DO BANKS OWE A FIDUCIARY DUTY IN FLORIDA?

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), the existence of a relation of trust and confidence between parties was sufficient to establish the presence of a fiduciary relationship. *Id.* at 374, quoting *Quinn v. Phipps*, 113 So. 419, 421 (Fla. 1927).

Fiduciary relationships may be implied in law and such relationships are premised upon the specific factual situation surrounding the transaction, as well as the relationship of the parties. *Capital Bank v. MVB, Inc.*, 644 So.2d 515, 518 (Fla. 3d DCA 1994). 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. **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).

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). **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*, 644 So.2d at 519. 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. *Barnett Bank*, 498 So.2d at 926. The borrower, a customer for 8 years, went to the bank for advice on an investment. The bank assured the borrower that the investment was sound, and additionally extended an initial loan to fund the investment. *Id.* at 924. Ultimately, the borrower lost his investment when the investment scheme collapsed. *Id*. The court reasoned that the bank owed a fiduciary duty to the borrower because the bank had provided the extra services of reviewing the value of the investment, classifying the investment as sound, and advising the borrower that the investment was worthy of his finances. *Id.* at 925-26.

In *Motorcity of Jacksonville, Ltd. v. S.E. Bank, N.A.*, the court found 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." *Motorcity of Jacksonville, Ltd. v. S.E. Bank, N.A.*, 83 F.3d 1317, 1339 (11th Cir. 1996). In this case, the bank failed to disclose relevant information learned from performing monthly audits concerning 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 failure to disclose relevant information amounted to the bank's breach of fiduciary duty. *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 Barnett Bank*, 498 So.2d at 924 (holding that a fiduciary relationship existed where a bank officer orally assured a customer that Hosner Investments was of sound nature and familiar); *Capital Bank*, 644 So.2d at 515 (finding that the bank's role exceeded 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.

A survey of Florida law, as pertains to banking fiduciary duties, yields that the **failure to disclose information material to a transaction and known only by the lender typically infuses risk of borrower 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, extreme caution is necessary as to the language employed during loan workouts, including the decision as to information withheld. Banks should be apprising borrowers of all the known facts pertaining to a particular workout, allowing the borrower to make an informed business decision

as to its future lending needs. Banks should not urge their borrowers to trust them in guiding their business through complex workouts as business partners. 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. There is a fine line between comforting a valued customer in a time of need and making a promise that cannot be performed without a special undertaking on the bank's behalf. 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 does so at the peril of commencing a partnership beyond standard lender-borrower terms.