

MEMORANDUM DECISION

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IN THE
Court of Appeals of Indiana

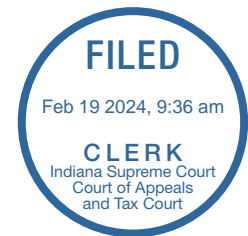
Joseph Jarboe,
Appellant-Defendant / Cross-Claimant

v.

Greg Moore,
Appellee-Defendant / Cross-Defendant

JM Newburgh, LLC, Smoke 'M Jarbs, LLC,
Sandra Shackelford Moore, and Spring Creek Subdivision, LLC,
Defendants

Thompson Homes, Inc.,
Plaintiff



February 19, 2024

Court of Appeals Case No.
23A-CC-1960

Appeal from the Warrick Superior Court
The Honorable Benjamin R. Aylsworth, Magistrate

Memorandum Decision by Judge Mathias
Judges Tavitas and Weissmann concur.

Mathias, Judge.

- [1] Joseph Jarboe appeals the trial court's judgment that he failed to meet his burden of proving that Greg Moore breached his fiduciary duty to Jarboe. On appeal, Jarboe claims that he presented overwhelming evidence that Moore breached his fiduciary duty and committed fraud.
- [2] Concluding that Jarboe's argument is simply a request to reweigh the evidence and reassess the credibility of the witnesses, we affirm.

Facts and Procedural History

- [3] On January 30, 2016, Jarboe and Moore established a company known as JM Newburgh, LLC, and they entered into an operating agreement. Jarboe and Moore were listed as the only members of the company, with Jarboe owning fifty-one percent. The purpose of the company was to sell lots to home builders.
- [4] On March 7, JM Newburgh entered into an agreement with Thompson Homes, LLC, granting Thompson Homes the exclusive option to purchase and build on designated lots in the Vann Estates planned development in Newburgh, Indiana. Thompson Homes paid JM Newburgh a deposit of \$8,000.00 on the

purchase of designated lots. Jarboe signed the agreement on behalf of JM Newburgh. The \$8,000 check was deposited into JM Newburgh's corporate account.

[5] On April 4, Jarboe and Moore agreed to dissolve JM Newburgh. Jarboe asked Moore to "buy [him] out and give [him] a refund of twenty-five hundred dollars." Tr. p. 7. On April 4, Jarboe and Moore executed an agreement to dissolve JM Newburgh, LLC. Moore wrote a check on his personal account in the amount of twenty-five hundred dollars and gave the check to Jarboe.

[6] Also, on April 4, Moore and Jarboe established a new business entity known as Spring Creek Subdivision, LLC, for the purpose of continuing to develop the homesites with Thompson Homes. Both Jarboe and Moore were listed as members of the company in the operating agreement. Jarboe and Moore signed the operating agreement. Jarboe's interest in Spring Creek Subdivision was fifteen percent, with Moore's interest being the remaining eighty-five percent. JM Newburgh's agreements with Thompson Homes were assigned to Spring Creek Subdivision. Ex. Vol. p. 47.

[7] On March 16, 2017, Thompson Homes filed a complaint against JM Newburgh, Moore, and Jarboe. Thompson Homes alleged that Newburgh, Moore, and Jarboe breached their contract with Thompson Homes because they did not transfer to Thompson Homes the lots listed in the March 8, 2016, purchase agreement. Thompson Homes also alleged that it demanded a return of its \$8,000 deposit and its funds were not returned. In Count II of the

complaint, Thompson Homes argued that JM Newburgh, Moore, and Jarboe had committed fraud because they did not own the lots at issue or have the owner's permission to sell the lots. Finally, Thompson Homes alleged that JM Newburgh, Moore, and Jarboe committed conversion by refusing to return Thompson's \$8,000 deposit. Thompson Homes requested that the trial court pierce the corporate veil and hold JM Newburgh, Jarboe, and Moore jointly and severally liable for any judgment issued.

[8] Jarboe filed an answer to the complaint and entered a general denial to Thompson Homes' claims. Jarboe also filed a crossclaim against Moore. In his crossclaim, Jarboe alleged that after he had relinquished his ownership interest in JM Newburgh, Moore and Thompson Homes had continued their negotiations for the development of the homesites. Jarboe alleged that Moore, in his dealings with Thompson Homes, had breached his fiduciary duty to Jarboe, and that Jarboe detrimentally relied on Moore to fulfill the company's obligations to Thompson Homes. Moore filed a crossclaim against Jarboe raising substantially the same claims that Jarboe filed against him.

[9] On January 17, 2020, Thompson Homes filed an amended complaint and included Spring Creek Subdivision as a defendant. On October 13, 2020, the Warrick Superior Court entered a default judgment for Thompson Homes after JM Newburgh, Moore, Jarboe, and Spring Creek failed to respond to

Thompson Homes' amended complaint. The court entered a judgment against all defendants jointly and severally in the amount of \$16,000 plus court costs.¹

[10] The trial court subsequently held a bench trial on Jarboe's and Moore's crossclaims against each other on February 13, 2023. On March 21, the trial court issued an order that neither party would take anything by way of their crossclaims and dismissed the claims. The court found that "neither party met their required burden to prevail on" the crossclaims and observed that "both parties at all relevant times were co-Owners of both corporations at issue." Appellant's App. Vol. 2, pp. 54-55.

[11] Jarboe subsequently filed a motion to correct error. After holding a hearing on the motion, the trial court denied it after reiterating that both parties were co-owners of the corporations at issue and finding that Jarboe's "testimony specifically was too vague and uncertain as to support any ultimate finding in his favor." *Id.* at 59-60.

[12] Jarboe now appeals.

Standard of Review

[13] A party who had the burden of proof at trial appeals from a negative judgment and will prevail only if it establishes that the judgment is contrary to law.

¹ Jarboe filed a motion to set aside the default judgment, which the trial court denied. Jarboe appealed and our court affirmed the judgment of the trial court. See *Jarboe v. Thompson Homes, Inc.*, No. 21A-CC-468, 175 N.E.3d 354 (Ind. Ct. App. Sept. 20, 2021) (mem.).

Helmuth v. Distance Learning Sys. Ind., Inc., 837 N.E.2d 1085, 1089 (Ind. Ct. App. 2005). A judgment is contrary to law when the evidence is without conflict and all reasonable inferences to be drawn from the evidence lead to only one conclusion, but the trial court reached a different conclusion. *Id.* When a trial court enters a general judgment, as is the case here, the judgment will be affirmed if it can be sustained upon any legal theory consistent with the evidence. *Id.* “In making this determination, we neither reweigh the evidence nor judge the credibility of witnesses.” *Id.* “Rather, we consider only the evidence most favorable to the judgment together with all reasonable inferences to be drawn therefrom.” *Id.*

Discussion and Decision

[14] Jarboe appeals the trial court’s judgment, claiming that he presented overwhelming evidence that Moore breached his fiduciary duty to Jarboe. “[A] claim for breach of fiduciary duty requires proof of three elements: (1) the existence of a fiduciary relationship; (2) a breach of that duty owed by the fiduciary to the beneficiary; and (3) harm to the beneficiary.” *Rapkin Grp., Inc. v. Cardinal Ventures, Inc.*, 29 N.E.3d 752, 757 (Ind. Ct. App. 2015) (quoting *Farmers Elevator Co. of Oakville, Inc. v. Hamilton*, 926 N.E.2d 68, 79 (Ind. Ct. App. 2010), *trans. denied*), *trans. denied*. Moore does not dispute that he and Jarboe

had a fiduciary relationship but he contends that Jarboe did not present any evidence to establish the breach of his fiduciary duty.²

[15] Jarboe argues that “Moore’s failure to fulfill the contracts or communicate with Jarboe regarding the fact that the contracts were not being fulfilled resulted [in] harm to Jarboe by his being sued and judgment entered.” Appellant’s Br. at 9. At trial, Jarboe claimed that, after the parties terminated the JM Newburgh operating agreement, he was no longer involved with the development project. Tr. pp. 15-16, 18.

[16] But after the parties terminated the JM Newburgh operating agreement, Jarboe entered into an operating agreement with Moore establishing Spring Creek Subdivision. Moore owned eighty-five percent of the shares and Jarboe owned the remaining fifteen percent. Tr. pp. 18-19; Ex. Vol. p. 100. Moore testified that, after the parties had executed the Spring Creek Operating Agreement, he continued to try to develop the property with Thompson Homes but was unable to secure financing or an investor. *Id.* at 30, 32-33. Moore testified that neither JM Newburgh nor Spring Creek had sufficient assets to proceed without an investor. *Id.* at 33. Moore testified that the project was “risky,” but Jarboe remained a fifteen percent owner of Spring Creek in the hopes of a return on his

² In his Appellee’s Brief, Moore argues that our court should decline to consider Jarboe’s arguments due to substantive and procedural deficiencies in his brief. In his brief, Jarboe failed to support his arguments with citations to the record and his arguments on appeal are minimally supported by cogent reasoning. While Moore’s arguments are well-taken, nonetheless we consider the issues presented on their merits. See *Picket Fence Prop. Co., v. Davis*, 109 N.E.3d 1021, 1029 (Ind. Ct. App. 2019), *trans. denied*.

investment. *Id.* at 34-35. Moore stated that he had several conversations with Jarboe concerning the status of the development. *Id.* at 35.

[17] When it ruled on Jarboe’s motion to correct error, the trial court noted that Jarboe’s “testimony . . . was too vague and uncertain as to support any ultimate finding in his favor.” Appellant’s App. Vol. 2, pp. 59-60. It was within the province of the trial court to credit Moore’s testimony concerning the parties’ respective duties and expectations for the success of their companies. Moreover, the trial court weighed Moore’s testimony that he continued to try to develop the property and kept Jarboe informed of the status of the development against Jarboe’s claim that Moore did not. We will not reweigh this testimony on appeal.

[18] For these reasons, we conclude that Jarboe has not persuaded us that the trial court erred when it entered a negative judgment against him on his claim of breach of fiduciary duty.

[19] Jarboe also claims that he detrimentally relied on Moore to complete the contracts and Moore’s failure to advise Jarboe that he failed to fulfill the companies’ obligations “was a misrepresentation of an existing fact.” *Id.* Therefore, “Jarboe relied on Moore’s misrepresentation to complete the project to his detriment.” *Id.*

[20] Jarboe categorizes his claim as “detrimental reliance,” but he cites to a case discussing a claim of fraud. *Id.* (citing *Munsell v. Hambright*, 776 N.E.2d 1272, 1281 (Ind. Ct. App. 2002), *trans. denied*). In *Munsell*, our court explained that

detrimental reliance is an element of a fraud claim. *Id.* (explaining that “[a]ctual fraud exists when there is a material misrepresentation of a past or existing fact made with knowledge of or reckless disregard for the falsity of the statement to the detrimental reliance of a third party”). “Detrimental reliance is the plaintiff’s reasonable reliance on the defendant’s misrepresentations.”³ *Id.*

[21] As we noted above, Moore testified that the property development project failed because he was unable to find an investor, and he testified that he had several conversations with Jarboe about the status of the project. Tr. pp. 30-35. Further, Moore testified that the Spring Creek development project was a risky investment and Jarboe knew of the risks. *Id.* Jarboe’s argument to the contrary is merely a request to reweigh the evidence and reassess the credibility of the witnesses, which we will not do. Jarboe failed to present evidence to prove that Moore committed fraud, i.e., that Moore made a misrepresentation by his silence upon which Jarboe detrimentally relied.

[22] Finally, Moore claims that, as the prevailing party, the trial court was required to award attorney’s fees to him under the Spring Creek Operating Agreement. But, in support, Moore cites the article in the agreement concerning arbitration provisions. *See Ex. Vol. pp. 92-93.* Moore does not cite any provision in the

³ Jarboe also cites to *Morfin v. Estate of Martinez*, 831 N.E.2d 791, 802 (Ind. Ct. App. 2005), but that case involved a claim of constructive fraud. “A plaintiff alleging the existence of constructive fraud has the burden of proving the existence of 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 with fraud.” *Id.* Jarboe did not argue or present any evidence that Moore gained an advantage or benefited from the contracts or transactions between the parties.

agreement allowing for the recovery of attorney’s fees in the event disputes are resolved in a court of law. Moreover, the trial court concluded that neither party had met his burden to prevail on his respective cross-claims and that “neither party shall take anything by way of their Cross-Claim[s].” Appellant’s App. Vol. 2, p. 55. For these reasons, we conclude that the trial court did not err when it failed to award attorney’s fees to Moore.

Conclusion

[23] We affirm the trial court’s judgment in all respects.

[24] Affirm.

Tavitas, J., and Weissmann, J., concur.

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