STATE OF MICHIGAN

COURT OF APPEALS

NBD BANK, NA,

Plaintiff/Counter-Defendant–Appellee,

v

CEDAR SPRINGS TRACTOR & EQUIPMENT COMPANY, PETER YFF, and PATRICIA YFF,

Defendants/Counter-Plaintiffs/Cross-Defendants–Appellants,

v

TIMBERJACK, INC., a Canadian corporation,

Defendant/Counter-Plaintiff,

and

DAN OWEN

Intervening Defendant.

UNPUBLISHED
June 18, 1996

No. 181945
LC No. 92-75143-PD

Before: Doctoroff, C.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

This case arises from a judgment ordering defendants Cedar Springs Tractor & Equipment Company (CSTE) and Peter Yff to pay a $102,293.59 deficiency judgment to plaintiff and ordering defendants Peter Yff and Patricia Yff to pay $48,508.39 to plaintiff on a $35,000 note. Defendants claimed that plaintiff orally agreed to renew and renegotiate the loans. The trial court found no evidence of such an agreement. Defendants now appeal as of right. We affirm.

The only issue on appeal is whether the trial court erred in finding that plaintiff made no binding promise to renew or renegotiate defendants' loans. The Yffs were the owners of CSTE and had used plaintiff and its predecessor bank as its loaning institution since they purchased CSTE in 1986. Upon acquiring the company, the Yffs embarked upon an aggressive plan to increase CSTE's market share, relying heavily on its borrowing relationship with plaintiff. Although defendants were successful in increasing CSTE's market share, the company began to lose money and it failed to provide plaintiff with accurate financial information. By 1990, plaintiff began to doubt the ability of CSTE to continue as a viable business. On May 1, 1991, plaintiff informed defendants that it planned to terminate its lending relationship with CSTE and the Yffs. After some negotiation, plaintiff set December 31, 1991, as the date by which plaintiffs were to have moved their banking business elsewhere. In July 1991, the parties conducted negotiations regarding the interest rates to be assessed in the interim period before the December 31, 1991, deadline. Plaintiff initially proposed a rate of prime-plus-three percent due to the risky nature of the loan, but defendants objected. The parties eventually agreed upon a rate of prime-plus-two percent.

Defendants allege that, in the course of negotiations, plaintiff made various statements implying that it would not strictly enforce the deadline if defendants were in the process of transferring the loans to a different banking institution. On August 6, 1991, plaintiff informed defendants that it could consider extension of the loan beyond the December 31, 1991, deadline only if defendants could "provide evidence satisfactory to the bank that a new financing package is imminent." At some point after August of 1991, an internal memorandum was drafted at NBD, NA, which stated in pertinent part:

> In the event the relationship is not moved, borrower has been told the loans will be renegotiated to include rapid amortization and substantially increased pricing, among other items.

Defendants allege that this internal memorandum proved that plaintiff promised to forbear the collection of the loan. We disagree.

There was no evidence that defendants ever received a copy of plaintiff's internal memorandum or had notice of its existence. In addition, representatives of plaintiff testified that, in October, 1991, defendants were informed both orally and in writing that liquidation of CSTE was "possible and even probable." On October 24, 1991, plaintiff gave defendants written notice of the possibility of liquidation, and recommended that the Yffs consider a voluntary and orderly liquidation. During the week leading up to the December 31, 1991, deadline, the parties conducted at least two meetings. At trial, the parties' recollections of these discussions were very different. Defendants contended that they were told that the loan would be extended six months. Representatives of plaintiff, however, testified that, in the days preceding the deadline, defendants were again warned of the possibility of liquidation of CSTE if new financing or a sizable cash infusion was not forthcoming.

The trial court did not err in finding that plaintiff had not either orally or in writing promised to renew or extend the established time frame for repayment. Such finding was supported by the evidence

presented at trial. The existence of a promise to renew or renegotiate the notes was a matter of dispute by the parties, and was the subject of conflicting testimony at trial. Matters of credibility are for the trial court to determine. *Thames v Thames,* 191 Mich App 299, 309; 477 NW2d 496 (1991). Although plaintiff acknowledged that an internal memorandum was written which stated that the loans would be renegotiated, the trial court did not err in finding that the document merely set forth one of the options available to the bank. Furthermore, there was no indication that defendants were aware of the memorandum, and thus they could not have relied on its contents. Accordingly, defendants' claim is denied.

Similarly, there is no merit to defendants' claim that the trial court should have found an "agreement to agree." While a contract to make a subsequent contract is not per se unenforceable, such a contract can fail for indefiniteness if the agreement does not include essential terms to be incorporated into a final contract. *Opdyke Investment Co v Norris Grain Co,* 413 Mich 354, 359; 320 NW2d 836 (1982). In this case, there was no indication that the parties had agreed to the material terms of an alleged agreement to extend the due date of the loans. The trial court was unable to supply missing contractual terms based on the parties' course of dealing because the parties' business relationship experienced considerable change and instability during the short period the Yffs owned CSTE. Further, between May 1991 and January 1992, the parties were consistently negotiating the terms of interim financing, yet failed to agree. Thus, these negotiations did not provide the trial court with the ability to supply any missing terms. Because the terms of the alleged "agreement to agree" were not definite, defendants' claim that such a contract was binding must fail. *Id.*

Affirmed.

/s/ Martin M. Doctoroff
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald