, 1) Jeffrey has presented evidence by way of affidavit that Plaintiff's representatives made those fraudulent misrepresentations to induce him to pledge his property, 2) that the "personal visit" made by bank officials to Jeffrey is evidence that a fiduciary relationship existed between Jeffrey and the bank, 3) that the Banks representatives agree that they never intended to apply payments made by Jeffrey's father first to the portion of the Chargeback Loan that was secured by Jeffrey's property and, 4) genuine issues of material fact exist as to Jeffrey's Fraud claims that preclude the granting of Summary Judgment on Jeffrey's Counterclaim for Fraud.

As to the issue of threats made to Jeffrey by Plaintiff's representatives, throughout the briefing process, Jeffrey has repeatedly claimed that Plaintiff's representative came to him and personally threatened "either pony up or your father goes to jail." A review of the evidence that is before the court, however, shows a slightly different picture. From John and Jeffrey's depositions, the first time that there was any contact between Plaintiff and either of the Angelini's regarding the checks was on January 8, 2001, when Vose called John and said, "We have a problem, check's are bouncing." John responded, "I'll

be right there," and went to the bank to meet with Vose, Hottenroth and other Bank officials. By the end of that meeting, John clearly believed, from the discussions that took place, that if he was not able to make arrangements with Plaintiff to cover the checks that had bounced, that he was at risk of being prosecuted for passing bad checks

The next day, January 9, 2001, the bank officials came to John's office and talked to John about setting up the loan and payback schedule that ultimately became the Chargeback Loan. The Bank was clear that it would need to have security for the entire amount of the loan and that, if John didn't have enough, that they would accept a pledge by Jeffrey, of his property to cover the balance. While those discussions were going on over those two days, John apparently talked to Jeffrey about the situation he was in with Plaintiff and asked him if he would consider pledging his property. Jeffrey agreed and at the end of the meeting on January 9, 2001, John called Jeffrey into the room and said, "... here's the situation, we owe these people money for these checks that haven't cleared the account, we need you to pledge your property or else they will seek legal action and send me to jail." According to Jeffrey, one of the bank officials who was present acknowledged that that was the bank's position.

On January 12, 2001, the Bank officials once again came to John's office for the purpose of closing on the loan and obtaining signatures on the loan documents. Jeffrey was only present when he came into the room to sign the documents. Jeffrey acknowledges that he signed them without reading them.

It was apparently in the discussions that Plaintiff had with John and/or Joyce that the representations that Jeffrey claims were stated by Plaintiff, that they would first apply payments made by John to the Chargeback Loan and specifically first to the portion of

the loan secured by Jeffrey's collateral, were made. The Plaintiff's representatives deny having made those representations.

Jeffrey also argues that, 1) the statement in the Pledge Agreement that the Florida property was pledged as security for the Chargeback Loan is a further affirmative representation by Plaintiff that they would apply the payment that John made from the proceeds of the refinancing of that property to the Chargeback Loan and that that statement was fraudulently made because those funds were not so applied, and 2) that in the Pledge Agreement, Plaintiff "... fraudulently represented that they would prepare a Schedule of Release of Properties that would illustrate that Jeffrey's property would be released first."

A review of the language of the Pledge Agreement shows that while it does provide that "... First federal will prepare a schedule of release of properties...", it makes no mention of a schedule of release of properties that shows that Jeffrey's property would be released first. As set forth above, Jeffrey agrees that he signed the Pledge Agreement without reading it and was, therefore, not aware of those provisions at the time he executed the contract. Accordingly, whether or not Plaintiff ultimately violated any provisions of the Pledge Agreement are matters for consideration under Jeffrey's Breach of Contract Claim.

As to the fraudulent concealment portion of Jeffrey's Fraud claim, Plaintiff argues that Jeffrey's fraudulent concealment claim fails because he did not have a fiduciary relationship with Plaintiff and, therefore, there was no duty placed upon Plaintiff to disclose information about any of Jeffrey's father's other dealings with the bank.

Jeffrey argues in response that Plaintiff fraudulently concealed the fact that Jeffrey's father had other obligations with the Bank to which it intended to apply payments made by him and that a fiduciary relationship existed between Plaintiff and Jeffrey that gave rise to a duty upon the Bank not to conceal such information.

As to Jeffrey's Fraudulent Misrepresentation claim, the provisions of the Pledge Agreement that are relevant to the issue of release of properties are as follows.

"3. Jeffrey J. Angelini shall sign the promissory note as a collateral pledgor for the purpose of pledging as additional collateral that property describes in Exhibit B, subject to the agreement by all parties that upon execution of the mortgage documents, promissory note documents, pledge and collateral agreements, that First Federal will prepare a schedule of release of properties which will be made upon dollar values received by first Federal upon the outstanding debt obligation ...

"6. ... First federal may release such parcels of property offered as security by Debtors and Pledgor/Guarantor as it deems proper and in such order as it may determine based upon a schedule for release of the individual parcels of property denoted by a specific release price for each parcel."

Upon consideration of Plaintiff's Motion for Summary Judgment as to Jeffrey's Fraud claim, the documentary evidence that is before the court, the written arguments of the parties, and the law, this court finds that there remains no genuine issue as to any material fact and that, when construing the evidence that is before the court in a manner most favorable to the nonmoving party, reasonable minds can only conclude that, 1) the written Pledge Agreement that Jeffrey signed clearly and unambiguously provides that it is within the discretion of the Plaintiff to determine in what order the parcels of property that were pledged as security will be released and upon what payment such release will take place, 2) there is no evidence before the court to support a finding that a fiduciary

relationship existed between Plaintiff and Jeffrey that required Plaintiff to disclose to Jeffrey information concerning any other obligations that his father may have had to the bank, and 3) Plaintiff is entitled to judgment as a matter of law on Jeffrey's Fraud claims.

C. Constructive Fraud Claim:

Jeffrey does not dispute that to succeed on his Constructive Fraud claim he must show that in the dealings in question in this case he had a fiduciary relationship with Plaintiff.

Upon consideration of Plaintiff's Motion for Summary Judgment as to Jeffrey's Constructive Fraud claim, the written arguments of the parties, the documentary evidence that is before the court and the law, this court finds that there remains no genuine issue as to any material fact and that, when construing the evidence that is before the court in a manner most favorable to the nonmoving party, reasonable minds can only conclude that, as set forth above, there is no evidence before the court to support a finding that a fiduciary relationship existed between plaintiff and Jeffrey and, therefore, Plaintiff is entitled to Judgment as a matter of law on Jeffrey's Constructive Fraud claim.

D. Breach of Contract Claim:

The thrust of Jeffrey's Breach of Contract claim and his Motion for Partial Summary Judgment on that claim is that Plaintiff breached its agreement with Jeffrey when it, 1) did not apply all of the funds that it received from Huntington Bank from the refinancing of the Florida property to the Blanket Loan as required by the terms of the Pledge Agreement, 2) did not apply all funds received from John first to the portion of the Blanket Loan that was secured by the collateral pledged by Jeffrey, as required by the oral agreement that the parties entered into prior to the execution of the written loan

agreements, and 3) failed to prepare a "schedule of release of properties" as it was required to do by the terms of the Pledge agreement.

Central to Jeffrey's Breach of Contract claim are the issues of, 1) whether or not the express terms of the written Pledge Agreement required that Plaintiff apply all the funds received from the proceeds of the refinancing of the Florida property to the Blanket Loan and, 2) whether the admitted failure of Plaintiff to prepare a "schedule of release of properties" was a material breach of the written Pledge Agreement.

A review of the Pledge Agreement shows two places where the Florida property is mentioned.

Paragraph three on page two states:

"WHEREAS, Angelini has now requested of First Federal its forbearance upon the collection of said checks and has offered certain security in the form of mortgages upon various properties and the conveyance of a property in Florida to First Federal as additional security, *all of which security shall act as a new credit item to satisfy said outstanding returned checks*; and ..."

The first full paragraph on page five states:

"7. First Federal received from Debtors a quit-claim deed to a certain property listed in Debtors' Exhibit C and located in Sanibel, Florida. First Federal specifically agrees that it will reconvey said property to Debtors upon the receipt of \$300,000, in cash, as the proceeds of a certain loan which is currently being negotiated by Debtors."

Jeffrey strenuously argues that the language "... all of which security [which included the Florida property] shall act as a new credit item to satisfy said outstanding returned checks..." clearly and unambiguously states that Plaintiff expressly agreed that funds that John and Joyce received from the refinancing of the Florida property that they

then paid to Plaintiff was to be applied only to the Blanket Loan and not to any other loans that John and Joyce had with Plaintiff.

Upon consideration of documentary evidence that is before the court, the written arguments of the parties and the law, this court finds that, 1) the fact that the Florida property was expressly pledged as security for the Blanket loan does not, absent a specific agreement to that effect, require Plaintiff to apply funds that John and Joyce paid to it from the refinancing of that property to the Blanket Loan as opposed to other outstanding loans that John and Joyce had with Plaintiff, 2) Plaintiff did not act in breach the Pledge Agreement when it applied the funds paid by John and Joyce from the proceeds of the refinancing of the Florida property in part to the Floor Plan Agreement rather than applying it all to the Blanket Loan Agreement.

As to the issue of whether the admitted failure of Plaintiff to prepare a "schedule of release of properties" was a material breach of the written Pledge Agreement, the critical provisions in the Pledge Agreement state as follows:

"3. Jeffrey J. Angelini shall sign the promissory note as a collateral pledgor for the purpose of pledging as additional collateral that property describes in Exhibit B, subject to the agreement by all parties that upon execution of the mortgage documents, promissory note documents, pledge and collateral agreements, that First Federal will prepare a schedule of release of properties which will be made upon dollar values received by first Federal upon the outstanding debt obligation ...

"6. ... First federal may release such parcels of property offered as security by Debtors and Pledgor/Guarantor as it deems proper and in such order as it may determine based upon a schedule for release of the individual parcels of property denoted by a specific release price for each parcel."

Under the clear language of these provisions, it was the parties agreement that, upon the execution of the note and mortgage documents and Pledge Agreement, Plaintiff was to prepare a schedule of release of properties the would show a dollar value assigned to each property that was pledged as collateral and how those properties would be released upon the payment of those amounts. It is also clear that the order in which the properties would be released was, by agreement of the parties, to be determined by Plaintiff.

The fact that Plaintiff did not provided the "schedule of release of properties" did not effect in any way the order in which properties would be released or the manner in which Plaintiff would apply payments made by John and Joyce on their obligations to Plaintiff. The only thing it would have done is, after the agreements were signed, place Jeffrey on notice as to the values that Plaintiff placed on the individual properties that had been pledged as collateral and how it would release those properties upon the payment of those amounts. While Jeffrey may believe that the agreement that he had with Plaintiff was otherwise, if he had read the documents that he signed he would have known that to which he was agreeing.

Upon consideration of the documentary evidence that is before the court, the written arguments of the parties, and the law, this court finds that, while Plaintiff agrees that it failed to prepare the "schedule of release of properties" as set forth in the Pledge Agreement, its failure to do so was not material to the agreement and does not constitute a material breach of the Pledge Agreement by Plaintiff.

The remaining issue for consideration under Jeffrey's Breach of Contract claim is whether Plaintiff breached the Pledge Agreement when it did not apply all funds received

from John first to the portion of the Blanket Loan that was secured by the collateral pledged by Jeffrey. Jeffrey argues that Plaintiff had orally agreed to do so before he signed the Promissory Note and Pledge Agreement.

As set forth above, however, if such assurances were made by plaintiff prior to the execution of the written loan agreements, they are in direct contradiction to the express terms of the Pledge Agreement which contains no such provision and, as set forth above, leaves the determination of values to be assigned to properties and the order of application of payments and release of mortgages, to the determination of Plaintiff.

Upon consideration of the documentary evidence that is before the court, the written arguments of the parties, and the law, this court finds that, 1) the agreement between the parties did not contain a requirement that Plaintiff apply all funds received from John first to the portion of the Blanket Loan that was secured by the collateral pledged by Jeffrey, and 2) Plaintiff did not breach the Pledge Agreement by its application of funds paid by John to John, Joyce and Jeffrey's obligations to Plaintiff.

In accordance with the foregoing, upon consideration of Plaintiff's Motion for Summary Judgment as to Jeffrey's Breach of Contract claim, the written arguments of the parties, the documentary evidence that is before the court and the law, this court finds that there remains no genuine issue as to any material fact and, when construing the evidence that is before the court in a manner most favorable to the nonmoving party, reasonable minds can only conclude that, 1) Plaintiff is entitled to judgment as a matter of law on Jeffrey's Breach of Contract claims, and 2) Jeffrey's Motion for Partial Summary Judgment on his Breach of Contract Claim is found not well taken.

II. Galion's Counterclaims:

In its counterclaim, Galion claims that, 1) at the time that Plaintiff and John, Joyce and Jeffrey signed the Blanket Loan documents, John and Joyce had additional obligations owed to Plaintiff which were "unsecured or under secured/under collateralized;" 2) prior to the execution of those documents, Jeffrey had no legal/financial obligations to Plaintiff, 3) at the time of the execution of those documents, Plaintiff was aware that John and Joyce owed money to other creditors, including Galion, "who were in a more secure position than Plaintiff as it pertained to its separate floor plan that was grossly under collateralized;" 4) pursuant to the Pledge Agreement, Plaintiff was required to apply all of John and Joyce's payment from the proceeds of their refinancing of the Florida property to the Blanket Loan rather than to the under secured/collateralized floor plan loan; 5) Plaintiff knowingly, wrongfully and maliciously misapplied that payment to the under collateralized floor plan loan with the specific intent and design to defraud John and Joyce's other creditors including Galion; 6) in addition to misapplying the payment from the proceeds of the refinancing of the Florida property, in an effort defraud Galion and other creditors, Plaintiff applied forced place insurance premiums and taxes that it had incurred on other properties on which it had loans with John and Joyce that were under collateralized, against the security for the Blanket Loan; 7) if Plaintiff had not misapplied the funds paid by John and Joyce from the proceeds of the refinancing of the Florida property and had not added forced place insurance and taxes from other properties to the properties securing the Blanket Loan, the balance due on the blanket loan would have been minimal and Galion would be in a secure position as to its loan to John and Joyce under which it also has security interests in the same properties that

Plaintiff has security interests under the Blanket Loan, and which Plaintiff has wrongfully encumbered; and 8) as a result of Plaintiff's misapplication of funds and continued wrongdoing, Galion has been forced to incurred costs and expenses, including attorney fees, to protect its security interest in those properties.

In its Counterclaim, Galion seeks, 1) a Declaratory Judgment that, a) Plaintiff be required to apply the payment made by John and Joyce from the proceeds from the refinancing of the Florida property to the Blanket Loan, and b) any forced place insurance, back taxes or other administrative fees that are not associated with the properties specifically identified in the Pledge Agreement be determined null and void and that they be deducted from the balance due and owing on the Blanket Loan, and 2) damages that it has sustained as a result of Plaintiff's misapplication of funds and misapplication of forced place insurance and taxes.

In its Motion for Summary Judgment, Plaintiff asserts that, 1) since Galion is neither a party to nor an intended third party beneficiary of the Blanket Loan Agreements that John, Joyce and Jeffrey had with Plaintiff, Galion does not have standing to seek a Declaratory Judgment as to the parties' rights under those contracts; and 2) Galion's claims that Plaintiff acted fraudulently when it misapplied the proceeds from the refinancing of the Florida property fail because Plaintiff's application of those funds was consistent with its agreements with John, Joyce and Jeffrey, and with Galion's January 25, 2001, agreement with John and Joyce.

Galion responds that, 1) they are an intended beneficiary of the Pledge Agreement because, a) Plaintiff and John and Joyce had knowledge of the loans that John and Joyce had with Galion, b) Plaintiff was aware of John and Joyce's financial problems and that

they were insolvent, c) when Plaintiff breached the terms of the Pledge Agreement and applied the majority of the proceeds from the refinancing of the Florida property to the Floor Plan Loan, it did so with knowledge of the possibility that doing so would cause injury to other secured mortgage holders, including Galion, and d) Plaintiff's failure to apply all of the proceeds to the Blanket Loan and release Jeffrey's property, has directly effected Galion's rights and interests as a secured creditor of John, Joyce and Jeffrey Angelini; and 2) that Plaintiff fraudulently coerced Jeffrey into pledging his property and then wrongfully breached the Pledge Agreement by failing to properly apply the proceeds of the refinancing of the Florida property and by failing to prepare the Schedule of Release of Properties as required by the Pledge Agreement.

Only a party to a contract or an intended third-party beneficiary of a contract may bring an action on a contract. *Bently Koepke, Inc. v. Jeffrey Allen Corp.* (Feb. 27, 1998), Hamilton App. C-970137, 998. A third person who is not a party to a contract has no enforceable rights under a contract unless the contracting parties intended to create such rights. Although such a third party who claims to be an intended beneficiary of a contract need not be named in the contract, that party must have been contemplated by the parties at the time that they entered into the contract. *Gentile v. Ristas*, 160 Ohio App. 3d 765, (2005).

As to Galion's claims for Declaratory Judgment, upon consideration of the documentary evidence that is before the court, the written arguments of the parties, and the law, this court finds that, there is no evidence before the court to support a finding that, at the time Plaintiff, John, Joyce and Jeffrey executed the Blanket Loan documents, any of them intend that Galion would be a direct beneficiary of those contracts.

Upon consideration of Plaintiff's Motion for Summary Judgment as to Galion's Declaratory Judgment claims, the written arguments of the parties, the documentary evidence that is before the court and the law, this court finds that there remains no genuine issue as to any material fact and, when construing the evidence that is before the court in a manner most favorable to the nonmoving party, reasonable minds can only conclude that, Plaintiff is entitled to judgment as a matter of law.

As to Galion's claims for damages for Breach of Contract and Fraud, as this court has found above, 1) Plaintiff did not act in breach of the Pledge Agreement when it applied a portion of the funds paid by John from the proceeds of the refinancing of the Florida property to the Floor Plan Loan, and 2) Plaintiff's failure to prepare the Schedule of Release of Properties was not a material breach of the Pledge Agreement.

In accordance with the foregoing, upon consideration of Plaintiff's Motion for Summary Judgment as to Galion's claim for damages for Fraud, the documentary evidence that is before the court, the written arguments of the parties and the law, this court finds that there remains no genuine issue as to any material fact and, when construing the evidence that is before the court in a manner most favorable to the nonmoving party, reasonable minds can only conclude that, Plaintiff is entitled to judgment as a matter of law.

III. Plaintiff's Motion for Summary Judgment on the Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth and Fifteenth Causes of Action.

Jeffrey's Motion for Summary Judgment on Plaintiff's Tenth, Eleventh, Twelfth and Thirteenth Causes of Action.

Plaintiff asserts that John and Joyce are in default on the Fifth Renewal of the Promissory note on the Blanket Loan and therefore they are entitled to a judgment of foreclosure on the various mortgages that were pledged as security for that loan.

Jeffrey responds with his own Motion for Summary Judgment on Plaintiff's Tenth, Eleventh, Twelfth and Thirteenth causes of action in which he sets forth all of the same arguments that are set forth above.

Upon consideration of this court's prior findings herein, the documentary evidence that is before the court, the written arguments of the parties and the law, this court finds that, as to Plaintiff's Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth and Fifteenth Causes of Action, there remains no genuine issue as to any material fact and, when construing the evidence that is before the court in a manner most favorable to the nonmoving party, reasonable minds can only conclude that, John and Joyce have not paid the balance due on the Fifth Renewal of the Promissory Note and Pledge Agreement and Plaintiff is entitled to judgment as a matter of law.

In accordance with the foregoing it is hereby ordered that:

- 1) Defendant Jeffrey J. Angelini's Civ. R. 56(A) Motion for Partial Summary Judgment in Favor of Defendant Jeffrey J. Angelini's Counterclaim No. 5 for Breach of Contract is denied;
- 2) Defendant Jeffrey J. Angelini's Civ. R. 56(B) Motion for Summary Judgment Against All of the Plaintiff's Claims Made Against Defendant Jeffrey J. Angelini (To Wit: The Plaintiff's Tenth, Eleventh, Twelfth, and Thirteenth Causes of

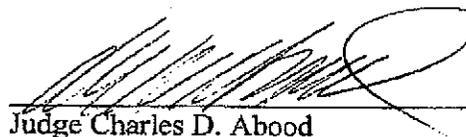
Action as Pleaded in the Plaintiff's Amended Complaint in Foreclosure) is denied;

- 3) Plaintiff's Motion for Summary Judgment on Defendant Jeffrey J. Angelini's Amended Counterclaim is well taken and is granted and said Counterclaim is hereby dismissed;
- 4) Plaintiff's Motion for Summary Judgment on Defendant Galion Building and Loan's Counterclaim is well taken and is granted and said Counterclaim is hereby dismissed;
- 5) Plaintiff's Motion for Summary Judgment on the Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth and Fifteenth Causes of Action of its Amended Complaint is well taken and is granted.

In accordance with the foregoing, it is hereby ordered that Plaintiff is to file its Judgment Entry of Foreclosure within thirty days of the date of this Entry and this case is continued for final pretrial on all of Plaintiff's remaining causes of action on January 15, 2007, as previously scheduled.

In the interest of judicial economy, in the event that any of the parties wish to appeal from this decision prior to proceeding to trial on the Counts that remain, this court finds further that there is no just cause for delay.

January 9, 2007


Judge Charles D. Abood