STATE OF MICHIGAN

COURT OF APPEALS

KIRCO REALTY & DEVELOPMENT, LIMITED and ALAN M. KIRILUK,

Plaintiffs-Appellants,

v

BANKERS TRUST COMPANY and FIRST OF AMERICA, S.E.,

Defendants-Appellees.

UNPUBLISHED
April 15, 1997

No. 156384
Oakland Circuit Court
LC No. 91 407347 CK

BANKERS TRUST COMPANY,

Plaintiff-Appellee,

v

ALAN M. KIRILUK,

Defendant-Appellant.

No. 180031
Oakland Circuit Court
LC No. 91 412669 CK

Before: Reilly, P.J., and White, and P.D. Schaefer,* JJ.

PER CURIAM.

In these consolidated appeals, Kirco and Kiriluk appeal as of right from the orders dismissing their suit for injunctive relief and entering judgment in favor of Bankers Trust. We affirm.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Docket No. 156384 involves the interpretation and enforceability of a $1.7 million guaranty given by Kiriluk to Bankers Trust to secure a $4.2 million loan to Kiriluk's company, Kirco. After Kirco's default, Kirco and Kiriluk sought to enjoin Bankers Trust from enforcing the guaranty and a $750,000 letter of credit issued by defendant First of America before foreclosing on real estate also securing the loan. The trial court ultimately denied a preliminary injunction and dissolved a temporary restraining order it previously entered. Bankers Trust then filed suit (Docket No. 180031) to enforce the guaranty, and the trial court entered judgment in its favor and dismissed Kirco and Kiriluk's suit.

Docket No. 156384

As a threshold matter, we must determine whether the trial court erred in giving effect to the parties' choice of law. The guaranty expressly provided that New York law would govern this case. Kirco and Kiriluk (hereinafter collectively referred to as Kiriluk) contend that the trial court erred in applying New York law. We disagree. Bankers Trust is a New York bank, and New York law would not be contrary to a fundamental policy of the state of Michigan. In the absence of compelling evidence that Michigan has a materially greater interest than New York, we decline to void the parties' express preference for New York law to apply. *Chrysler Corp v Skyline Industrial Services, Inc*, 448 Mich 113, 133; 528 NW2d 698 (1995).

Next, we reject Kiriluk's assertion that the trial court erred when it refused to grant injunctive relief on equitable grounds based on Restatement Security, §131. Plaintiffs have failed to establish that Bankers Trust would not suffer prejudice if it was required to sell the property at a foreclosure sale before collecting on the guaranty. As stated by Bankers Trust, "the property is simply not the equivalent of cash in hand . . . ." Also, we disagree that Michigan's statutory provisions governing foreclosure evince a public policy of preventing a lender from collecting on a guaranty before foreclosing on primary collateral, particularly in a case such as this where the guarantor agrees in writing that the lender may do so.

We reject plaintiffs' contention that the guaranty was voidable because of fraud in the inducement or that the guaranty should be reformed. Under New York law, "[w]here, as here, there is a 'meaningful' conflict between an express provision in a written contract and an earlier alleged oral representation, the conflict negates a claim of reasonable reliance upon the oral representation." *Stone v Schulz*, ___ AD2d ___; 647 NYS2d 822 (1996). See also *AFG Industries v Empire Glass Co, Inc*, 226 AD2d 487; 641 NYS2d 106 (1996). Parol evidence "is not admissible to establish the existence of fraud as an inducement to execution of a contract in situations where the challenged agreement contains a specific disclaimer clause which disclaims the making of any representation as to the particular matter concerning which the fraud is now being asserted." *State University Construction Fund v Aetna Casualty & Surety Co*, 189 AD2d 929, 932; 592 NYS2d 490 (1993). Kiriluk is thus precluded from claiming fraudulent inducement because the guaranty contains numerous provisions contradicting the alleged representations and a disclaimer clause refers to the "matter concerning which the fraud is now being asserted." *Id.* Kiriluk's claim that the guaranty should be reformed also did not preclude summary disposition because there was "no unequivocal evidence of mutual mistake or fraud." *Chimart Associates v Paul*, 66 NY2d 570, 574; 489 NE2d 231 (1986).

Kiriluk argues that the trial court erred in entering judgment without reducing Kirkiluk's liability by $750,000 attributable to Bankers Trust's recovery under a letter of credit issued by Kirco. We disagree. Under New York law, courts will not look to the underlying intent of the parties in executing a contract unless it is ambiguous. *Chimart*, *supra* at 572-573. In this case, we agree with the trial court and the special master that the guaranty is unambiguous with respect to partial payments from any source: "[S]hould said sums be insufficient to fully pay the Borrower's Obligations, the Guarantor hereby covenants and agrees to remain liable for any deficiency to the extent herein provided." Accordingly, Kiriluk's obligation under the guaranty ($1.7 million) should not have been reduced by the $750,000 that Bankers Trust was able to collect on the letter of credit issued by Kirco. Because the guaranty was not ambiguous, the trial court did not err in refusing to consider extrinsic evidence of intent. Furthermore, Kiriluk's suggestion that the trial court abdicated its responsibilities in failing to decide the issue of ambiguity is without merit. The court's opinion, order and judgment clearly indicates that the court found that the guaranty was not ambiguous and that it was adopting the reasons in the special master's opinion.

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Philip D. Schaefer