Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES Justice

IA Part 17

DAVID LICHTENHEIM, et al.

- against -

MICHAEL P. D'ALESSIO, et al.

Index Number 3055 2001

Motion Date June 20, 2001

Motion Cal. Number 23

The following papers numbered 1 to 11 read on this motion by defendant Ponce De Leon Federal Bank for an order granting summary judgment dismissing the complaint. Plaintiffs cross-move in opposition and seek leave to serve an amended complaint.

	Papers Numbered
Notice of Motion-Affidavits-Exhibits (A-B)..	1 - 4
Notice of Cross-Motion-Affidavits-Exhibits (1-6)	5 - 8
Answering Affidavits-Exhibits (A-D).....	9 - 11
Defendant's Memorandum of Law.....	
Plaintiffs' Memorandum of Law.....	

Upon the foregoing papers it is ordered that the motion to dismiss the complaint is granted and the cross-motion for leave to amend the complaint is denied. Plaintiff 3700 Tremont Associates, Inc. obtained a construction loan from defendant Ponce De Leon Federal Bank in the sum of $500,000 on July 22, 1999, in connection with its construction of a medical office building. This loan was guaranteed by Enrico Corbi, David J. Lichtenheim, Edward E. Sokol, Alexander M. Lindsay and Robert W. Maggio. The guarantors executed the "building loan & permanent mortgage note" and the building loan contract on July 22, 1999. Plaintiffs assert that while Mr. Corbi signed these documents as the president of 3700 Tremont Associates, Inc., he was not the president and is a stranger to the corporation. Plaintiffs in their complaint allege that the bank was negligent and breached its fiduciary duty, in that it failed to obtain personal financial information from the guarantors; that it failed to obtain a personal guarantor from Michael D'Alessio, who negotiated the loan and is named in the incorporation documents as the president; that it failed to obtain from D'Alessio, on behalf of the corporation, a construction schedule and budget; that it failed to obtain corporate resolutions authorizing the corporation to obtain the loan; that the bank negligently failed to advise the

corporation, its officers and shareholders that even with the loan it had inadequate financing to complete construction of the project; that it negligently failed to examine the corporation's finances and those of the guarantors to see if they genuinely qualified for the loan; that the bank negligently failed to monitor the progress of construction of the project; and that it negligently permitted the corporation to draw down all of the proceeds of the loan despite the fact that it was not nearing completion, and in advance of the percentage of work completed by the corporation. It is asserted that the bank's actions will cause the loan to default, and precipitate plaintiffs' liability as guarantors, causing them damages in excess of $1,000,000.00.

A fiduciary duty may be created by the express provisions of a contract, or by factors such as the length of the relationship of the parties, their financial interdependence, and their sharing of confidential and proprietary information (Zimmer-Masiello, Inc. v Zimmer, Inc., 159 AD2d 363, 365, lv dismissed 76 NY2d 772). However, not every commercial contract or relationship creates a fiduciary duty (see, Neumann v Metropolitan Med. Group, 153 AD2d 885, 887-888). "If the parties find themselves or place themselves in the milieu of the 'workaday' mundane marketplace, and if they do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them" (Northeast Gen. Corp. v Wellington Adv., 82 NY2d 158, 162).

In New York, the courts have generally held that the legal relationship between a customer and a bank is a contractual one of debtor-creditor which does not, without more, create a fiduciary relationship. (Chester Color Separations, Inc. v Trefiol Capital Corp., 222 AD2d 276; Banque Nationale v 1567 Broadway Ownership Assocs., 214 Ad2d 359; Budget Rent-A-Car, 204 AD2d 1007; Bank Leumi Trust Co. v Block 3102 Corp., 180 AD2d 588, 589, lv denied 80 NY2d 754; Nathan v J & I Enters., 212 AD2d 677; American Bank & Trust Co. v Lichtenstein, 48 Ad2d 790, affirmed 39 NY2d 857). A fiduciary relationship may arise between a bank and its customer where the bank assumes control and responsibility over the customer's assets and operations, or where the customer places special trust and confidence in the bank and thereby becomes dependent upon it (see, Chimento Co. v Banco Popular, 208 AD2d 385, 386) but there is "no legal authority for the proposition that a normal commercial relationship between a bank and a customer assumes a fiduciary nature whenever the officers of a company and the officers of the bank become friendly" (Chimento Co. v Banco Popular, 208 AD2d, at 386). Here, the complaint does not allege that the bank assumed control and responsibility over 3700 Tremont Association's assets or operations, or that the corporation's officers placed a substantial trust in the defendant's officers. Moreover, the mere fact that Mr. D'Alessio may have borrowed money from the same bank for several years in connection with his interests in other corporations, is insufficient to transform the

relationship with 3700 Tremont Associates into one in which the bank is a fiduciary (see, Manufacturers Hanover Trust Co. v Yanakas, 7 F3d 310, 318). Inasmuch as plaintiffs allegations are insufficient to establish the existence of a fiduciary relationship between the bank and the corporation or the guarantors, the seventh cause of action against the bank for breach of fiduciary duty is dismissed.

Plaintiffs' negligence claims are also dismissed. The documentary evidence submitted herein establishes that the loan application submitted on behalf of 3700 Tremont Associates to the bank was executed by Robert Maggio and David Lichtenstein, and that they listed Enrico Corbi as a 25 percent owner of the corporation and that all of the guarantors, including the individual plaintiffs provided financial information to the bank. Plaintiffs' assertion that the bank failed to obtain financial information from the guarantors is without merit. The court further notes, that the loan application lists the cost of the land as $400,000 and the cost of construction as $720,000, and that the applicants sought to obtain a loan of $720,000. The bank, however, only loaned the corporation $500,000. The plaintiffs thus knew, at the time the loan was granted, that Mr. Corbi was a named guarantor, and that the corporation would have to obtain additional funds in order to fully fund the construction project. The court notes that while plaintiffs assert that Mr. Corbi was not authorized to execute the loan documents as the president of the corporation, they do not deny that they sought to obtain this loan on behalf of the corporation. Plaintiffs concede that the loan proceeds have been used by the corporation, and they do not seek to return any portion of the loan proceeds to the bank. In addition, plaintiffs are unable to provide any legal support to their claim that the bank was required to obtain a guaranty from all of the corporation officers or shareholders. Moreover, whether a bank obtains financial information about a borrower, or a obtained a guaranty, or abides by the contractual provisions pertaining to the construction project which were for the benefit of the bank, does not state a cause of action for negligence inuring to the benefit of the plaintiffs. Finally, as the bank asserts that the loan is not in default, plaintiffs claim of damages is clearly premature. Inasmuch as defendant bank's motion to dismiss the complaint against them is granted, the cross-motion for leave to serve an amended complaint is denied as moot.

Dated: August 14, 2001

J.S.C.