

12/11/07

STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-CV-07-017

Key Equipment Finance, Inc.,

Plaintiff

v.

ORDER

Benjamin Hawkins and Timothy Morse,

Defendants

v.

TD Banknorth, N.A.,

Third-party Defendant

This matter is before the Court on the Motion by Defendant Timothy Morse to Vacate Judgment Pursuant to M.R. Civ. P. Rules 60(b) and (6). Plaintiff filed an objection to the motion.

Plaintiff commenced this action with the filing of its Complaint on November 7, 2006. Defendant Morse was served with the Complaint on October 20, 2006, and subsequently filed an answer to the Complaint. On December 20, 2006, Plaintiff moved for summary judgment against both Defendants. Defendant Morse did not file an objection to the motion. In April 2006, the Court granted Plaintiff's Motion for Summary Judgment against Defendant Morse.

On October 18, 2007, Defendant Morse moved to vacate the judgment entered against him. In his motion, Defendant Morse asserts that he did not respond to the motion for summary judgment because of certain representations that Plaintiff made in support of its motion, which representations Defendant Morse now maintains were fraudulent. Plaintiff argues that Defendant Morse's motion is "an inappropriate collateral attack on the [Bankruptcy Court] Order." (*Opposition to Defendant Morse's Motion to Vacate Judgment Pursuant to Rules 60(B)(3) and 60(B)(6)*, p. 3). Plaintiff also contends that the representations upon which Plaintiff relies were not fraudulent.

Discussion

M. R. Civ. P. 60(b)(3) authorizes the Court to relieve a party from a judgment if the party can prove fraud on behalf of the party for whom judgment was entered. In essence, Defendant Morse

000019

alleges that Plaintiff fraudulently induced Defendant Morse not to oppose Plaintiff's Motion for Summary Judgment. Specifically, Defendant Morse contends that the fraud consists of (a) describing the negotiations between Plaintiff and the purchaser (JWA Holdings Corp.) of the assets that are the subject of this matter as "substantial" and (b) the representation that the sale price of \$500,000 for the assets was "reasonable".

Preliminarily, the Court notes that the representations about which Defendant Morse complains were included among the findings in an agreed-upon order entered in the Bankruptcy Court.¹ The alleged fraudulent representations are, therefore, actually findings made by the Bankruptcy Court. Nevertheless, Defendant Morse evidently argues that in its representations to the Bankruptcy Court and the Superior Court², Plaintiff committed fraud.

Even if the representations can be attributed to Plaintiff, the Court is not persuaded that the representations are false, or that Defendant Morse chose not to respond to Plaintiff's Motion for Summary Judgment as the result of the representations. With respect to the value of the assets, Defendant Morse has at best demonstrated that there might be a difference of opinion regarding the value of the assets. The fact that the opinions of the Plaintiff, JWA Holdings Corp., and the Bankruptcy Court differ from the opinions of Defendant Morse's proffered experts does not render the representations invalid and certainly does not make the representations fraudulent.

Similarly, Defendant Morse has not demonstrated that describing the negotiations between Plaintiff and JWA Holdings Corp. as substantial was fraudulent. "Substantial" is in many ways a subjective term. While it is often difficult, if not impossible, to assess the accuracy of a person's use of a subjective term, the Court can unquestionably conclude that use of the term "substantial" in this case was not fraudulent.

"Substantial" is not exclusively a quantitative term. Neither the number of parties involved in the negotiations, nor the number of communications in the negotiation process is controlling. In some cases, negotiations can be substantial even if there is one communication between two parties. Here, the record demonstrates that Plaintiff and JWA Holdings Corp. engaged in a number of

¹ The Order was entered in *Morse Brothers, Incorporated, M.B Bagging Corp., No. 224, LLC, and Dancing Bear Realty Trust, Cases 05-21919 through 05-21922 (D. Me.)*.

² Judgment was entered against Defendant Morse in the Superior Court before the matter was transferred to the Business and Consumer Docket.

meaningful communications regarding the sale of the assets. Simply stated, Defendant Morse has not proven that use of the term substantial was inaccurate in this case.

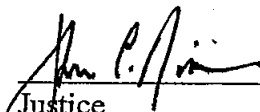
The Court is equally unconvinced that Defendant Morse decided not to oppose the motion for summary judgment because of representations made by Plaintiff in support of the motion. In his affidavit, Defendant Morse identifies the reasons that he did not oppose the motion. In particular, Defendant Morse asserted that when he decided not to respond to Plaintiff's motion for summary judgment, he "took into consideration that an active defense was being maintained by his co-defendant, Benjamin Hawkins. [Defendant Morse] assumed that Mr. Hawkins' defense would work to his benefit because the Court would take Hawkins' defense and [Mr. Morse's] express denial of liability in his Answer into account and deny [Plaintiff's] motion for summary judgment." (*Affidavit of Timothy Morse, par. 5*). In other words, Defendant Morse made a strategic decision, unrelated to the Plaintiff's alleged representations, not to oppose Plaintiff's motion. To prevail on a claim of fraud, a party must prove that he "justifiably [relied] upon the representation as true and [acted] upon it to his damage." *Sargent v. Sargent, 622 A.2d 721, 723 (Me. 1993) (citing, Diversified Foods, Inc. v. First Nat'l Bank of Boston, 605 A.2d 609, 615 (Me. 1992))*. Here, Defendant Morse has not established this necessary element to sustain his allegation of fraud.³

Conclusion

Based on the foregoing analysis, Defendant has failed to demonstrate that the alleged representations were false, or that Defendant Morse did not oppose Plaintiff's Motion for Summary Judgment because of Plaintiff's representations. Accordingly, the Court denies the Motion by Defendant Timothy Morse to Vacate Judgment Pursuant to M.R. Civ. P. Rules 60(b) and (6).⁴

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Order into the docket by reference.

Date: 12/11/07


Justice
Maine Business and Consumer Docket

³ Given the lack of evidence of fraud, Defendant Morse's claim that Plaintiff conspired with JWA Holdings Corp. to commit fraud also fails.

⁴ Because Defendant Morse has not established that the judgment was entered as the result of fraudulent representations made by Plaintiff, the Court does not reach Plaintiff's contention that the Bankruptcy Court's Order is *res judicata* on the reasonableness of the value of the assets and the commercial reasonableness of the sale.