

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLUB VISTA FINANCIAL SERVICES,
L.L.C., a Nevada Limited Liability Company;
THARALDON MOTELS II, INC., a North
Dakota corporation; and GARY D.
THARALDSON,

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT,
COUNTY OF CLARK, STATE OF NEVADA,
AND THE HONORABLE MARK R.
DENTON, DISTRICT JUDGE,

Respondents

and

SCOTT FINANCIAL CORPORATION, a North
Dakota corporation; BRADLEY J. SCOTT;
BANK OF OKLAHOMA, N.A., a national
bank; GEMSTONE DEVELOPMENT WEST,
INC., a Nevada corporation; ASPHALT
PRODUCTS CORPORATION D/B/A APCO
CONSTRUCTION, a Nevada corporation,

Real Parties in Interest.

Electronically Filed
Jun 21 2011 09:45 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

Case No.: 57784

District Court Case: A579963

**SCOTT FINANCIAL CORPORATION AND BRADLEY J. SCOTT'S
LIMITED OPPOSITION TO EMERGENCY MOTION UNDER NRAP 27(e)**

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*Attorneys for Real Parties in Interest
SCOTT FINANCIAL CORPORATION
and BRADLEY J. SCOTT*

1 While Real Parties in Interest Scott Financial Corporation and Bradley J. Scott (the
2 “Scott Parties”) are not opposed to this Court ruling on the instant motion sooner rather
3 than later, they file this limited opposition for the purpose of correcting a misleading
4 statement made by Petitioners in their Motion.

5 Petitioners have two mandamus petitions pending in this Court. This one (case
6 #57784) challenges the district court’s decision to bifurcate this case, conduct a bench
7 trial on all claims related to the approximately \$110 million in guaranties that Petitioners
8 signed (which contain jury trial waivers), and leave the remaining issues for a final jury
9 trial. After several stops, starts, and delays occasioned by Petitioners, the bench trial
10 begins July 6th. Petitioners dispute the district court’s enforcement of their knowing,
11 voluntary, and intentional jury waivers, situated conspicuously above the signature line
12 of billionaire businessman Petitioner Gary Tharaldson. And they have moved this court
13 to stay the impending bench trial pending the decision on their writ petition.

14 Petitioners’ instant motion for an expedited decision on the motion to stay asserts
15 that “the District Court found that [Petitioners’] claims for fraudulent inducement and
16 fraudulent concealment presented genuine issues of material fact with regard to the very
17 guaranties containing the jury trial waivers.” Motion at 1:13-16. This is not true. The
18 district court found that there were triable issues of material fact **generally** as to the
19 fraudulent concealment claims against the Scott Parties, meaning that the motion for
20 summary judgment by the Scott Parties on this point was denied. Scott Appendix (“SA”)
21 85:25-27. There were no specific findings as to fraudulent concealment regarding either
22 Gary Tharaldson’s personal guaranty or the guaranty executed by Petitioner Tharaldson
23 Motels II, Inc. See id.

24 Furthermore, Petitioners’ implication that the fraudulent inducement claims still
25 exist against the Scott Parties as to the guaranty is also patently false. As this Court can
26 see from the Order partially granting the Scott Parties’ motion for summary judgment,
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1 the fraudulent inducement claims were dismissed against the Scott Parties.¹ SA 86. The
2 Scott Parties will not belabor this point, which was discussed in the briefing on the
3 instant Petition; however, they wish to correct the record before this Court so that it
4 has accurate facts on which to base its ruling on Petitioners' instant motion. For these
5 reasons and those set forth in the Scott opposition (incorporated herein), Petitioners'
6 request for a stay of the district court proceedings must be denied.

7 DATED this 20th day of June, 2011.

8 Respectfully submitted by:

9 KEMP, JONES & COULTHARD, LLP

10 /s/ J. Randall Jones

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17 *and Bradley J. Scott*

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27 ¹ The fraudulent inducement and fraudulent concealment claims were also dismissed against
28 Bank of Oklahoma. See Order Granting Defendant Bank of Oklahoma, N.A.'s Motion for
Summary Judgment, attached hereto as Exhibit A.

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of June, 2011, **SCOTT FINANCIAL CORPORATION AND BRADLEY J. SCOTT'S LIMITED OPPOSITION TO EMERGENCY MOTION UNDER NRAP 27(e)** was served by U.S. mail or via this Court's electronic service system on the following:

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EXHIBIT A

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DISTRICT COURT
CLARK COUNTY, NEVADA

13 CLUB VISTA FINANCIAL SERVICES,
14 L.L.C., a Nevada limited liability company;
15 THARALDSON MOTELS II, INC., a North
16 Dakota corporation; and GARY D.
17 THARALDSON,

Plaintiff,

vs.

18 SCOTT FINANCIAL CORPORATION, a
19 North Dakota corporation; BRADLEY J.
20 SCOTT; BANK OF OKLAHOMA, N.A., a
21 national bank; GEMSTONE DEVELOPMENT
22 WEST, INC., a Nevada corporation;
23 ASPHALT PRODUCTS CORPORATION
24 D/B/A APCO CONSTRUCTION, a Nevada
25 corporation; DOE INDIVIDUALS 1-100; and
26 ROE BUSINESS ENTITIES 1-100,

Defendants.

Case No. A579963
Dept. No. XIII

Hearing Date: N/A
Hearing Time: N/A

**NOTICE OF ENTRY OF ORDER
GRANTING DEFENDANT BANK OF
OKLAHOMA N.A.'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
ON PLAINTIFFS' FIRST CLAIM FOR
RELIEF (FRAUDULENT
MISREPRESENTATION) AND
SECOND CLAIM FOR RELIEF
(FRAUDULENT
CONCEALMENT/FRAUDULENT
OMISSIONS)**

24 Please take notice that on the 15th day of March, 2011, an Order Granting Defendant Bank
25 of Oklahoma N.A.'s Motion for Partial Summary Judgment on Plaintiffs' First Claim for Relief
26 (Fraudulent Misrepresentation) and Second Claim for Relief (Fraudulent Concealment/Fraudulent
27 Omissions) was entered in the above-captioned action, a copy of said Order is attached hereto.

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DATED this 17th day of March, 2011.

LEWIS AND ROCA LLP

By /s/ Von S. Heinz

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to Nev. R. Civ. P. 5(b), I hereby certify that service of the foregoing NOTICE
3 OF ENTRY OF ORDER GRANTING DEFENDANT BANK OF OKLAHOMA N.A.'S
4 MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' FIRST CLAIM
5 FOR RELIEF (FRAUDULENT MISREPRESENTATION) AND SECOND CLAIM FOR
6 RELIEF (FRAUDULENT CONCEALMENT/FRAUDULENT OMISSIONS) was made this
7 date by e-service to the following:

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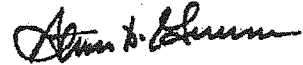
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26 DATED this 17th day of March, 2011.

27 /s/ Judith A. Vienneau
An Employee of Lewis and Roca, LLP



CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

18 CLUB VISTA FINANCIAL SERVICES,
19 L.L.C., a Nevada limited liability company;
20 THARALDSON MOTELS II, INC., a North
21 Dakota corporation; and GARY D.
22 THARALDSON,

Plaintiffs,

v.

22 SCOTT FINANCIAL CORPORATION, a
23 North Dakota corporation; BRADLEY J.
24 SCOTT; BANK OF OKLAHOMA, N.A., a
25 national bank; GEMSTONE DEVELOPMENT
26 WEST, INC., a Nevada corporation;
27 ASPHALT PRODUCTS CORPORATION
28 D/B/A APCO CONSTRUCTION, a Nevada
corporation; DOE INDIVIDUALS 1-100; and
ROE BUSINESS ENTITIES 1-100,

Defendants.

Case No.: A579963

Dept. No.: XIII

ORDER GRANTING DEFENDANT
BANK OF OKLAHOMA, N.A.'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT ON PLAINTIFFS' FIRST
CLAIM FOR RELIEF (FRAUDULENT
MISREPRESENTATION) AND SECOND
CLAIM FOR RELIEF (FRAUDULENT
CONCEALMENT/FRAUDULENT
OMISSIONS)

RECEIVED

MAR 04 2011

DISTRICT COURT DEPT. 13
MAR 04 2011

1 This matter came before this Court for hearing on January 18, 2011 on Defendant Bank of
2 Oklahoma N.A.'s Motion for Partial Summary Judgment on Plaintiffs' First Claim for Relief
3 (Fraudulent Misrepresentation) and Second Claim for Relief (Fraudulent Concealment/Fraudulent
4 Omissions).

5 Martin A. Aronson of Morrill & Aronson, P.L.C., Terry A. Coffing of Marquis Aurbach
6 Coffing, and Martin A. Muckleroy of Cooksey, Toolen, Gage, Duffy & Woog appeared on behalf
7 of Plaintiffs Club Vista Financial Services, L.L.C., Tharaldson Motels II, Inc., and Gary D.
8 Tharaldson. J. Randall Jones of Kemp, Jones & Coulthard, LLP appeared on behalf of Defendants
9 Scott Financial Corporation and Bradley J. Scott. John D. Clayman of Frederic Dorwart Lawyers
10 and Jennifer K. Hostetler of Lewis and Roca LLP appeared on behalf of Defendant Bank of
11 Oklahoma, N.A. P. Kyle Smith of Smith Law Office appeared on behalf of Defendant Alex
12 Edelstein. Gwen Rutar Mullins of Howard & Howard appeared on behalf of Asphalt Products
13 Corporation.

14 Having considered the parties' briefs, pleadings and other court filings in this matter, and
15 having considered argument of counsel, and good cause appearing, the Court makes the following
16 findings of fact and conclusions of law:

17 I.

18 FINDINGS OF FACT

19 1. The only individuals who have personal knowledge about the Manhattan West
20 transaction are Gary Tharaldson, Ryan Kucker, and Kyle Newman.¹

21 2. Through their sworn testimony, each of these individuals has admitted that he does
22 not have personal knowledge about the factual allegations contained in the Complaint.²

23 3. BOK did not give Plaintiffs advice with respect to the Loan.³ Mr. Tharaldson did
24

25 ¹Deposition of Gary Tharaldson, Vol. II, pp. 299-301, Exhibit A; Deposition of Ryan Kucker, Vol.
26 II, p. 339, l. 8 - p. 340, l. 3.

27 ²Deposition of Gary Tharaldson, Vol. III, p. 632, ll. 11-20, p. 678, l. 23 - p. 679, l. 15; Vol. II, p.
28 425, ll. 11-22. Deposition of Kyle Newman, p. 134, ll. 1-19. Deposition of Ryan Kucker, Vol. II, p.
292, l. 16-p. 293, l. 15; p. 339, l. 8 - p. 340, l. 3.

³Deposition of Gary Tharaldson, Vol. II, p. 510, l. 22 - p. 511, l. 9; Vol. III, p. 654, ll. 21-24.

1 not negotiate any aspect of the Loan with BOK, and never had conversations with BOK with
2 respect to the Loan.⁴

3 4. BOK did not directly give Mr. Tharaldson or Club Vista or TM2I any specific
4 assurances or any assurances of any kind that the transaction was sound.⁵

5 5. Before BOK was contacted about participating in the Manhattan West transaction,
6 all of the monetary terms had already been established.⁶

7 6. Mr. Tharaldson has no personal knowledge or evidence that BOK knew anything
8 about fraud related to the TM2I guaranty.⁷

9 7. Mr. Tharaldson has no evidence that the proper inspections were not done on
10 Manhattan West.⁸

11 8. With respect to the subordination issue, Mr. Tharaldson never discussed this deal
12 point with anyone from BOK.⁹

13 9. BOK never talked to Plaintiffs about what activities or duties BOK would
14 undertake as the co-lead.¹⁰

15 10. Plaintiffs have no knowledge or evidence that BOK failed to disclose the pro forma
16 to Plaintiffs.¹¹

17 11. BOK never undertook any actions with the intention of injuring any of the
18 Plaintiffs.

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21 ⁴*Deposition of Gary Tharaldson*, Vol. II, p. 571, ll. 4-8; Vol. IV, p. 1084, ll. 11-24; p. 1093, ll. 3-21; p. 1095, ll. 5-22.

22 ⁵*Deposition of Gary Tharaldson*, Vol. II, p. 517, l. 22 – p. 518, l. 7.

23 ⁶*Deposition of Gary Tharaldson*, Fargo, N.D., July 9, 2010, p. 137, l. 24 – p. 138, l. 4.

24 ⁷*Deposition of Gary Tharaldson*, Vol. III, p. 659, l. 14 – p. 660, l. 12.

25 ⁸*Deposition of Gary Tharaldson*, Vol. I, p. 70, ll. 19-21.

26 ⁹*Deposition of Gary Tharaldson*, Vol. IV, p. 993, l. 25 – p. 994, l. 101.

27 ¹⁰*Deposition of Gary Tharaldson*, Vol. IV, p. 997, ll. 1-10.

28 ¹¹*Deposition of Gary Tharaldson*, Vol. II p. 570, ll. 10-16.

12. BOK never knowingly or unintentionally assisted Scott Financial or Mr. Scott in making fraudulent or negligent misrepresentations or omissions to the Plaintiffs.

13. BOK never told Plaintiffs that Brad Scott or Scott Financial could speak for BOK.¹²

14. Neither Brad Scott nor Scott Financial ever told Plaintiffs that they had the power to make representations on behalf of BOK.¹³

II.

CONCLUSIONS OF LAW

1. To prevail on a fraudulent misrepresentation claim, Plaintiffs are required to prove that:

- (1) BOK made a false representation;
- (2) That BOK knew or believed that the representation was false or that BOK had an insufficient basis of information for making the misrepresentation;
- (3) BOK's intention to induce the Plaintiffs to act or refrain from acting in reliance upon the misrepresentation;
- (4) Plaintiffs' justifiable reliance on upon the misrepresentation; and
- (5) Damage to the Plaintiffs as a result of relying on the misrepresentation.

Bulbman, Inc. v. Nev. Bell, 108 Nev. 105, 110, 825 P.2d 588, 592 (1992).

2. BOK did not make any false representations or fraudulently conceal or omit information, including information related to: (1) pre-sales, (2) subordination of prior loans, (3) the General Contractor Agreement, and (4) the TM2I Guaranty.

3. BOK did not intend to "deliberately cause harm or to deliberately deceive" Plaintiffs. *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 110, 825 P.2d 588, 592 (1992).

¹²Deposition of Gary Tharaldson, Vol. IV, p. 997, ll. 11-17.

¹³Deposition of Gary Tharaldson, Vol. IV, p. 998, ll. 2-16.

1 4. BOK never induced Plaintiffs to rely on representations made by BOK because
2 Plaintiffs were unaware of any representations at the time they acted. *Chen v. Nev. State Gaming*
3 *Control Bd.*, 116 Nev. 282, 285-86, 994 P.2d 1151, 1152 (2000).

4 5. Accordingly, Plaintiffs did not justifiably rely upon any misrepresentation by BOK.
5 "Reliance on alleged misrepresentations presumes that [Plaintiffs have] actually read or heard
6 those alleged misrepresentations in order to plead a cause of action for deceit." *Nev. Power Co. v.*
7 *Monsanto Co.*, 891 F. Supp. 1406, 1413-14 (D. Nev. 1995).

8 6. BOK is not liable for any alleged fraudulent misrepresentations or fraudulent
9 concealment/omissions based upon an agency or apparent authority theory related to SFC because
10 BOK's appointment of SFC as its agent was strictly limited to servicing the Loan as set forth in
11 Paragraph 6(d) of the Participation Agreement.

12 8. BOK is not responsible for the actions and inactions of SFC that occurred before
13 the alleged agency relationship occurred.

14 9. Accordingly, the Court finds that there are no genuine issues of material fact as to
15 Plaintiffs' First Claim for Relief (Fraudulent Misrepresentation) and Second Claim for Relief
16 (Fraudulent Concealment/Fraudulent Omissions) such that Bank of Oklahoma, N.A. is entitled to
17 judgment as a matter of law on each of these claims, pursuant to Nev. R. Civ. P. 56.

18
19 III.

20 CONCLUSION

21 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Bank of Oklahoma,
22 N.A.'s Motion For Partial Summary Judgment on Plaintiffs' First Claim for Relief (Fraudulent
23 Misrepresentation) and Second Claim for Relief (Fraudulent Concealment/Fraudulent Omissions)
24 is GRANTED IN FULL.

25 IT IS SO ORDERED

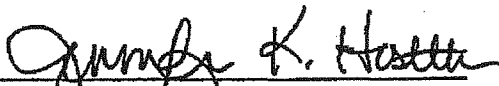
26 Honorable Mark R. Denton
27 DISTRICT COURT JUDGE

28 Dated: March 11, 2011

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