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**IN THE
COURT OF APPEALS OF INDIANA**



BEVERLY JINKINS,)
)
Appellant,)
)
vs.)
)
JET CREDIT UNION n/k/a)
CREDIT UNION 1,)
)
Appellee.)

No. 49A02-1006-PL-666

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable S.K. Reid, Judge
Cause No. 49D14-0402-PL-334

August 17, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

CUMIS Insurance Society (“CUMIS”), the subrogee of Jet Credit Union a.k.a Credit Union 1 (“Jet”), filed a complaint against Beverly Jinkins (“Jinkins”) in Marion Superior Court alleging that Jinkins breached her fiduciary duty to Jet. Jinkins responded by filing counterclaims against Jet alleging breach of contract and various tort claims. Jet filed a motion for partial summary judgment on Jinkins’s counterclaims, and the trial court granted the motion. Jinkins appeals and raises several issues, which we consolidate and restate as:

I. Whether the trial court erred when it struck Jinkins’s response to Jet’s motion for partial summary judgment; and

II. Whether the trial court erred when it granted Jet’s motion for partial summary judgment on Jinkins’s counterclaims for breach of contract, fraud, abuse of process and frivolous litigation.

Concluding that the trial court properly granted Jet’s motion to strike Jinkins’s untimely response and Jet’s motion for partial summary judgment, we affirm.

Facts and Procedural History

Jinkins was employed at Jet, a credit union chartered by the State of Indiana, for over twenty-five years, and in her last six months of employment, served as Jet’s Chief Executive Officer and the Secretary/Treasurer of the Board of Directors. Her predecessor, John Loudermilk (“Loudermilk”), retired from Jet on August 22, 2003. The next day, Jinkins assumed the role of CEO under the terms of a Succession Agreement executed between Jinkins and Jet in 1993.

The Succession Agreement provided that Jet would retain Jinkins “as CEO for a period of five years from the date that John V. Loudermilk’s employment is discontinued as CEO.” Appellant’s App. p. 967. The parties agreed that Jinkins’s salary would be

\$2500 per week, and additional weekly amounts to be funded as deferred compensation. Finally, the Succession Agreement could be “terminated with payment of 75% of the Contract in full.” Id. at 968.

Shortly after Loudermilk retired, Jet sued him for “several instances of misconduct and financial improprieties’ that caused harm to Jet.” See Jet Credit Union v. Loudermilk, 879 N.E.2d 594, 596 (Ind. Ct. App. 2008), trans denied (record citation omitted); see also Appellant’s App. pp. 287-304. Loudermilk’s alleged misconduct was investigated by Jet, American Mutual Share Insurance Company (“ASI”),¹ and the Indiana Department of Financial Institutions (“DFI”). Jinkins cooperated with the investigation and assisted with the assessment of Jet’s financial status in the wake of Loudermilk’s alleged malfeasance.

But on February 27, 2004, Jet, Jinkins, ASI, and the DFI entered into an agreement (hereinafter “the 2004 Agreement”), in which Jinkins resigned as Jet’s CEO and waived her rights under the Succession Agreement. The agreement contains the following provisions at issue in this appeal:

4. Jet, DFI, and ASI shall and do hereby agree to refrain from filing any lawsuits, claims, or causes of action against Jinkins or her spouse, Gary W. Jinkins, or from adding Jinkins or her spouse as a defendant in the Loudermilk Lawsuit based upon circumstances that are presently known to legal counsel for Jet, DFI or ASI, provided, however, that this paragraph shall not be construed to preclude Jet, DFI, or ASI from later filing or pursuing a civil claim of any kind or nature against Jinkins based upon acts or circumstances which become known to legal counsel for Jet or to DFI or ASI after the effective date of this Agreement; and provided further that Jinkins’ continued compliance with the terms and conditions of paragraphs 3 and 6 of this Agreement is a condition precedent to Jet’s and DFI’s duty

¹ American Mutual Share Insurance Corporation guarantees the payment of credit union share accounts of Jet’s members.

to comply with the terms and conditions of this paragraph. This paragraph constitutes a covenant not to sue but is not intended to operate as a release or discharge from liability and shall not be construed as such.

8. . . . [T]hat the parties expressly agree that the terms and conditions of paragraphs 4 and 5 of this Agreement shall not impair or affect the right of CUNA Mutual Group and/or CUMIS Insurance Society, Inc. to pursue or assert any claims that CUNA Mutual Group and/or CUMIS Insurance Society conclude that Jet may have against Jinkins to which CUNA Mutual Group and/or CUMIS Insurance Society, Inc. become subrogated as a result of the payment of any claim submitted by Jet under Bond Number BB01304734, and shall not impair or affect the right of Jet to file any bond claims with CUNA Mutual Group and/or CUMIS Insurance Society, Inc. against Jinkins. Jet will furnish information to CUNA Mutual Group and CUMIS Insurance Society, Inc. about the nature of Jinkins' cooperation with Jet, DFI and ASI in aid of their determinations.

Appellee's App. pp. 69-71.

On November 15, 2006, CUMIS², as Jet's subrogee, filed a third amended complaint in the Loudermilk litigation. In the complaint, CUMIS added Jinkins as a party and alleged that she "acted as the agent for John Loudermilk in furtherance of a conspiracy to commit Deception, Fraud on a Financial Institution, and breach of other fiduciary duties to Jet Credit Union." Appellant's App. p. 304. CUMIS further alleged that Jinkins was aware of Loudermilk's misconduct and failed to report it, thereby breaching her fiduciary duty to Jet. CUMIS requested both compensatory and punitive damage awards for Jinkins's "lack of due diligence," "breach of fiduciary duty" and her "reckless willful, wanton, or heedless disregard of the consequences" of her acts and omissions. *Id.* at 307.

In response, Jinkins, claiming that Jet was responsible for filing the amended complaint, filed counterclaims against Jet alleging breach of contract, unjust enrichment,

² CUMIS Insurance Society was Jet's bonding company.

fraud, defamation, and abuse of process. Jinkins also claimed that Jet's lawsuit was frivolous, unreasonable, and groundless, and therefore she was entitled to attorney's fees. On March 31, 2009, Jet filed a motion for partial summary judgment on Jinkins's counterclaims. Jinkins sought and received several extensions of time to respond, and her response was eventually due on November 13, 2009. But she did not file her response until November 16, 2009. On Jet's motion, the trial court struck Jinkins's response as untimely.

A hearing was held on Jet's motion for partial summary judgment on December 22, 2009.³ On February 3, 2010, the trial court issued an order concluding that CUMIS, as Jet's subrogee, filed the Third Amended Complaint in Jet's name, which "asserted claims against Jinkins for breach of fiduciary duty arising out of Jinkins' conduct during her tenure as a member of the Jet Board of Directors." Appellant's App. p. 63. The court also concluded:

1. The 2004 Agreement is a valid, enforceable contract supported by consideration.
2. Jinkins[']s breach of contract claim fails as a matter of law because the filing of the Third Amended Complaint by [CUMIS] in Jet's name and as Jet's subrogee did not violate the 2004 Agreement. In fact, Jinkins specifically agreed in the 2004 Agreement that Jet's covenant not to sue Jinkins did not apply to any claims that [CUMIS] concluded that Jet could assert against her and to which [CUMIS] became subrogated. The undisputed material facts demonstrate that [CUMIS], not Jet or its successor Credit Union 1, filed the Third Amended Complaint naming Jinkins as a defendant. Jet, therefore, is entitled to judgment as a matter of law on Jinkins' breach of contract claim in Count I of her Counterclaim.

³ On January 19, 2010, after the hearing, but before the trial court entered its order granting Jet's motion for partial summary judgment, Jinkins filed a motion for summary judgment on her counterclaims.

3. Jet also is entitled to judgment as a matter of law on Jinkins' claims for unjust enrichment and quasi-contract asserted in Counts II and III of her Counterclaim. Those claims fail for two (2) independent reasons. First, [u]njust enrichment and quasi-contract are related claims that both require the plaintiff to "demonstrate that to allow a defendant to retain a benefit without paying for it would be unjust and that plaintiff expected payment." The undisputed material facts demonstrate that Jet has not received any benefits under the 2004 Agreement for which it has not paid. Second Jinkins' unjust enrichment and quasi-contract claims also must fail because there is an express contract – the 2004 Agreement – that governs the parties' rights and obligations.

4. Jinkins' fraud claim in Count IV of her Counterclaim is based upon her allegations that "Jet misrepresented to Jinkins, inter alia, that it would refrain from filing any lawsuits against Jinkins, or from adding Jinkins as a defendant in litigation matters involving Loudermilk based upon information then available to legal counsel for Jet." This claim is barred by Jinkins' contract claim because it is nothing more than a restatement of Jinkins' breach of contract claim that Jet purportedly breached the 2004 Agreement by filing the Third Amended Complaint. Jinkins' fraud claim also fails because the undisputed material facts demonstrate that Jet has made no misrepresentations, but rather complied with all of the promises and representations it made in the 2004 Agreement.

5. Jinkins' defamation claim in Count V of her Counterclaim also fails because the undisputed material facts demonstrate that Jet has not made any defamatory statements about Jinkins or her business relationship with Jet. To the extent Jinkins' defamation claim arises out of the claims in the Third Amended Complaint asserted by [CUMIS] in Jet's name, the allegations in the Third Amended Complaint are privileged and cannot support a defamation claim. Even if they could, Jet cannot be responsible for the statements in the Third Amended Complaint because [CUMIS] filed that pleading, not Jet.

6. Jinkins' claims for abuse of process and for alleged violation of Ind. Code § 34-52-1-1, asserted in Count VI and VII of her Counterclaim, also fail because the undisputed material facts demonstrate that Jet did not file the claims in the Third Amended Complaint against her. Those claims were filed by [CUMIS] as subrogee of Jet.

Appellant's App. pp. 65-66 (citations and record citations omitted).

The trial court then concluded that Jet was entitled to summary judgment on all claims asserted in Jinkins's counterclaim, and entered final judgment in favor of Jet. Jinkins then filed a motion to correct error, which the trial court denied. Jinkins now appeals. Additional facts will be provided as necessary.

I. Motion to Strike

Jinkins argues that the trial court erred when it struck her response to Jet's motion for partial summary judgment as untimely. Our courts have held that

[W]here a nonmoving party fails to respond within thirty days by either (1) filing affidavits showing issues of material fact, (2) filing his own affidavit under Rule 56(F) indicating why the facts necessary to justify his opposition are unavailable, or (3) requesting an extension of time in which to file his response under 56(I), the trial court lacks discretion to permit that party to thereafter file a response. In other words, a trial court may exercise discretion and alter time limits under 56(I) only if the nonmoving party has responded or sought an extension within thirty days from the date the moving party filed for summary judgment.

HomEq Servicing Corp. v. Baker, 883 N.E.2d 95, 98 (Ind. 2008) (quoting Desai v. Croy, 805 N.E.2d 844, 850 (Ind. Ct. App. 2004), trans. denied); see also Borsuk v. Town of St. John, 820 N.E.2d 118, 124 n.5 (Ind. 2005) (holding that where a party opposing summary judgment filed an affidavit approximately sixty days after the filing of the motion, the affidavit was untimely filed and was improperly considered in determining summary judgment).

Here, the trial court initially extended the thirty-day deadline for Jinkins's response to that motion because Jinkins was attempting to depose Paul Simons, Credit Union 1's (formerly Jet's) Chief Executive Officer. That deposition was eventually scheduled for November 3, 2009, and therefore, the trial court ultimately extended the

deadline for Jenkins's response to Friday, November 13, 2009. But Jenkins did not file her response until Monday, November 16, 2009.

The fact that the trial court granted Jenkins extensions of time does not require a result opposite than those reached in HomEq, Desai, and Borsuk. “[A]ny response, including a subsequent motion for enlargement of time, must be made within the additional period granted by the trial court.” Miller v. Yedlowski, 916 N.E.2d 246, 251 (Ind. Ct. App. 2009) (holding that the trial court's order granting the Plaintiffs' second motion for enlargement of time, which was filed six days after the court's deadline set as a result of their first motion for enlargement of time, was a nullity and the trial court “was precluded from considering Plaintiffs' response[.]”), trans. denied. Because Jenkins failed to file a motion for enlargement of time or her response to Jet's motion for partial summary judgment by the November 13, 2009 deadline, the trial court properly struck her untimely filed response.⁴

II. Summary Judgment

We review the grant or denial of summary judgment de novo. Tri-etch, Inc. v. Cincinnati Ins. Co., 909 N.E.2d 997, 1001 (Ind. 2009), reh'g denied. In so doing, we stand in the same position as the trial court and must determine whether the designated evidence shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Dreaded, Inc. v. St. Paul Guardian Ins. Co., 904 N.E.2d 1267, 1269-70 (Ind. 2009). In making this determination,

⁴ Jenkins argument that Trial Rule 6's provision for enlargements of time trumps Rule 56(I)'s provision for alterations of time for deadlines in summary judgment proceedings is inapt in light of our Supreme Court's HomEq and Borsuk decisions.

we construe the evidence in a light most favorable to the non-moving party and resolve all doubts as to the existence of a genuine factual issue against the moving party. N. Ind. Pub. Serv. Co. v. Bloom, 847 N.E.2d 175, 180 (Ind. 2006).

Also, where the trial court makes findings and conclusions in support of its entry of summary judgment, we are not bound by such findings and conclusions, but they aid our review by providing reasons for the trial court's decision. Kumar v. Bay Bridge, LLC, 903 N.E.2d 114, 115 (Ind. Ct. App. 2009). If the trial court's entry of summary judgment can be sustained on any theory or basis in the record, we will affirm. Id.

A. Validity of the 2004 Agreement

Initially, we address Jinkins's argument scattered throughout her brief that the 2004 Agreement lacks mutuality of obligation and that Jet's promise not to sue Jinkins is illusory. The existence of a valid contract depends upon mutuality of obligation. Rogier v. Am. Testing and Eng'g Corp., 734 N.E.2d 606, 618 (Ind. Ct. App. 2000), trans. denied. "Unless each party to the contract has assumed a legal obligation to the other, the contract is lacking in mutuality." OVR Acquisition Corp. v. Cmty Health Servs., Inc., 657 N.E.2d 117, 127 (Ind. Ct. App. 1995), trans. denied.

Under the 2004 Agreement, Jinkins agreed to waive her rights under the Succession Agreement and resign from her employment and position of CEO of Jet Credit Union. In exchange, Jet agreed to pay to \$36,728 to Jinkins, which represented severance pay, vacation time accrued, and health insurance premiums, and not to file any lawsuit against Jinkins or add her as a defendant in the Loudermilk litigation.

But under the 2004 Agreement, Jet is not precluded from suing Jinkins if “acts or circumstances become known to legal counsel for Jet or to DFI or ASI after the effective date of [the] Agreement” or if Jinkins refuses to cooperate with assistance of the matters set forth in paragraph 6 of the Agreement, which includes matters relating to the Loudermilk litigation. We cannot agree with Jinkins’s assertion that these conditions render Jet’s promise not to sue illusory. See Pardieck v. Pardieck, 676 N.E.2d 359, 364 n.3 (Ind. Ct. App. 1997) (citing RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. e (1981) (“An illusory promise is a promise which by its terms makes performance entirely optional with the promisor.”)), trans. denied. Jet’s promise not to sue is not “entirely optional;” rather, Jet may only sue Jinkins if the circumstances described in paragraph 6 are met.

The 2004 Agreement executed by the parties is not lacking in mutuality of obligation. Jinkins and Jet assumed legal obligations to the other, i.e. Jinkins resigned from her employment and waived her rights under the Succession Agreement in exchange for payment of \$36,728 and Jet’s covenant not to sue. For these reasons, we reject Jinkins’s argument that the 2004 Agreement is not valid and enforceable.

B. Breach of Contract

Our consideration of Jinkins’s claim that Jet violated its contractual agreement not to sue Jinkins is key to our resolution of the remaining issues presented in this appeal.

The 2004 Agreement contains the following relevant provisions:

4. Jet, DFI, and ASI shall and do hereby agree to refrain from filing any lawsuits, claims, or causes of action against Jinkins or her spouse, Gary W. Jinkins, or from adding Jinkins or her spouse as a defendant in the Loudermilk Lawsuit based upon circumstances that are presently known to

legal counsel for Jet, DFI or ASI, provided, however, that this paragraph shall not be construed to preclude Jet, DFI, or ASI from later filing or pursuing a civil claim of any kind or nature against Jinkins based upon acts or circumstances which become known to legal counsel for Jet or to DFI or ASI after the effective date of this Agreement; and provided further that Jinkins' continued compliance with the terms and conditions of paragraphs 3 and 6 of this Agreement is a condition precedent to Jet's and DFI's duty to comply with the terms and conditions of this paragraph. This paragraph constitutes a covenant not to sue but is not intended to operate as a release or discharge from liability and shall not be construed as such.

8. . . . [T]hat the parties expressly agree that *the terms and conditions of paragraphs 4 and 5 of this Agreement shall not impair or affect the right of CUNA Mutual Group and/or CUMIS Insurance Society, Inc. to pursue or assert any claims that CUNA Mutual Group and/or CUMIS Insurance Society conclude that Jet may have against Jinkins to which CUNA Mutual Group and/or CUMIS Insurance Society, Inc. become subrogated as a result of the payment of any claim submitted by Jet under Bond Number BB01304734, and shall not impair or affect the right of Jet to file any bond claims with CUNA Mutual Group and/or CUMIS Insurance Society, Inc. against Jinkins. Jet will furnish information to CUNA Mutual Group and CUMIS Insurance Society, Inc. about the nature of Jinkins' cooperation with Jet, DFI and ASI in aid of their determinations.*

Appellee's App. pp. 69-71 (emphasis added).

The terms of the 2004 Agreement unambiguously provide that CUMIS, as Jet's subrogee, may pursue **any** claim against Jinkins. Further, CUMIS's right to do so is not limited by the provisions of paragraph 4 of the 2004 Agreement, which restricts Jet's right to sue Jinkins.

But Jinkins argues that CUMIS, as Jet's subrogee acquired "only such rights as the subrogor had, and the subrogee can enforce only such rights as the subrogor would have been able to enforce." Appellant's Br. at 17. She therefore claims that CUMIS is subject to the limitations on Jet's right to sue set forth in paragraph 4 of the 2004 Agreement.

Subrogation is a doctrine of equity long recognized in Indiana, which “applies whenever a party, not acting as a volunteer, pays the debt of another that, in good conscience, should have been paid by the one primarily liable.” Erie Ins. Co. v. George, 681 N.E.2d 183, 186 (Ind. 1997).

When a claim based on subrogation is recognized, “a court substitutes another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the right of the creditor in relation to the debt.” It is settled that “[s]ubrogation confers no greater right than the subrogor had at the time the surety or indemnitor became subrogated. The subrogator [sic] insurer stands in the same position as the subrogor, for one cannot acquire by subrogation what another, whose rights he claims, did not have.” The ultimate purpose of the doctrine, as with other equitable principles such as contribution, is to prevent unjust enrichment.

Id. (internal citations omitted). See also Bank of N.Y. v. Nally, 820 N.E.2d 644, 651 (Ind. 2005) (“Subrogation arises from the discharge of a debt and permits the party paying off a creditor to succeed to the creditor’s rights in relation to the debt.”); Harrison v. State Farm Mut. Auto. Ins. Co., 164 Ind. App. 569, 573, 330 N.E.2d 126, 129 (1975) (“The right of subrogation is purely derivative as the insurer succeeds only to the rights of the insured, and no new cause of action is created. In other words, the concept of subrogation merely gives the insurer the right to prosecute the cause of action which the insured possessed against anyone legally responsible for the latter’s harm.”) (quoting Couch, Insurance 2d §§ 61:36-37, pp. 261-63).

We agree with Jinkins that a subrogee generally stands in the shoes of the subrogor. But, here, Jinkins agreed to allow CUMIS the right to bring any claim against Jinkins to which CUMIS became subrogated by virtue of its payment of Jet’s claim submitted under Bond Number BB01304734. The 2004 Agreement expressly provides

that the terms of paragraph 4 “shall not impair or affect the right” of CUMIS to pursue any claim CUMIS concludes that Jet may have against Jinkins. Appellant’s App. p. 71.

Furthermore, the undisputed material facts support the conclusion that CUMIS, as subrogee of Jet, caused the Third Amended Complaint to be filed against Jinkins. Although the complaint lists Jet as the plaintiff, the complaint was filed by CUMIS’s counsel. Further, Jet’s (now Credit Union 1’s) CEO, Paul Simons averred that Jet filed a bond claim with CUMIS for the losses allegedly suffered due to Loudermilk’s and Jinkins’s breach of their fiduciary duties. Simons also stated that CUMIS, as Jet’s subrogee, caused the complaint to be filed against Jinkins and

Jet had no input into the decision to file the claims against Jinkins in the Third Amended Complaint and had no input into the specific allegations therein. The Third Amended Complaint was drafted and filed by [CUMIS] in its role as subrogee of Jet’s claims.

Appellant’s App. p. 979.

Quite simply, the 2004 Agreement expressly provides that CUMIS, as Jet’s subrogee, was not constrained by Jet’s promise not to sue Jinkins.⁵ For all of these reasons, we agree with the trial court’s conclusion that “Jinkins[’s] breach of contract claim fails as a matter of law because the filing of the Third Amended Complaint by [CUMIS] in Jet’s name and as Jet’s subrogee did not violate the 2004 Agreement.”

Appellant’s App. p. 64.

C. Fraud

⁵ Because the 2004 Agreement is a valid and enforceable contract, we need not address Jinkins’s unjust enrichment and quasi-contract claims. See Appellant’s Br. at 18 (“In pleading her counterclaims, Jinkins chose to plead in the alternative – breach of contract if the 2004 Agreement is determined to be enforceable, and unjust enrichment and quasi-contract if it is determined to be unenforceable.”).

Jenkins also argues that the trial court erred when it granted summary judgment on her fraud claim. In her counterclaim, Jenkins alleged that “Jet misrepresented to Jenkins, . . . that it would refrain from filing any lawsuits against Jenkins, or from adding Jenkins as a defendant in the litigation matters involving Loudermilk based upon information then available to legal counsel for Jet.” Appellant’s App. p. 140. Further, Jet claimed that “Jet made the misrepresentations to Jenkins knowing them to be false, and fraudulent with the intent of inducing Jenkins to enter into the Purported Agreement, and to waive the compensation and benefits due to her pursuant to the Succession Contract.” Id.

Jenkins’s fraud claim lacks merit because Jet did not file the Third Amended Complaint against Jenkins. The complaint was filed by CUMIS, Jet’s subrogee, and CUMIS was expressly permitted to file any claim against Jenkins as provided in paragraph 8 of the 2004 Agreement. We also agree with the trial court’s conclusion that Jenkins’s fraud claim is “nothing more than a restatement of Jenkins’ breach of contract claim that Jet purportedly breached the 2004 Agreement by filing the Third Amended Complaint.” Id. at 65.

D. Abuse of Process

Jenkins also alleged that the Third Amended Complaint was filed against her “for the ulterior and wrongful purpose of coercing Jenkins to give false testimony with respect to Jet’s claims against Loudermilk, a purpose for which said process was not designed or intended.” Appellant’s App. p. 141. Further, Jenkins claimed that by filing the complaint, Jet is attempting to “coerce Jenkins to provide evidence against Loudermilk with regard to certain alleged improprieties concerning the management, operations,

transactions, business and lending practices of Jet during the time prior to August 2003.”
Id. at 141-42. Finally, Jinkins argues that the claims alleged in the Third Amended Complaint are “frivolous, unreasonable or groundless,” and therefore she is entitled to recover the expense of defending herself pursuant to Indiana Code section 34-52-1-1.⁶
Id.

“An action for abuse of process requires a finding of misuse or misapplication of process for an end other than that which it was designed to accomplish.” Watson v. Auto Adviors, Inc., 822 N.E.2d 1017, 1029 (Ind. Ct. App. 2005), trans. denied (citation omitted).

Abuse of process has two elements: (1) “ulterior purpose or motives;” and (2) “a willful act in the use of process not proper in the regular conduct of the proceeding.” If a party’s “acts are procedurally and substantively proper under the circumstances” then his intent is irrelevant. A party may not be held liable for abuse of process if the “legal process has been used to accomplish an outcome which the process was designed to accomplish.”

Id. (internal citations omitted).

To the extent that Jinkins claims abuse of process by Jet, we decline to address it in light of the undisputed fact that CUMIS, as Jet’s subrogee, filed the Third Amended Complaint. Jinkins also claims that she should be permitted to proceed with her abuse of

⁶ Indiana Code section 34-52-1-1, the General Recovery Rule, provides in pertinent part:

(b) In any civil action, the court may award attorney’s fees as part of the cost to the prevailing party, if the court finds that either party:

- (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
- (2) continued to litigate the action or defense after the party’s claim or defense clearly became frivolous, unreasonable, or groundless; or
- (3) litigated the action in bad faith.

(c) The award of fees under subsection (b) does not prevent a prevailing party from bringing an action against another party for abuse of process arising in any part on the same facts. However, the prevailing party may not recover the same attorney’s fees twice.

process claim against CUMIS, but that is the sum total of her argument, and therefore, it is waived. See Ind. Appellate Rule 46(A)(8)(a) (2011). Moreover, Jinkins has not cited any evidence in the record that would satisfy the elements of a claim of abuse of process. Finally, our review of the record leads us to conclude that CUMIS's acts in filing the Third Amended Complaint are procedurally and substantively proper. For these same reasons, we reject Jinkins's argument that she is entitled to litigation expenses under Indiana Code section 34-52-1-1. The trial court properly entered summary judgment in favor of Jet on these claims.

Conclusion

The trial court properly struck Jinkins's untimely response to Jet's motion for partial summary judgment. We affirm the trial court's entry of partial summary judgment in favor of Jet on Jinkins's claims of breach of contract, fraud, abuse of process, and frivolous litigation.

Affirmed.

FRIEDLANDER, J., and MAY, J., concur.