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**IN THE
COURT OF APPEALS OF INDIANA**

TANA S. DULIN,

Appellant-Plaintiff,

vs.

SUN MORTGAGE CO., LLC, a/k/a SUN
MORTGAGE, LLC, and WENDY CREED,

Appellees-Defendants.

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No. 29A04-1008-PL-482

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel J. Pfleging, Judge
Cause No. 29D02-0611-PL-1176

June 8, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Tana S. Dulin appeals the trial court's award of damages to her in her successful suit against Sun Mortgage Company ("Sun Mortgage") and Wendy Creed. Dulin raises two issues for our review, which we restate as follows:

1. Whether the trial court's denial of her claim of constructive fraud is clearly erroneous.
2. Whether Dulin is entitled to attorney's fees because Sun Mortgage and Creed engaged in frivolous, unreasonable, or groundless litigation.

We affirm.

FACTS AND PROCEDURAL HISTORY

On May 18, 2010, the trial court entered judgment for Dulin on Dulin's claim that Sun Mortgage and its agent, Wendy Creed, had breached their contract to pay Dulin \$800. The court entered the following findings of fact and conclusions thereon:

Findings of Fact

1. This case was initiated by [Dulin's] filing of a Complaint for Damages on November 27, 2006. The Complaint was amended on June 21, 2007.
2. Dulin alleges that she applied for a mortgage loan with Sun Mortgage. [Dulin] alleges that she worked with Wendy Creed ("Creed"), who was an agent and employee of Sun Mortgage at all relevant times.
3. Dulin alleges that in 2006 she entered into an agreement to purchase real property from Rosemary Collier, subject to obtaining financing on acceptable terms.
4. Dulin contacted Creed and executed an application for a mortgage loan on said real property. Dulin executed a number of documents in connection with the application for mortgage financing, including:

- a. A Uniform Residential Loan Application (Exhibit 1);
- b. An Interest Rate and Loan Point Agreement (Exhibit 2);
- c. A Good Faith Estimate (Exhibit 3).

5. Each of the documents listed above listed an interest rate of 7.25%, and also contained a checked paragraph entitled "Lock and Reforeck," which stated that the "Commitment Period" for Dulin's loan ran from 9/20/2006 to 10/5/2006.

6. Closing was scheduled for September 29, 2006. Dulin was not advised prior to closing that National City Bank had declined her application for a loan at the interest rate of 7.25%, but would extend to her at an interest rate of 7.305%.

7. Dulin testified that if she had known of the higher rate of interest prior to closing she would have sought other mortgage financing.

8. Dulin and Creed both attended the closing on September 29, 2006.

9. The actual loan document signed by Dulin at closing was admitted into evidence as Defendant's Exhibit "B." At closing, the parties executed a handwritten document entitled "Agreement," which was admitted into evidence as Exhibit "4." Exhibit "4" stated in part that Wendy Creed, individually and as representative of Sun Mortgage, regarding the closing of Rosemary Collier and Tana S. Dulin, agreed to pay Dulin \$800.00 [representing 1/2 of the additional interest resulting from the higher rate of interest] no later than October 16, 2006, and further they agreed to waive \$425 toward a re-finance or new mortgage application by Dulin within one year. It is undisputed that Sun Mortgage and Creed failed to pay Dulin \$800.00 by October 16, 2006.

10. Dulin had no reason to believe that Sun Mortgage and Creed would breach their agreement to pay her \$800.00 or fail to abide by the other terms contained in Exhibit "4" and, based on their promises, she proceeded to execute the closing documents.

11. The Court finds Dulin's reliance upon Creed, as Sun Mortgage's representative, to be reasonable, and that Dulin incurred damages as a result of the wrongful conduct of Creed acting on behalf of Sun Mortgage. Such damages include actual damages in the amount of \$800.00.

Conclusions of Law

12. This Court has both subject-matter jurisdiction over this cause of action and personal jurisdiction over the parties.

13. The Court finds that [Dulin] has met her burden of proving the required elements for a breach of contract claim, and [she] is entitled to an award of actual costs pursuant to Indiana law.

* * *

15. [Dulin] is entitled to an award of \$800.00 in actual damages plus prejudgment interest at the rate of 8% per annum from the date of September 29, 2006[,] to the date of payment.

Appellant's App. at 9-11.

On June 21, Dulin filed a "Motion to Amend Judgment Entry," in which she requested the trial court to clarify its ruling with respect to her additional claims of fraud, constructive fraud, deceit, and violation of the Real Estate Settlement Procedures Act. More specifically, Dulin stated that, although the judgment "neither grant[ed] nor den[ied] relief for these latter claims . . . [n]evertheless, [the judgment does] support an award of attorney fees and treble damages . . . pursuant to the equitable doctrine of constructive fraud." Id. at 21. Dulin's claim for additional damages included more than \$24,000 in attorney's fees.¹

The trial court did not rule on Dulin's motion, and the motion was deemed denied. Dulin now appeals.

¹ Sun Mortgage claimed to have incurred at least \$60,000 in attorney's fees.

DISCUSSION AND DECISION

Issue One: Constructive Fraud

Dulin first contends that the trial court should have entered judgment on her claim for constructive fraud, which would have entitled her to treble damages and attorney's fees. The trial court entered judgment with findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52(A). When a court has made special findings, we review the judgment using a two-step process. Yanoff v. Muncy, 688 N.E.2d 1259, 1262 (Ind. 1997). First, we must determine whether the evidence supports the trial court's findings of fact. Id. Second, we must determine whether those findings support the trial court's conclusions. Id. Findings will be set aside only if they are clearly erroneous. Id. Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference. Id. A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. Id.

In order to determine that a finding or conclusion is clearly erroneous, an appellate court's review of the evidence must leave it with the firm conviction that a mistake has been made. Id. In applying this standard, we neither reweigh the evidence nor judge the credibility of the witnesses. Crawley v. Oak Bend Estates Homeowners Ass'n, Inc., 753 N.E.2d 740, 744 (Ind. Ct. App. 2001) (citation and quotation omitted), trans. denied. Rather, we consider only the evidence that supports the judgment and the reasonable inferences to be drawn therefrom. Id. We may affirm the judgment on any legal theory supported by the findings. Mitchell v. Mitchell, 695 N.E.2d 920, 923 (Ind. 1998).

Further, Dulin appeals from a negative judgment. See Curley v. Lake County Bd. of Elections & Registration, 896 N.E.2d 24, 32 (Ind. Ct. App. 2008), trans. denied. She must, therefore, establish that the trial court's judgment is contrary to law. Id. A judgment is contrary to law only if the evidence in the record, along with all reasonable inferences, is without conflict and leads unerringly to a conclusion opposite that reached by the trial court. Id. Thus, Dulin carries a heavy burden on appeal.

Our Supreme Court has discussed constructive fraud as follows:

Constructive fraud arises by operation of law from a course of conduct that, if sanctioned by law, would secure an unconscionable advantage, irrespective of the actual intent to defraud. Drudge v. Brandt, 698 N.E.2d 1245, 1250 (Ind. Ct. App. 1998). This theory of fraud is based on the premise that there are “[S]ituations which might not amount to actual fraud, but which are so likely to result in injustice that the law will find a fraud despite the absence of fraudulent intent.” Scott v. Bodor, Inc., 571 N.E.2d 313, 324 (Ind. Ct. App. 1991). A claim of constructive fraud requires, at a minimum, the existence of a duty on the part of the party to be charged arising out of the parties' relationship. Strong v. Jackson, 777 N.E.2d 1141, 1147 (Ind. Ct. App. 2002), trans. denied. Such a duty exists in fiduciary relationships and in relationships of trust and confidence. Id. at 1146-47. But “the mere existence of a relationship between parties of bank and customer or depositor does not create a special relationship of trust and confidence.” Huntington Mortgage Co. v. DeBrot, 703 N.E.2d 160, 167 (Ind. Ct. App. 1998) (citations omitted). See also Block v. Lake Mortgage Co., 601 N.E.2d 449, 452 (Ind. Ct. App. 1992), reh'g denied, (“A fiduciary relationship does not exist between a lender and a borrower unless certain facts exist which establish a relationship of trust and confidence between the two.”). Sees has no claim for constructive fraud because he and Bank One had no special relationship. Rather, they were engaged in an ordinary arms length business transaction.

Sees v. Bank One, Ind., N.A., 839 N.E.2d 154, 164 n.8 (Ind. 2005) (alteration original).

Again, the trial court here concluded that Sun Mortgage and Creed (hereinafter collectively referred to as “Sun Mortgage”) breached their contract to pay Dulin \$800. On appeal, Dulin contends that the court's factual findings in support of that judgment

likewise support her additional claim that Sun Mortgage engaged in constructive fraud when it informed her that the interest rate was locked in at 7.25% but then raised the rate to 7.305% on the day of closing.

Contrary to Dulin's argument on appeal, it makes no difference whether the trial court denied or failed to rule on her constructive fraud claim because the evidence does not support a finding of fraud. There is no evidence of a special relationship between Sun Mortgage and Dulin outside that of an ordinary lender-borrower, arms-length transaction. See id. And there is no evidence that the fractional change in the interest rate was the product of "a course of conduct that . . . would secure an unconscionable advantage." See id. Indeed, Sun Mortgage's willingness to promptly enter into a corrective contract with Dulin to remit to her—through payment and the waiver of fees—more than three-quarters of the difference caused by the changed interest rate indicates that the fractional change was simply an error. There is no evidence of fraud.

Dulin's reading of the trial court's factual findings does not support her appeal. The trial court's findings are directed only to its judgment on her breach of contract claim. Nothing in those findings can reasonably be read to support Dulin's argument that Sun Mortgage engaged in constructive fraud. The findings might, in the alternative, support a damage claim based on the doctrine of promissory estoppel, in that Dulin agreed to close the transaction in reliance upon the express representations made by Creed that she would be compensated, at least in part, for the interest discrepancy. See First Nat'l Bank of Logansport v. Logan Mfg. Co., 577 N.E.2d 949, 954 (Ind. 1991). But Dulin did not argue promissory estoppel before the trial court. And, in any event, a claim

based on promissory estoppel would not produce a different result than the judgment entered for breach of contract. To the contrary, Dulin's argument on this issue is merely a request for this court to reweigh the evidence on her constructive fraud claim, which we will not do. See Crawley, 753 N.E.2d at 744.

Issue Two: Attorney's Fees

Dulin also claims that she is entitled to attorney's fees independent of her claim for constructive fraud. Specifically, Dulin states that she is entitled to attorney's fees under Indiana Code Section 34-52-1-1 because Sun Mortgage engaged in "extensive litigation of an \$800 claim[, which] was frivolous, unreasonable[,] and groundless." See Appellant's Br. at 20-21. Dulin avers that \$60,000 in attorney's fees for Sun Mortgage "for defending an \$800 claim is shocking and arguably even reckless," and, as such, is evidence of Sun Mortgage's bad faith. Id.

Our review of a trial court's decision to grant or deny attorney's fees is clear:

Indiana adheres to the "American Rule" with respect to the payment of attorney fees, which requires each party to pay his or her own attorney fees absent an agreement between the parties, statutory authority, or rule to the contrary. Indiana Code Section 34-52-1-1(b) provides for the payment of attorney fees when a litigant has pursued a claim or defense that is frivolous, unreasonable or groundless.

We review de novo the trial court's legal conclusion that a party litigated in bad faith or pursued a frivolous, unreasonable or groundless claim or defense, and then review the trial court's decision to award attorney fees and the amount thereof under an abuse of discretion standard. A claim or defense is "frivolous" if it is taken primarily for the purpose of harassment, if the attorney is unable to make a good faith and rational argument on the merits of the action, or if the lawyer is unable to support the action taken by a good faith and rational argument for an extension, modification, or reversal of existing law. A claim or defense is "unreasonable" if, based on the totality of the circumstances, including the law and the facts known at the time of filing, no reasonable attorney would

consider that the claim or defense was worthy of litigation. A claim or defense is “groundless” if no facts exist which support the legal claim presented by the losing party. A trial court is not required to find an improper motive to support an award of attorney fees; rather, an award may be based solely upon the lack of a good faith and rational argument in support of the claim.

Breining v. Harkness, 872 N.E.2d 155, 161 (Ind. Ct. App. 2007) (citations omitted), trans. denied.

We first note that Dulin does not dispute the legitimacy of Sun Mortgage’s counterarguments to her claims at trial,² and neither does Dulin suggest that her agreement with Sun Mortgage required that the losing party pay the attorney’s fees of the prevailing party in the event of litigation. Rather, Dulin claims she is entitled to attorney’s fees because Sun Mortgage chose to “extensively litigate this matter,” which, she contends, is evidence of its unreasonableness or bad faith. Appellant’s Br. at 20-21. In other words, her claim under Indiana Code Section 34-52-1-1 is grounded on the obdurate behavior exception to the American Rule. See State Bd. of Tax Comm’rs v. Town of St. John, 751 N.E.2d 657, 658 (Ind. 2001).

We do not disagree with Dulin’s suggestion that the attorney’s fees in this case appear to be excessive, but that conclusion cuts both ways, and we can discern no justification for either Sun Mortgage’s fees in excess of \$60,000 or Dulin’s fees of more than \$24,000. These fees defy any reasonable cost-benefit analysis. In any event, while the large fees indicate that Sun Mortgage was determined to defend against Dulin’s claims at almost any cost, that does not mean that Sun Mortgage acted inappropriately. A

² There is no argument in this section of Dulin’s principal brief on appeal to support any such suggestions, and, therefore, Dulin waived those arguments. See Ind. Appellate Rule 46(A)(8)(a). And it is not clear whether some of Dulin’s statements in her reply brief are an attempt to raise these issues for the first time on appeal. If so, they are also waived.

vigorous defense is not tantamount to bad faith or obdurate behavior. Dulin has not shown that Sun Mortgage acted improperly, which was her burden under Indiana Code Section 34-52-1-1. As such, the trial court did not abuse its discretion when it denied her claim for attorney's fees, and we affirm the court's decision.

Affirmed.

ROBB, C.J., and CRONE, J., concur.