COURT OF APPEALS
DECISION
DATED AND FILED

June 18, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2412 **Cir. Ct. No. 01-CV-311**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

FIRST FEDERAL FINANCIAL SERVICES, INC.,
A WISCONSIN CORPORATION,

PLAINTIFF-RESPONDENT,

V.

HEIDI BRANDT, MICHAEL BRANDT AND
HMB CONTRACTORS, INC.,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Washington County: DAVID C. RESHESKE, Judge. *Affirmed*.

Before Nettesheim, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Heidi Brandt, Michael Brandt and HMB Contractors, Inc. ("HMB"), appeal from the judgment of the circuit court which found that HMB defaulted under a lease agreement with First Federal Financial

Services, Inc. HMB argues that First Federal fraudulently induced Heidi Brandt to enter into the lease agreement. Because we conclude that the evidence supports the circuit court's verdict, we affirm the judgment.

¶2 HMB entered into an agreement with First Federal to lease certain equipment. A trial was held to the court. The parties do not dispute that there was a lease and that HMB defaulted on it. HMB claims that Heidi Brandt was fraudulently induced to enter into the agreement by First Federal's agent, Tim Rupnow. Rupnow is no longer employed by First Federal and was not available to testify at trial. At trial, Heidi Brandt testified that she was induced by various representations made by Rupnow to enter into the agreement. These representations varied from the actual terms of the lease. She further testified that she was not aware of the differences at the time she entered into the contract, but that she had not read all of the contract.

¶3 The circuit court found that HMB had not established the elements of fraud. Specifically, the court stated that it did not find Heidi Brandt's testimony to be persuasive. The court found that Heidi Brandt was a sophisticated business person who had entered into similar transactions in the past. While she stated she was unaware of certain provisions of the lease, the court found that she had read, objected to, and made changes to other provisions of the lease. The court concluded: "[T]he written documents themselves are explicit and clear with respect to the terms of the lease between the parties. The defendant's testimony as to oral modifications of those terms by a representative of the plaintiff who is not available to testify I do not find to be credible."

¶4 HMB first challenges the court's finding that Heidi Brandt's testimony was not persuasive. The appellate courts of this state have repeatedly

said that we will not substitute our judgment for that of a trial court in the matter of witness credibility. *See, e.g.*, ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 249, 274 N.W.2d 647 (1979). When the trial court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and of the weight to be given to each witness' testimony. ***Plesko v. Figgie Int'l***, 190 Wis. 2d 764, 775, 528 N.W.2d 446 (Ct. App. 1994). The trier of fact is in a far better position than an appellate court to make this determination because it has the opportunity to observe the witnesses and their demeanor on the witness stand. ***Pindel v. Czerniejewski***, 185 Wis. 2d 892, 898-99, 519 N.W.2d 702 (Ct. App. 1994).

¶5 HMB argues that First Federal did not present any evidence to rebut Heidi Brandt's testimony. We disagree. First, the lease itself rebuts Heidi Brandt's claim as to what the parties actually agreed. In addition, her testimony that she did not read the entire contract is rebuttal evidence. Further, although the actual agent did not testify, First Federal offered the testimony of an employee about the training provided to its agents and how they are supposed to negotiate contracts. All of this constituted sufficient rebuttal evidence.

¶6 HMB also argues that since First Federal did not offer the testimony of the agent who entered into the contract, the trial court should have inferred that his testimony would have supported their position. *See* ***State ex rel. Park Plaza Shopping Ctr., Inc. v. O'Malley***, 59 Wis. 2d 217, 218, 207 N.W.2d 622 (1973). The general rule is that "the failure of a party to call a material witness within his [or her] control … raises an inference against such party." ***Carr v. Amusement, Inc.***, 47 Wis. 2d 368, 375-76, 177 N.W.2d 388 (1970) (citation omitted). First Federal argues that since the agent was no longer its employee, he was not within its control and the inference should not be used against First Federal. We agree. The trial court found that the agent was no longer employed by First Federal and

was not available to testify. This is not a situation where the potential witness was within the party's control.

¶7 HMB also argues that under WIS. STAT. § 903.01, a presumption is created in support of its counterclaim for fraud and the burden of proof shifted to First Federal. HMB is correct that the statute creates a presumption when the party asserting the claim has established the underlying facts in support of his or her claim. In this case, therefore, HMB needed to establish a claim for fraudulent inducement. A claim of fraudulent inducement requires showing a statement of fact that is untrue, which is made with the intent to defraud and for the purpose of inducing the other party to act on it, and that the other party relied on the false statement to his or her detriment. ***Douglas-Hanson Co. v. BF Goodrich Co.***, 229 Wis. 2d 132, 144 n.2, 598 N.W.2d 262 (Ct. App. 1999), *aff'd*, 2000 WI 22, 233 Wis. 2d 276, 607 N.W.2d 621. In this case, as the trial court found, HMB failed to establish the underlying facts in support of its claim. The presumption created by the statute, therefore, does not apply.

¶8 HMB also argues that when the documents which preceded the lease are compared to the lease, certain ambiguities are created. Consequently, HMB argues, those matters should be construed against First Federal as the drafter of the lease. First Federal responds that HMB impermissibly raises this argument for the first time on appeal. We will, however, address the issue on the merits.

¶9 The contract at issue here contains an integration clause which provides: "All terms and conditions of this Lease shall govern the rights and obligations of Lessor and Lessee except as specifically modified in writing." HMB, therefore, may not use parole evidence to vary the terms of the contract. "When the parties to a contract embody their agreement in writing and intend the

writing to be the final expression of their agreement, the terms of the writing may not be varied or contradicted by evidence of any written or oral agreement in the absence of fraud, duress, or mutual mistake." ***Kramer v. Alpine Valley Resort, Inc.***, 108 Wis. 2d 417, 426, 321 N.W.2d 293 (1982) (citation omitted).

¶10 Heidi Brandt's testimony violated this principle. Although HMB alleged fraud, the trial court specifically found that they had not established the elements of fraud. And while First Federal did not argue the integration clause in the trial court, this is because HMB did not raise the issue of ambiguity until this appeal. More importantly, however, the integration clause presents an issue of law which we may address. Since HMB did not establish fraud, then the written contract controls. The integration clause negates any prior writings between the parties on the issue contained in the contract. The lease itself is not ambiguous. For the reasons stated, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.