When Does a Standard Lender-Borrower Relationship Become a Fiduciary Relationship Imposing Extra Fiduciary Duties?

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In order to state a cause of action in Florida for breach of fiduciary duty, there must exist a fiduciary duty, a breach thereof, and resulting damages. *Gracey v. Eaker*, 837 So. 2d 348,353 (Fla. 2002). In *Doe v. Evans*, 814 So.2d 370 (Fla. 2002), a fiduciary relationship was characterized as follows:

If a relation of trust and confidence exists between the parties (that is to say, where confidence is reposed by one party and a trust accepted by the other, or where confidence has been acquired and abused), that is sufficient as a predicate for relief.

Id. at 374, quoting *Quinn v. Phipps*. 93 Fla. 805, 113 So. 419, 421 (Fla. 1927). *See also Dale v. Jennings*, 90 Fla. 234, 107 So. 175 (Fla. 1925); *First Nat. Bank and Trust Co. v. Pack* 7,89 So.2d 411 (Fla. 4th DCA 2001); *Capital Bank v. MVB, Inc.*, 644 So.2d 515, 518 (Fla. 3d DCA 1994), rev. denied 654 So.2d 918 (Fla. 1995).

Fiduciary relationships may be implied in law and such relationships are premised upon the specific factual situation surrounding the transaction and the relationship of the parties. *Id.* at 518. In a banking context, the relationship is generally that of a creditor to debtor and the bank owes no fiduciary responsibilities. *Keys Jeep Eagle, Inc.*, 897 F. Supp. at 1443; *Motorcity of Jacksonville, Ltd.*, 83 F.3d at 1339; *Barnett Bank of West Fla.*, 498 So. 2d at 925; *Carpenter*, 710 So. 2d at 66-67. To plead an exception to this general rule, "a party must allege some degree of dependency on one side and some degree of undertaking on the other side to advise, counsel, and protect the weaker party." *Welnia, LLC v. Bodymedia, Inc.*, 2008 WL 3155148 at * 2 (M.D.Fla. 2008); *Mount Sinai Med. Ctr.*, 188 Fed. Appx. at 969.

However, in limited circumstances, Florida courts have found the existence of fiduciary relationships between borrowers and lenders. *Barnett Bank v. Hooper*.,498 So.2d 923 (Fla. 1986); *First Nat. Bank and Trust Co,* 789 So.2d 411; *Capital Bank*, 644 So.2d at 515, 519 (and numerous authorities cited therein). Such relationships exist where the bank knows or has reason to know that the customer is placing trust and confidence in the bank and is relying on the bank to counsel and inform him. *Capital Bank, supra*. Additionally, special circumstances may impose a fiduciary duty where the lender takes on extra services for a customer, receives any greater economic benefit than from a typical transaction, or exercises extensive control. *Id.*

In *Barnett Bank*, the Florida Supreme Court affirmed the First District Court of Appeal's holding that Barnett Bank's relationship with its borrower matured into a fiduciary relationship due to special circumstances. *Id.* at 926. The borrower, a customer for 8 years, went to the bank for advice on an investment to which the bank assured the borrower that the investment was sound and extended an initial loan to fund the investment. *Id.* at 924. The bank made the loan, the scheme collapsed, and the borrower lost his investment. Id. The court reasoned that the bank owed a fiduciary duty to the borrower because the bank had provided an extra service of advising the borrower that the value of the investment had been reviewed by the bank and amounted to a sound investment that was worth investing in. *Id.* at 925-26.

Motorcity of Jacksonville, Ltd. v. S.E. Bank, N.A., 83 F.3d 1317 (Fla. 11 th Cir. 1996), provides that "in order to establish a fiduciary relationship, there must be an allegation of dependency by one party and a voluntary assumption of a duty by the other party to advise, counsel, and protect the weaker party." *Id.* at 1339. In *Motorcity*, the bank failed to disclose relevant information that it learned from monthly audits that it performed upon the borrower's operations. *Id.* at 1322. The borrower brought a claim alleging their relationship with the bank elevated to the level of fiduciary and thus the bank breached their duty by failing to disclose relevant information. Id. The court analyzed the fiduciary relationship relying only upon non-extrinsic evidence and held that no fiduciary duty existed. *Id.* at 1338.

Motorcity highlights the important role that oral promises play in Florida's fiduciary duty law. *Id.* at 1340. Oral misrepresentations by a bank have led various Florida courts to hold that a fiduciary relationship was created with the borrower. *See Burger King Com. v. Holder*, 844 F.Supp. 1528, 1532 (S.D.Fla.l993) (holding that a reasonable jury could find the oral representations by the bank created a special relationship of trust and a fiduciary); *Barnett Bank*, 498 So.2d at 924 (holding that a fiduciary relationship existed where bank officer orally told loan customer "that he was familiar with Hosner Investments and that they were sound and had passed Internal Revenue scrutiny"); *Capital Bank*, 644 So.2d at 515 (finding that the bank's role exceeded that of a lender in a traditional lender-borrower relationship when bank officer expressly invited customer's reliance by urging customer to trust him and by reassuring customer that he was part of the Capital Bank family). Thus, while claims that promises not incorporated into the loan documents may fail due to the Banking Statute of Frauds, there is precedent that lends hope to the longshot claims pertaining to oral misrepresentations that contravene the loan documents if the court determines such representations induced reliance and rose to fiduciary representations.

In my survey of Florida law pertaining to banking fiduciary duties, I have found that failing to disclose information material to a transaction and known only by the lender typically impregnates claims of breach of fiduciary duty. In Florida, once a fiduciary relationship is established, a fiduciary has a legal duty to "disclose all essential or material facts pertinent or material to the transaction in hand." *Greenberg v. Miami Children's Hosp. Research Inst., Inc.*, 264 F. Supp. 2d 1064,1071 (S.D. Fla. *2003) (quoting Dale v. Jennings*, 107 So. 175 (Fla. 1926).

For special assets officers, all of this means that you should be very careful in the language you employ in your loan workouts and what information you select to withhold. Banks should be apprising borrowers of all the known facts pertaining to a particular workout and let the borrower

make an informed business decision as to its future lending needs. Banks should not be urging their borrowers to trust them in guiding their business through complex workouts or implying that some partnership exists that otherwise does not. While it is tempting to engage with your customers to help solve their problems, dabbling in the business operations of borrowers exposes lenders to potential fiduciary duty claims. When your bank is operating in the workout capacity, it is imperative that you choose your words wisely and turn off your sales training. There is a fine line between comforting a valued customer in a time of need and making a promise that you know cannot be performed without a special undertaking on the bank's part. When a bank promises assistance to preserve the enterprise value of the borrower or otherwise exercises excessive control of the borrower's business operations, it will do so at the peril of commencing a partnership beyond standard lender-borrower terms.

Practice areas: Banking Law; Business Litigation; Breach of Fiduciary Duty and Business Torts

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