
This opinion is uncorrected and subject to revision before
publication in the New York Reports.

1 No. 1
J.A.O. Acquisition Corp., et al.,
 Appellants,

 v.
Jeffrey D. Stavitsky, et al.,
 Defendants,
First Union National Bank, &c.,
 Respondent.
(And a Third-Party Action.)

Jay D. Fischer, for appellants.
Louis Smith, for respondent.

GRAFFEO, J.:

In this action arising out of a stock purchase
transaction, we conclude that plaintiff did not raise a triable
issue of fact on its negligent misrepresentation and fraud claims

against defendant bank. We therefore affirm the order of the Appellate Division dismissing the complaint.

In June 1997, plaintiff J.A.O. Acquisition Corp. entered into an agreement to purchase the stock of D.B. Brown, Inc., a meat and fish distributor, from Jeffrey Stavitsky and W. Paul Brogowski.¹ The agreement listed D.B. Brown's net worth at \$2.2 million and, as relevant here, obligated J.A.O. to satisfy D.B. Brown's loans from its bank, defendant First Union National Bank, formerly known as CoreStates Bank, N.A. (CoreStates). Prior to the stock transfer, J.A.O. undertook a due diligence review, finding that D.B. Brown was worth about \$1 million less than what Stavitsky and Brogowski had represented. As a result, J.A.O. and D.B. Brown amended the stock purchase agreement by lowering D.B. Brown's net worth to approximately \$1.17 million and providing for a price adjustment to be made within 90 days after the closing, at which time D.B. Brown's net worth as of the date of the closing would be determined.

Chase Manhattan Bank acted as J.A.O.'s primary financier for the transaction. Pursuant to the loan arrangement between Chase and J.A.O., Chase agreed to loan J.A.O. funds sufficient to purchase D.B. Brown's stock, including repayment of D.B. Brown's debt to CoreStates. As a condition of its financing, Chase required J.A.O. and each of its affiliates to

¹ J.A.O. Acquisition Corp. is a wholly owned subsidiary of plaintiff J.A.O. Holding Company, Inc. These entities will be referred to collectively as J.A.O.

demonstrate excess borrowing availability of at least \$2 million on the date of the closing. On October 9, 1997, Chase forwarded an outline of the terms of this loan agreement -- including the borrowing availability requirement -- to CoreStates.

On the afternoon of October 10, 1997, the scheduled closing date, CoreStates sent a payoff letter to D.B. Brown, calculating that D.B. Brown's outstanding liabilities to CoreStates amounted to \$26,564,628.29. Earlier that day, checks previously written by D.B. Brown were presented to CoreStates for payment, resulting in a deficiency of about \$1.3 million in D.B. Brown's operating account.² The debt balance in the payoff letter, however, did not include the \$1.3 million as part of D.B. Brown's obligations to CoreStates. That same day, Chase determined that J.A.O. and its affiliated companies had not met the \$2 million borrowing availability threshold. To satisfy that prerequisite, Stavitsky invoiced a number of foreign receivables valued in excess of \$1 million in order to convince Chase that J.A.O. had complied with the availability requirement. Chase agreed to finance the transaction and the stock transfer was consummated. The following business day, CoreStates requested payment of the \$1.3 million from Chase; Chase complied and paid

² In the months preceding the closing date, D.B. Brown often incurred a negative balance in its operating account and then borrowed against its commercial loan account to cover a particular day's check presentments.

the debt.³

J.A.O. commenced this action against CoreStates asserting claims for negligent misrepresentation and fraud. Specifically, J.A.O. alleged that CoreStates misrepresented D.B. Brown's outstanding liabilities by negligently failing to include in the payoff letter the \$1.3 million negative balance in D.B. Brown's operating account. J.A.O. contended that it would not have purchased D.B. Brown's stock had it known it would become liable to pay this additional debt to CoreStates, and that Chase would not have agreed to finance the transaction because the \$2 million excess borrowing availability requirement would not have been met. Alternatively, J.A.O.'s fraud claim posited that CoreStates intentionally concealed the \$1.3 million debt to cause J.A.O. to complete the asset purchase.

CoreStates moved for summary judgment dismissing the complaint, arguing that there was no privity or special relationship between it and J.A.O., the payoff letter was correct in listing only loans and J.A.O. did not reasonably rely on the letter. Supreme Court granted the motion and dismissed the complaint, holding that J.A.O. could not satisfy the privity or reliance elements. The Appellate Division affirmed for the same

³ The financial health of D.B. Brown was tenuous over the next few years. In March 2000, D.B. Brown contracted to sell its assets to another company and, upon doing so, ceased operations. After creditors filed an involuntary bankruptcy petition, D.B. Brown was granted a discharge in bankruptcy in 2001.

reasons. We granted J.A.O. leave to appeal.

A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information (see Parrott v Coopers & Lybrand, 95 NY2d 479, 484 [2000]; Murphy v Kuhn, 90 NY2d 266, 270 [1997]). Assuming that J.A.O. can meet the first two elements, we conclude that J.A.O. failed to raise a triable question of fact as to the reliance requirement because the evidence established that J.A.O.'s decision to purchase D.B. Brown's stock was not dependent upon the payoff letter.

After entering into the June 1997 stock purchase agreement, J.A.O. performed its own due diligence review of D.B. Brown's assets and liabilities, determining that the company was worth less than the amount represented in the agreement. As a result, the parties amended the stock purchase agreement to reflect a lower net worth and negotiated a post-closing price adjustment procedure. Similarly, as the Appellate Division recognized, J.A.O. should have had knowledge that it was not unusual for D.B. Brown to overdraw its operating account. Even before Stavitsky invoiced a number of questionable receivables,⁴

⁴ The foreign receivables were ineligible for inclusion in the borrowing availability calculation because they were not

it was evident that J.A.O. strongly desired to complete the transaction. Indeed, J.A.O.'s chief financial officer testified that the amount in the payoff letter had no effect on J.A.O.'s desire to purchase D.B. Brown's stock. It is clear that J.A.O.'s decision to move forward with the deal resulted from its own investigation of D.B. Brown's condition, not any reliance on the information contained in the payoff letter.

Furthermore, J.A.O.'s contention that Chase would have refused to close on October 10, 1997 had it been aware of the additional \$1.3 million debt is misplaced. As previously discussed, Chase required that J.A.O. and its affiliated companies have an excess borrowing availability of at least \$2 million on the closing date. But in determining whether it would finance the deal, it was Chase (a nonparty to this litigation), not J.A.O., that would have relied on the loan balance in the payoff letter. To the extent J.A.O. continues to press its fraud claim on this appeal, it likewise fails for lack of justifiable reliance.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

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Order affirmed, with costs. Opinion by Judge Graffeo. Chief Judge Kaye and Judges Ciparick, Read, Smith and Pigott concur. Judge Jones took no part.

backed by letters of credit.

Decided February 13, 2007