

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
File No. CT 98-12425

Khadar A. Wazwaz,

Plaintiff,

**ORDER AND
MEMORANDUM**

vs.

Firstar Bank, N.A. and Buerkle Motor
Company, Inc.,

Defendants.

The above-entitled matter came on for hearing before the Honorable Bruce Hartigan, one of the judges of this Court, on August 14, 2000.

Thomas J. Lyons, Jr., Esq., appeared on behalf of the Plaintiff. Jennifer Berquist, Esq., appeared on behalf of the Defendant Firstar Bank, N.A.

Upon all of the files, memoranda and proceedings herein, the argument of counsel and the Court being fully advised in the premises,

IT IS HEREBY ORDERED THAT:

1. The Plaintiff's motion for summary judgment is **GRANTED**. Judgment shall be entered dismissing the Defendant Firstar Bank, N.A.'s fraud claim with prejudice.
2. The Defendant's motion for summary judgment is **DENIED**.
3. The attached Memorandum shall be made a part of this Order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT,

Dated: 10-18-00

A handwritten signature in black ink, appearing to read "Bruce Hartigan", written over a horizontal line.

Bruce Hartigan
Judge of the District Court

MEMORANDUM

In June, 1998, Plaintiff Khadar A. Wazwaz ("Wazwaz") purchased a 1992 Mercedes SEL automobile from Defendant Buerkle Motor Company, Inc. for \$33,500.00. Wazwaz made a \$15,000.00 downpayment and financed the remainder of the price with a loan from Defendant Firststar Bank, N.A ("Firststar").

The loan agreement provided that the first payment from Wazwaz was due on July 21, 1998. However, the loan agreement also provided that "if payment is late by more than 10 days, [Wazwaz] will be charged 5% of the unpaid installment." Affidavit of Thomas J. Lyons, Jr., Exhibit H. With the understanding that he had a 10-day grace period, Wazwaz waited until July 30, 1998 to make his first payment to Firststar.

On or about July 29, 1998, Firststar decided to repossess the Wazwaz vehicle. The record reflects that this decision was made in part on the fact that when the Plaintiff completed his loan application, he misstated one of the 9 digits in his social security number. Firststar was apparently also under the impression that members of the Wazwaz family were "all frauds." Lyons Affidavit, Exhibit K.

On August 3, 1998, after already accepting Wazwaz's first payment under the loan agreement, Firststar repossessed the automobile. Wazwaz commenced the instant suit for replevin, breach of contract and conversion. Firststar brings counterclaims for breach of contract and fraud.

At present, Firststar moves for summary judgment on its fraud and breach of contract claims. Wazwaz moves for summary judgment dismissing Firststar's fraud claim. Summary judgment is proper where there are no genuine issues of material fact and either

party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03; DLH, Inc. v. Russ, 566 N.W.2d 60, 69 (Minn. 1997).

Firststar contends that Wazwaz breached the parties' loan agreement by failing to make his first payment when it was due: July 21, 1998. However, the loan agreement, which was drafted by Firststar, provides for a late charge if a debtor fails to make his payment within 10 days of when it is due. When read together with the rest of the contract, the late charge provision creates a 10-day grace period for all installment payments. Wazwaz made his first payment within that 10-day period. He therefore did not breach the agreement for failing to pay on time.

Firststar argues that the agreement also allows it to declare a default and repossess the vehicle if it believes "in good faith that [Wazwaz] may not be able or willing to pay." Lyons Affidavit, Exhibit H. Firststar points to the facts that Wazwaz misstated his monthly income and the length of time he had owned his home as indications that he would not be able to pay off the loan. However, whether Firststar had a good faith belief that Wazwaz could not pay is a fact question that cannot be resolved on a motion for summary judgment.

With respect to the fraud claim, Firststar relies upon Wazwaz's alleged misstatements about income and home ownership and his failure to provide an accurate social security number. The record, however, shows that Firststar was aware that the social security number was incorrect before it approved Wazwaz's loan application. Lyons Affidavit, Exhibit K. Firststar was aware that Wazwaz was only nineteen years old at the time he made the application stating that he had owned his own home for eighteen years.

To maintain its fraud claim, Firststar must show that it relied to its detriment on the allegedly fraudulent statements. See M.H. v. Caritas Family Services, 488 N.W.2d 282, 289 (Minn. 1992) (setting forth the elements of fraud). Firststar thus knew, *before* it approved the loan, that the social security number was incorrect and that Wazwaz could not have owned his own home for eighteen years. Hence, there no evidence in the record to show that Firststar relied upon those particular alleged misstatements in deciding to make the loan to him. Moreover, there is nothing in the record establishing that Wazwaz was not in fact earning \$10,000.00 a month at the time he made the loan application.

Therefore, summary judgment must be entered dismissing Firststar's fraud claim. As regards Firststar's breach of contract claim, the record establishes that Wazwaz made his installment payment within the 10-day grace period allowed under the contract. However, there remains a genuine question of fact as regards whether Firststar nevertheless had a good faith belief that Wazwaz would not be able to make payments under the contract. Hence, summary judgment cannot be entered in either party's favor on the breach of contract claim.

B.H.