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IN THE COURT OF APPEALS OF INDIANA

Neal Bruder,
Appellant-Defendant,

v.

Seneca Mortgage Services, LLC,
Appellee-Plaintiff.

January 31, 2022

Court of Appeals Case No.
21A-PL-1085

Appeal from the Marion Superior Court

The Honorable Kurt Eisgruber, Judge

Trial Court Cause No.
49D06-1911-PL-46694

Baker, Senior Judge.

Statement of the Case

[1] The issues in this appeal require us to determine if a party to a consulting agreement can be required to pay a commission to a consultant when the consultant presents the party with a lender who will provide financing only if the party commits what would otherwise be a fraudulent and/or illegal act. We conclude that the party cannot be required to do so.

[2] Neal Bruder appeals from the trial court's order denying his motion to correct error in an action brought by Seneca Mortgage Services, LLC (Seneca), seeking collection of a commission under a consulting agreement Bruder entered into with Seneca Mortgage Financial Services (SMFS). Finding that the court correctly concluded Seneca is a successor to SMFS but erred by concluding that Bruder violated the non-circumvention clause of the agreement and owed Seneca a commission and attorney fees, we affirm in part and reverse and remand in part with instructions.

Issues

[3] Bruder presents the following restated issues for our review:

> I. Is the court's finding and conclusion that Seneca is a successor to SMFS clearly erroneous?
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> II. Was the court's conclusion that a non-circumvention clause required Bruder to seek financing exclusively with SMFS during the term of the agreement clearly erroneous?
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> III. Was the court's conclusion that Bruder breached the non-circumvention clause of the agreement clearly erroneous?

Seneca raises the additional argument that it is also entitled to appellate attorney fees incurred defending this appeal.

Facts and Procedural History

[4] Bruder is a general contractor who does business in Indianapolis and "flips"[1] homes. He entered into a non-exclusive one-year consulting agreement with SMFS in February of 2019. SMFS is "a paid commercial loan brokerage firm" that provides financing in "creative ways" or "where conventional financing wouldn't be available." Tr. Vol. 2, pp. 3, 6.

[5] During the term of the agreement, SMFS obtained financing for two of Bruder's real estate purchases and Bruder paid SMFS the commissions that were earned upon closing. Next, in the spring of 2019, Bruder became interested in purchasing property on Primrose Avenue in Indianapolis (the Primrose property). He contacted David Rusk, President of SMFS, informing him that although he did not need to borrow money for the purchase of the Primrose property, he was interested in discovering what kind of loan SMFS might obtain for him for around $100,000.

[6] Rusk located a prospective lender willing to loan Bruder $142,000. The prospective lender also required as a condition of the loan that Bruder pay for and pull permits on the Primrose property before the loan was finalized. Bruder replied that he only required $100,000 to $104,000. Further, he told Rusk he refused to pay for and pull permits, believing that doing so and identifying

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[1] Merriam-Webster defines the transitive verb "flip" as: "to buy and usually renovate (real estate) so as to quickly resell at a higher price." https://www.merriam-webster.com/dictionary/flipping (last visited January 20, 2022).

himself as the owner of the Primrose property before he actually owned the Primrose property, would be a fraudulent act that could jeopardize his relationship with the City of Indianapolis as a general contractor in good standing.[2] Rusk replied that he would communicate Bruder's position to the potential lender.

[7] At about this time, SMFS was advised to change its name to reflect that it did "not sell stocks, and bonds, and securities, and things of that nature." Tr. Vol. 2, p. 7. SMFS dropped "financial services from [its] name as [it] was exclusively a commercial loan broker[]." *Id*. Thereafter, the company did business as Seneca. According to records from the Indiana Secretary of State's Office, SMFS voluntarily dissolved with an inactive date of June 3, 2019. *See* Appellant's Appendix Vol. 2, p. 34. An internal document purportedly existed, containing an acquisition successor clause between SMFS and Seneca. *See* Tr. Vol. 2, p. 37.

[8] Rusk sent additional text messages to Bruder indicating that the proposed lender remained steadfast in its requirement that Bruder pay for and pull the permits on the Primrose property prior to closing on the loan. Bruder again

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[2] Bruder testified at trial that the permit application requires that you sign "under the penalty of law." Tr. Vol. 2. p. 20. He filled out the permit application with the City of Indianapolis as an owner but did not pay for the permits until after the closing on the financing, i.e., when he owned the property. *See id.* He testified that "I wasn't going to --I felt like--say the loan didn't go through, or the closing didn't go through, or the seller backed out, then I've pulled permits with the [City] that stated I owned a house, that I didn't own. I just ---I wasn't going to risk my reputation---I was well aware of the legalities there, and I wasn't going to do it." *Id.*

refused to do so and financed the purchase through a loan to himself. That loan was provided by Black Dog Property Management, LLC, a company co-owned by Bruder and two other business partners, with Bruder owning 46.3 percent. The loan he made to himself did not contain the permit requirements, had a different interest rate, and thus was not similar to the loan Seneca identified. Later, after Bruder closed on the financing for the Primrose property, Seneca corresponded with Bruder, attempting to collect a two-percent commission it claimed was owed under the consulting agreement. Bruder did not pay Seneca the commission.

[9] Even though the consulting agreement contained a binding arbitration clause, Seneca first filed a complaint with the trial court against Bruder alleging breach of contract. *See* Ex. Vol. 3, p. 7; Appellant's App. Vol. 2, pp. 19-26. Seneca sought payment of the commission and attorney fees incurred while enforcing the contract. Bruder argued that the consulting agreement was with SMFS not Seneca, and, therefore, he did not owe the commission to it. He further argued that it was his right under the contract to decline financing offered by Seneca and he did just that. He claimed that because no transaction was consummated, he did not owe a commission. Seneca countered that Bruder had violated the non-circumvention clause of the contract and nonetheless owed Seneca its commission per the terms of that clause.

[10] A bench trial was held after which the court found that: (1) Seneca was a successor to SMFS; (2) Bruder breached the contract by failing to pay the 2% commission ($2,840); (3) Bruder must pay the commission plus pre- and post-

judgment interest; and (4) Bruder must pay Seneca's attorney fees ($11,340). The court's order also provided that the total judgment of $14,512 increases by sixty-two cents per day from March 5, 2021. Bruder timely filed a motion to correct error which the court denied. Bruder now appeals.

Discussion and Decision

Standard of Review

[11] Bruder appeals from the denial of his motion to correct error. Generally, a trial court's ruling on a motion to correct error is reviewed for an abuse of discretion. *Ind. Bureau of Motor Vehicles v. Watson*, 70 N.E.3d 380, 384 (Ind. Ct. App. 2017). An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before the court or if the court has misinterpreted the law. *Id.* However, where the issues raised in the motion are questions of law, the standard of review is de novo. *Poiry v. City of New Haven*, 113 N.E.3d 1236, 1239 (In. Ct. App. 2018).

[12] When cases are tried upon the facts without a jury, the court shall make findings of fact and conclusions thereon. Ind. Tr. Rule 52(A). On appeal, we will not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. *Id.* Here, Bruder did not bear the burden of proof at trial; therefore, he appeals from an adverse judgment. *See Garling v. Ind. Dep't of Nat. Res.*, 766 N.E.2d 409, 411 (Ind. Ct. App. 2002), *trans. denied.* "When the trial court enters findings in favor of the party bearing the burden of proof, we will

hold the findings clearly erroneous if they are not supported by substantial evidence of probative value." *Id.* "Even if the supporting evidence is substantial, we will reverse the judgment if we are left with a definite and firm conviction a mistake has been made." *Id.*

I. Successor Finding

[13] Bruder says that the court's finding that Seneca was a successor to SMFS is clearly erroneous. He argued that he was not provided with notice of the change and challenged whether the successor status complied with the provision in the consulting agreement.

[14] The consulting agreement provided in pertinent part as follows:

> The terms and conditions of this Agreement shall inure to the benefit of and be binding upon the Parties and their respective successors and permitted assigns. Neither [Seneca] nor [Bruder] may assign their rights or delegate their obligation under this Agreement without the prior written consent of the other.

Ex. Vol. 3, p. 7.

[15] As for Bruder's complaint about notice, this part of the consulting agreement required prior written consent for an assignment of rights or delegation of obligations, not when a successor to the agreement becomes involved. Although it would be good business practice to provide the other party to the agreement with notice about such a change, it was not required by this consulting agreement.

[16] Rusk's uncontroverted testimony at trial was that "the new company drops the financing, it's still Seneca," and that it "[assumed] all liabilities of the old company." Tr. Vol. 2, p. 36. Rusk further testified that "the new company didn't acquire the old company. . . . the old company doesn't exist[.] It's a successor. The new company is a successor." Rusk clarified that "Seneca Mortgage Services is the successor to Seneca Mortgage and Financial Services." *Id.* at 7. He said,

> It was recommended to us since we do not sell stocks, and bonds, and securities, and things of that nature, that we immediately drop financial services from our name as we were exclusively commercial loan brokers.

Id.

[17] What occurred was a name change and voluntary dissolution of SMFS. "The changing of the corporate name does not affect the liability of the corporation." *Lindenborg v. M & L Builders & Brokers, Inc.*, 302 N.E.2d 816, 820 (Ind. Ct. App. 1973). "A successor, with reference to corporations, . . . generally means another corporation which, through amalgamation, consolidation, or other legal succession, becomes invested with rights and assumes burdens of first corporation." *Markham v. Prutsman Mirror Co.*, 565 N.E.2d 385, 386-87 (Ind. Ct. App. 1991) (quoting Black's Law Dictionary 1283 (5th ed. 1979)). SMFS's name was changed to Seneca and SMFS was voluntarily dissolved. Rusk's uncontroverted testimony established that Seneca was a successor to SMFS. The trial court did not abuse its discretion nor was its determination clearly erroneous that Seneca was a successor to SMFS.

II. Non-Exclusivity

[18] Next, Bruder argues the court's conclusion that a non-circumvention clause required Bruder to seek financing exclusively with Seneca during the term of the agreement was clearly erroneous. More specifically, he claims that the court erred by finding and concluding that, "The Agreement included a non-circumvention clause whereby [Bruder] agreed to seek financing only through Seneca during the term of the agreement." Appellant's App. Vol. 2, p. 8. This finding is not supported by the evidence. There is no language in the non-circumvention clause requiring Bruder to seek financing through Seneca and only through Seneca for the duration of the term. *See* Ex.Vol. 3, pp. 5-6.

[19] Additionally, the court found that Bruder "has breached the non-circumvention clause of the Agreement by *accepting the financing from a third party* while the Agreement was still in force." *Id.* at 9 (emphasis added). Bruder argued in his motion to correct error that the unambiguous language of the agreement did not restrict Bruder from seeking financing elsewhere during the term of the contract; *ergo* the trial court misinterpreted the agreement as a matter of law by holding that it did. Seneca contended in reply that Bruder's challenge was improper for a motion to correct error because it was not based on newly discovered evidence; but, nonetheless argued that the court correctly interpreted the agreement to restrict Bruder's financing options solely to Seneca. Bruder and Seneca make similar arguments here on appeal.

[20] We first turn to the retention section of the consulting agreement for guidance. The retention section contains language about non-exclusivity and provides as follows:

> 1. RETENTION
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> [Bruder] hereby retains [Seneca] for a primary period of one year, commencing on the Effective Date as corporate consultant on a non-exclusive basis. [Seneca] shall be an independent contractor, and not an employee of [Bruder] and shall be responsible to determine its own work hours and place of work.

Ex.Vol. 3, p. 4.

[21] "[M]atters of contract interpretation are particularly well-suited for de novo appellate review because they generally present questions purely of law." *In re Ind. State Fair Litig.*, 49 N.E.3d 545, 548 (Ind. 2016) (internal quotations omitted). "It is the duty of courts to interpret a contract so as to ascertain the intent of the parties." *First Fed. Sav. Bank of Ind. v. Key Markets, Inc.*, 559 N.E.2d 600, 603 (Ind. 1990). "It must accept an interpretation of the contract which harmonizes its provisions as opposed to one which causes the provisions to be conflicting." *Id.* "In interpreting a written contract the court will attempt to determine the intent of the parties at the time the contract was made as disclosed by the language used to express their rights and duties." *Id.*

[22] Looking at the plain language of the retention provision, and breaking it down to its essence, it reads, "[Bruder] . . . retains [Seneca] . . .as a corporate consultant on a non-exclusive basis." Ex. Vol. 3, p. 4. Had Seneca sought to explicitly restrict Bruder from seeking financing elsewhere during the term of

the agreement, it should have included that language in the agreement. The only restrictions placed on Bruder's financial dealings with others during the term of the agreement appear in the section on non-circumvention which we address next. Here, we hold that the court's conclusion that Bruder could seek financing only from Seneca during the term of the agreement was clearly erroneous.

III. Non-Circumvention Clause Violation

[23] Bruder alleges that the court's conclusion that he breached the non-circumvention clause is clearly erroneous. We agree.

[24] The non-circumvention provision provides as follows:

> In accordance with the terms of this Agreement, [Bruder] hereby irrevocably agrees not to circumvent, avoid, bypass, or obviate, directly or indirectly, the intent of this Agreement. Notwithstanding anything to the contrary herein, [Bruder], in its sole and absolute discretion, may decline any and all proposed investments, financing or other transaction, without any liability to [Seneca], except for the payment of the fee described in Section 3(b)(2) above.

Ex. Vol. 3, pp. 5-6.[3]

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[3] We observe that although referenced in this section, there is no paragraph 3(b)(2) in the agreement. However, the parties both treated the paragraph under section 3(B)–"Two percent (2%) of the total gross amount of any accepted Sale/Financing or Transactional Value (due at the closing)"–as paragraph 3(b)(2) for purposes of argument.

Further, that section involves payment of a 2% commission upon closing of a loan consummating a transaction involving a lender introduced to Bruder directly or indirectly by Seneca. The only financial

[25] The court concluded as follows:

> [Bruder] has breached the non-circumvention clause of the Agreement by accepting financing from a third party while the Agreement was still in force. Pursuant to that clause, Seneca was entitled to collect the commission it would have earned. [Seneca] is entitled to enforce the Agreement as [SMFS]'s successor.
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> The Court recognizes and acknowledges [Bruder's] reasons for rejecting the financing option. The parties are, however, bound to the written terms of the Agreement, which allowed [Bruder] the right to reject financing options and demand alternatives from Seneca, but did not permit [Bruder] to circumvent the Agreement and pursue third-party financing options without compensating Seneca for its services.
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> [Bruder] breached the Agreement by failing to pay the commission to [Seneca] when requested. [Bruder] is further liable for [Seneca's] attorneys' fees incurred to pursue its valid right to payment of that commission.

Appellant's App. Vol. 2, pp. 9-10.

[26] Using the contract interpretation principles previously stated, we turn to the first sentence of the non-circumvention provision. This sentence provides that Bruder agreed "not to circumvent, avoid, bypass, or obviate, directly or indirectly, *the intent of this Agreement.*" Ex. Vol. 3, p. 5 (emphasis added). The

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transaction that was consummated was between Bruder and Black Dog Property Management, LLC. Seneca did not introduce Bruder to Black Dog, and Bruder did not violate the terms of the non-circumvention clause as discussed herein. Payment of the commission was not triggered.

Rusk testified at trial that if Bruder "turned down that July financing" he would not have "charged [Bruder] a commission just for rejecting that financing." Tr. Vol. 2, p. 27. Rusk would have charged him a commission on another loan found by Seneca that Bruder accepted. *See id.* at 28.

intent of the agreement was that Bruder sought assistance from Seneca including: (1) introducing Bruder to banking and legal entities and/or investors; (2) assisting in the negotiation and closing of any financing initiated by Seneca; (3) general consulting including corporate strategy development; and (4) business development. In exchange for that assistance, the agreement provided for Bruder to compensate Seneca. One can imply the term that the financing arrangement would not require Bruder to violate the law.

[27] Here, the evidence reflects that Bruder had successfully completed two prior transactions with Seneca. Though Bruder did not require financing for the Primrose property flip, he asked Rusk to inform him of any financing Seneca could provide. The financing Rusk came back with was for more money than Bruder required by around $40,000 and included the firm requirements that Bruder pay for and pull permits on the property before the closing of the loan. Bruder told Rusk that he did not need a loan that large and that he believed that paying for and pulling the permits prior to owning the property would require fraudulent representations of ownership he was not prepared to make. Those permit requirements remained until immediately prior to the closing on the financing Bruder obtained through his own company Black Dog Property Management, LLC.

[28] Seneca offered a financing opportunity Bruder could not accept and consistently advanced that financing opportunity, despite Bruder's refusals, until the last minute. *See* Tr. Vol. 2, p. 40. Seneca did not provide alternative financing despite Bruder's repeated protestations at the financing offered.

Those protestations reasonably amounted to an implied request for alternative financing, and no express request for alternative financing was required by the agreement. Bruder testified that had the permits not been a requirement for the financing, he would have closed on the financing Seneca found. *See id.* at 19.

[29] An argument could be made that Seneca breached the agreement in the first instance by insisting that Bruder close on financing that included the perpetration of a fraud on the City of Indianapolis as a term of arrangement. Though the consulting agreement itself arguably was not unconscionable, the financing arrangement Seneca insisted Bruder accept included an unconscionable requirement. The court erred by concluding that Seneca could recover under the terms of the consulting agreement when to do so would sanction the requirement of an illegal act as a condition of the loan it obtained to Bruder.

[30] Furthermore, instead of reaching out to another mortgage consulting company (which would not have violated the agreement), Bruder found a way to lend the money to himself to finance the purchase. Circumventing, avoiding, bypassing, or obviating the agreement might have been established had Bruder been introduced by Seneca to the potential lender and Bruder negotiated directly with the potential lender, leaving Seneca out of the equation and without compensation. The evidence does not support the court's conclusion that Bruder circumvented the consulting agreement, and we find that conclusion to be clearly erroneous.

[31] Seneca acknowledged at trial that had the parties simply walked away from the Primrose property deal, Seneca would not be entitled to a commission. *See* Tr. Vol. 2, p. 42. The court's rationale for finding that Bruder circumvented the agreement was based on its mistaken interpretation that the agreement was non-exclusive only as to Seneca, and thus Bruder was in breach by obtaining financing from another source during the term of the agreement. Further, the financing arrangement identified by Seneca required Bruder to commit a fraudulent and illegal act in order prior to closing on the financing. Consequently, the court's award of the commission and attorney's fees are reversed.

[32] Seneca's request for appellate attorney fees under Indiana Appellate Rule 66(E) is denied.

Conclusion

[33] We conclude that the court correctly concluded that Seneca is a successor to SMFS. However, we further conclude that the court incorrectly concluded that Bruder could only obtain financing through Seneca during the term of the consulting agreement. The court further erroneously concluded that Bruder owed Seneca a commission and attorney's fees for circumventing the agreement. Accordingly, this matter is affirmed in part, and reversed and remanded in part with instructions to enter judgment in favor of Bruder. Seneca's request for appellate attorney's fees is denied.

[34] Affirmed in part and reversed and remanded in part.

May, J., and Tavitas, J., concur.