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IN THE COURT OF APPEALS OF INDIANA

Sri Shirdi Saibaba Sansthan of Tri State, Inc. and Sumalatha Satoor,

Appellants-Plaintiffs/Counterclaim-Defendants,

v.

Farmers State Bank of Alto Pass, Ill.,

Appellee-Defendant/Counterclaim-Plaintiff.

July 29, 2022

Court of Appeals Case No. 21A-PL-2572

Appeal from the Warrick Superior Court

The Honorable Amy Steinkamp Miskimen, Judge,

Trial Court Cause No. 87D02-1812-PL-1937

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellants-Plaintiffs/Counterclaim-Defendants, Sri Shirdi Saibaba Sansthan of Tristate, Inc. (Tristate) and Sumalatha Satoor (Satoor) (collectively, Appellants), appeal the trial court's findings of fact and conclusions thereon in favor of Appellee-Defendant/Counterclaim-Plaintiff, Farmers State Bank of Alto Pass, Ill. (Farmers), on Appellants' claim for breach of contract.

[2] We affirm.

ISSUE

[3] Appellants present this court with one issue on appeal, which we restate as: Whether the trial court abused its discretion by concluding that Farmers did not fraudulently induce Satoor to enter into a purchase agreement for real estate.

FACTS AND PROCEDURAL HISTORY

[4] Sometime in 2012, Farmers acquired the real estate and its improvements located at 6299 Oak Grove Road in Newburgh, Indiana, through a foreclosure proceeding. After its acquisition, Farmers leased the property to a religious group, the Embassy of Christ, which used the building as a church. At all relevant times during these proceedings, the real estate was zoned "R3" which, pursuant to Article XI, Section 1 of the Warrick County's Comprehensive Zoning Ordinance, permits the property to be used for "Churches and Church-operated incidental\accessory facilities (on same site) and religious facilities." (Exh. p. 80). Farmers performed several upgrades and repairs to the building,

including fixing leaks around the dome, correcting landscaping issues, repairing the front door lock, repairing roof tiles and related drainage issues, and replacing an entire wall on the lower level. During the spring of 2013, Mark Miller (Miller), Farmers' licensed realtor, created a for-sale listing of the property, describing the property as a religious facility.

[5] Satoor is a resident of Evansville, Indiana, and one of the three founders of Tristate, which was attempting to open a Hindu Temple in the area. Satoor became aware of the listing and viewed the listing information, noticing specifically that the building was described as a religious facility. At all times during the purchase proceedings, Satoor was represented by a realtor and visited the facility several times prior to making an offer on the property to determine whether it was suitable to serve as a Hindu Temple.

[6] On April 25, 2013, Farmers and Satoor entered into an agreement to purchase the real estate. The purchase agreement incorporated Counter Offer No. 2, which was executed by Farmers and Satoor and which included handwritten 'As Is' language. Prior to closing on the purchase, and although she had the right under the purchase agreement to do so, Satoor did not review the zoning regulations or fire code applicable to the real estate and, except for a structural inspection, did not have the real estate inspected to confirm it could be used for a specific purpose.

[7] On June 3, 2013, at the closing, Satoor signed a Satisfaction of Contingencies and Release in which she acknowledged that all contingencies were met to her

satisfaction and she did not "rel[y] upon any representations of [Farmers], Listing Broker, or any salesperson associated with [Farmers] as to the condition of any fixtures, improvements, equipment, or personal property included in the sale." (Exh. p. 77). On that same day, Tristate entered into various agreements with Farmers to fund the purchase of the real estate, including a promissory note, a mortgage, an assignment of rents, and a business loan agreement (collectively, Loan Documents). Satoor executed a commercial guaranty, wherein she personally guaranteed full payment of the amount owed to Farmers by Tristate pursuant to the Loan Documents.

[8] After closing on the real estate, the Fire and Building Code Enforcement Inspection report found that as the building originally was designated as a banquet hall and zoned as A-2, its use for religious purposes required a zoning of A-3. Due to this violation, Appellants' ability to use the facility as a Hindu Temple has been limited to small gatherings. This prohibition on large gatherings has limited Appellants' ability to raise funds to cover the expenses of the Temple and make the payments on the promissory note.

[9] On December 6, 2018, Appellants filed their Complaint against Farmers, alleging a breach of contract. On December 18, 2018, Farmers filed its Answer and Counterclaim.[1] On July 28, 2021, the trial court conducted a two-day

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[1] Neither party included the Complaint and Answer in the Appendix. Our review is therefore limited to the references to these documents included in the trial court's judgment.

bench trial on Appellants' Complaint and Farmers' Counterclaim. Following Appellants' close of evidence at trial, Farmers moved for a directed verdict on (1) Tristate's claims relating to the purchase agreement, arguing that Tristate lacked standing to bring the claim as it was not a party to the purchase agreement; and (2) Appellants' claims, arguing Appellants failed to establish damages as a result of any action by Farmers. The trial court granted Farmers' motion for directed verdict as to Tristate's claims relating to the purchase agreement but denied the motion as to Appellants. On October 21, 2021, the trial court issued its findings of fact and conclusions thereon, finding in favor of Farmers. With respect to Appellants' claims, the trial court determined that Farmers did not breach the purchase agreement and had not fraudulently induced Satoor to enter into the agreement to purchase the real estate.

> Specifically, no evidence was admitted establishing that [Farmers] knew of any issue zoning, fire, or building code or otherwise regarding the use of the property as religious facility, prior to closing on June 3, 2013. While the marketing listing for the property listed its type as "religious facility," there is no evidence that [Farmers] or Scott Johnson [then-president of Farmers] provided any information for or assisted in the creation of that marketing listing. Regardless, no evidence was admitted to establish that [Miller] or [Farmers] knew such listing was false.

(Appellants' App. Vol. II, pp. 25-26). With respect to Farmers' counterclaim, the trial court concluded that Appellants breached the Loan Documents and determined that Farmers is entitled to foreclose on its security interest and have the real estate sold.

[10] Appellants now appeal. Additional facts will be provided if necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

[11] Appellants appeal from a negative judgment. A judgment entered against a party who bore the burden of proof at the trial court is a negative judgment. *Smith v. Dermatology Assocs. of Fort Wayne, P.C.*, 977 N.E.2d 1, 4 (Ind. Ct. App. 2012). On appeal, we will not reverse a negative judgment unless it is contrary to law. *Id.* When determining whether a judgment is contrary to law, we consider the evidence in the light most favorable to the appellee, together with all the reasonable inferences to be drawn therefrom. *Id*. A party appealing from a negative judgment must show that the evidence points unerringly to a conclusion different than that reached by the trial court. *Id*.

[12] When a trial court enters findings of fact and conclusions of law thereon pursuant to Indiana Trial Rule 52, we apply the following two-tiered standard of review: whether the evidence supports the findings and whether the findings support the judgment. *Tompa v. Tompa*, 867 N.E.2d 158, 163 (Ind. Ct. App. 2007). The trial court's findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. *Id*. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. *Id.* We neither reweigh the evidence nor assess the credibility of the witnesses, but we

consider only the evidence most favorable to the judgment. *Id*. We review conclusions of law de novo. *Id.*

II. *Analysis*[2]

[13] Appellants contend that the trial court erred when it concluded that Farmers did not fraudulently induce Appellants to enter into the purchase agreement for the real estate.[3] Specifically, Appellants claim that "Farmers concealed the issues with the building by holding the [r]eal [e]state out to be used as a religious facility all while [Farmers] knew that Satoor desired to use the [r]eal [e]state as a Hindu Temple and [Farmers' president] advised Satoor, at the closing, that the documents were all as they had discussed." (Appellants' Br. pp. 14-15).

[14] Initially, we observe that Appellants' argument centers around the fraudulent inducement to enter into the purchase agreement. Generally, only those who are parties to a contract or those in privity with a party have the right to enforce

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[2] We acknowledge that "[g]enerally, where parties have reduced an agreement to writing and have stated in an integration clause that the written document embodies the complete agreement between the parties, the parol evidence rule prohibits courts from considering extrinsic evidence for the purpose of varying or adding to the terms of the written contract." *Wind Wire, LLC v. Finney,* 977 N.E.2d 401, 405 (Ind. Ct. App. 2012). However, "[a]n exception to the parol evidence rule applies [] in the case of fraud in the inducement, where a party was 'induced' through fraudulent representations to enter a contract." *Circle Ctr. Dev. Co. v. Y/G Ind., L.P,* 762 N.E.2d 176, 179 (Ind.Ct.App.2002).

[3] Although Appellants phrase their claim as "Tristate and Satoor have elected to seek damages relating to the fraudulent inducement to enter into the purchase agreements and promissory note with [Farmers]," they do not make any argument, let alone a cogent one, with respect to the promissory note executed by Tristate. (Appellants' Br. p. 13). As no argument is made beyond this general statement, we find the issue of fraudulent inducement to enter into the promissory note waived for our review. *Martin v. Hunt*, 130 N.E.3d 135, 137 (Ind. Ct. App. 2019) (Failure to present a cogent argument results in waiver on appeal).

the contract. *Ind. Gaming Co. v. Blevins*, 724 N.E.2d 274, 277 (Ind. Ct. App. 2000). It is undisputed by the parties that only Satoor was a party to the real estate agreement with Farmers. Based on this uncontradicted evidence, Farmers moved for a directed verdict before the trial court with regard to Tristate's claims derived from the purchase agreement, which was granted by the court. Appellants do not present us with any argument that the trial court erred in granting the directed verdict with respect to Tristate; therefore, we uphold the trial court's judgment and will address Appellants' claim with respect to Satoor only.

[15] As Satoor relies on a constructive fraud theory, we note that it is well-established that "'[c]onstructive fraud arises by operation of law from a course of conduct which, if sanctioned by law, would secure an unconscionable advantage, irrespective of the existence or evidence of actual intent to defraud.'" *Kreighbaum v. First Nat. Bank & Trust*, 776 N.E.2d 413, 420 (Ind. Ct. App. 2002) (quoting *Marathon Oil Co. v. Collins*, 744 N.E.2d 474, 480 (Ind. Ct. App. 2001)). The five elements of constructive fraud are:

> (i) a duty owing by the party to be charged to the complaining party due to their relationship; (ii) violation of that duty by the making of deceptive material misrepresentations of past or existing facts or remaining silent when a duty to speak exists; (iii) reliance thereon by the complaining party; (iv) injury to the complaining party as a proximate result thereof; and (v) the gaining of an advantage by the party to be charged at the expense of the complaining party.

Rice v. Strunk, 670 N.E.2d 1280, 1284 (Ind. 1996); *see also Kreighbaum*, 776 N.E.2d at 421. A plaintiff alleging the existence of constructive fraud has the burden of proving the first and last elements enumerated in *Rice*: a duty owing by the party to be charged to the complaining party due to their relationship, and the gaining of an advantage by the party to be charged at the expense of the complaining party. *Strong v. Jackson*, 777 N.E.2d 1141, 1147 (Ind. Ct. App. 2002), *aff'd on reh'g*, 781 N.E.2d 770 (Ind. Ct. App. 2003), *trans. denied*. The duty mentioned in the first element may arise in one of two ways: by virtue of the existence of a fiduciary relationship, or in the case where there is a buyer and a seller, where one party may possess knowledge not possessed by the other and may thereby enjoy a position of superiority over the other. *Epperly v. Johnson*, 734 N.E.2d 1066, 1073 (Ind. Ct. App. 2000). If the plaintiff meets the burden of proof with respect to those two elements and establishes the existence of a fiduciary relationship, the burden shifts to the defendant to disprove at least one of the second, third, and fourth elements of *Rice* by clear and unequivocal proof: no making of deceptive material misrepresentations of past or existing facts or remaining silent when a duty to speak exists, no reliance thereon by the complaining party, or no injury to the complaining party as a proximate result thereof. *Id*. We observe, however, that in a constructive fraud action based on misrepresentations between a buyer and a seller and not the existence of a fiduciary relationship, no presumption of fraud arises and the burden is on the plaintiff to prove all five elements of the *Rice* test. *Id*.

[16] The trial court's findings and conclusions do not indicate that it precisely followed the above analysis. Rather, without indicating that a presumption of constructive fraud arose in this case, or that Farmers had the burden of refuting such a presumption, the trial court conducted an analysis based on an actual fraud theory.[4] Nevertheless, we may affirm this judgment on any legal theory consistent with the trial court's findings. *Strong*, 777 N.E.2d at 1147.

[17] Claiming the existence of a fiduciary relationship, Satoor focuses on the existence of trust and confidence that was created due to Farmers acting as the closing agent when Farmers "and the bank's president [were] the one giving Satoor the documents to sign at closing." (Appellants' Br. p. 14). She argues that she was handed the documents, which claimed to show "what they had talked about" even though handwritten 'As Is' language had been added. (Appellants' Br. p. 14). Under Indiana law, a business or arm's length, contractual relationship, such as the one existing between Satoor and Farmers, does not give rise to a fiduciary relationship. *Wilson v. Lincoln Fed. Sav. Bank*, 790 N.E.2d 1042, 1046-47 (Ind. Ct. App. 2003). More specifically, "the mere existence of a relationship between parties of bank and customer or depositor does not create a special relationship of trust and confidence." *Kreighbaum*, 776 N.E.2d at 419. The only relevant exception is when special circumstances

[4] Actual fraud exists when there is: (1) a material misrepresentation of part of existing facts by the party to be charged; (2) which was false, (3) which was made with knowledge or reckless ignorance of the falseness, (4) which was relied upon by the complaining party, and (5) proximately caused the complaining party injury. *Song v. Iatarola*, 76 N.E.3d 926, 934 (Ind. Ct. App. 2017).

establish a "confidential relationship" between the parties. *Id.* A confidential relationship exists where one party reposes confidence in another with resulting superiority and influence exercised by the other. *Id.* The party reposing the confidence must be in a position of inequality, dependence, weakness, or lack of knowledge, and the dominant party must have abused the confidence by improperly influencing the weaker so as to obtain an unconscionable advantage. *Id.*

[18] The evidence reflects that at all times during these proceedings, Satoor was represented by a realtor and while Scott Johnson (Johnson), Farmers' then-president, initially testified that Farmers conducted the closing, upon closer review of the documents he corrected his testimony and confirmed that the closing was conducted by a third-party title company. Similarly, conflicting evidence was presented at trial as to whether the documents already contained the 'As Is' language when presented to Satoor for signature. Johnson testified that he could not explain why the counteroffer was electronically signed by Satoor and also contained the handwritten 'As Is' language; however, he clarified that he does not "write anything on a document after it's been signed." (Transcript Vol. II, p.p. 102-03). Regardless, Johnson and Miller both stated that the real estate was sold 'As Is,' and Satoor's interrogatory responses, admitted at trial, twice affirmed that "[w]e purchased the [real estate] with 'As-Is' clause as it was a church." (Exh. p. 42). Viewing the evidence most favorable to the judgment, we conclude that no fiduciary relationship existed between Satoor and Farmers as she cannot establish that Farmers stood in a

position of superiority and exercised influence over her. Accordingly, in the absence of a fiduciary relationship, Satoor remained in a buyer and seller relationship and retained the burden to establish all five elements of the *Rice* test.

[19] Linking the first element of the *Rice* test—the superior knowledge and position of one party over another—together with the second *Rice* element—the deceptive material misrepresentation—Satoor asserts that Farmers "concealed the issues with the building by holding the [r]eal [e]state out to be used as a religious facility all while [Farmers] knew Satoor desired to use the [r]eal [e]state as a Hindu Temple[.]" (Appellants' Br. pp. 14-15).

[20] The evidence reflects that prior to listing the property for sale, the building was used as a church by a religious group. Based on this usage, which had also been observed by Satoor when she visited the building, Miller created a marketing listing for the property, describing the property as a religious facility. Both Miller and Johnson testified that they were not aware of any issues prior to closing that would have prevented the building from being used as a religious facility. Although Satoor had the right under the purchase agreement to review the zoning regulations or fire code applicable to the real estate prior to closing, she did not do so and, except for a structural inspection, she did not have the real estate inspected to confirm it could be used for a specific purpose. She conceded at trial that because she "saw [the building] being used as a church," she never discussed "anything about the zoning of the property with the bank" prior to closing. (Tr. Vol. II, p. 49).

[21] In *Craig v. ERA Mark Five Realtors*, 509 N.E.2d 1144, 1146 (Ind. Ct. App. 1987), a property was listed by a realtor as a "multi-family apartment building." After closing it was discovered that the property did not comply with local zoning laws and the buyer filed a Complaint, alleging fraud by misrepresenting the zoning status of the property. *Id*. at 1147. Finding no fraud, we concluded that "[t]he mere fact that the defendants represented the property as an apartment building does not rise to the level of an affirmative representation that the use of the property was permissible under the applicable zoning ordinance. Furthermore, there was evidence that the usage of the term 'multi-family' in listing documents ha[d] nothing to do with zoning; it merely is used by realtors to distinguish such property from single family and condominium properties." *Id*.

[22] Likewise, here, Farmers did not make any representation regarding the real estate's compliance with any zoning, fire, or building code regarding its use as a religious facility. Rather, Miller indicated on the listing that the building was used as a religious facility based on the then-current use of the building by the Embassy of Christ. Satoor does not point us to any evidence inferring that the description of religious facility represented anything more than a realtor's depiction and indicated an affirmative representation of its zoning status. Viewing, as we must, only the evidence in the record which supports the trial court's judgment, we cannot say that Farmers made any fraudulent representations with respect to the zoning of the building that induced Satoor to enter into the purchase agreement.

CONCLUSION

[23] Based on the foregoing, we hold that the trial court did not abuse its discretion by concluding that Farmers did not fraudulently induce Satoor to enter into a purchase agreement for real estate.

[24] Affirmed.

[25] May, J. and Tavitas, J. concur