IN THE

Indiana Supreme Court

Supreme Court Case No. 22S-PL-195

Neal Bruder,
Appellant–Defendant,

–v–

Seneca Mortgage Services, LLC,
Appellee–Plaintiff.

Decided: June 14, 2022

Appeal from the Marion Superior Court,
No. 49D06-1911-PL-46694
The Honorable Kurt Eisgruber, Judge

On Petition to Transfer from the Indiana Court of Appeals,
No. 21A-PL-1085

Per Curiam Opinion

Chief Justice Rush and Justices David, Massa, Slaughter, and Goff concur.

Per curiam.

At issue is whether Seneca Mortgage Services is entitled to recover a two percent ($2,840) "Consultant's Fee" in exchange for arranging financing for Neal Bruder's purchase of a property—financing that Bruder ultimately did not accept.

The trial court entered judgment in Seneca's favor after finding that Bruder breached the parties' consulting agreement by failing to pay the Consultant's Fee. But the Court of Appeals reversed, finding that Seneca's recovery of the fee "would sanction the requirement of an illegal act as a condition of the loan it obtained to [sic] Bruder." *Bruder v. Seneca Mortgage Services, LLC*, 183 N.E.3d 300, 307 (Ind. Ct. App. 2022), *reh'g denied*.

Because the record lacks support for the Court of Appeals' conclusion that Bruder was required—or even asked—to commit an illegal act, and because the parties' agreement explicitly provides for the Consultant's Fee to be paid regardless of whether a particular financing offer is accepted, we grant transfer and affirm the trial court's judgment in all respects.

Background

Bruder, a licensed general contractor who purchases and flips homes, entered into a non-exclusive one-year "Consulting Agreement" with Seneca Mortgage Services, a commercial loan broker that specializes in financing "in creative ways, or where conventional financing wouldn't be available." Tr. Vol. 2 at 3.

The Consulting Agreement provided that, in exchange for Seneca's brokerage services, Bruder would pay a Consultant's Fee of two percent of the loan value whenever Bruder consummated a transaction for which Seneca had "directly," "indirectly," or "though [its] efforts" procured a financing offer. Ex. Vol. at 5. Bruder would owe the fee even if he did not accept the offer—the Agreement specifically allowed him to decline any proposed financing "without any liability to [Seneca], except for the payment of the [Consultant's Fee]." Ex. Vol. at 5–6.

In late April 2019, Bruder became interested in purchasing an Indianapolis property, and he texted Seneca's President, David Rusk, to inquire whether Seneca could obtain a "fix and flip" loan for him. Ex. Vol. at 16. Rusk located a prospective lender willing to lend Bruder $142,000, and over the next month, the parties proceeded toward closing.

In June 2019, Rusk informed Bruder that, as a condition of the loan, the lender wanted Bruder to pay for certain permits on the property before closing. Bruder responded that he didn't want to "pull" permits on a house he didn't yet own. *Id.* at 20. When the lender refused to drop the permit requirement, Bruder arranged financing through another company in which he is a minority owner. A few days before closing, Rusk told Bruder that the lender had waived the permit requirement, but Bruder replied that it was too late.

After Bruder closed on the property, Seneca sent a letter to collect its $2,840 Consultant's Fee. Bruder refused to pay, and Seneca sued for breach of contract. At the bench trial, Bruder explained that he refused to pull any permits before closing "because my relationship with the city is very important, and I would be committing fraud to say that I owned something and pulled a permit on it that I didn't [own] yet." Tr. Vol. 2 at 13. However, Bruder admitted that he had "no idea" of the specific penalties, if any, for asking the City to issue a permit on a home he didn't own. *Id.* at 20–21. For his part, Rusk testified that it was not unusual for lenders to ask clients to pay for permits as part of "skin in the game" to show their commitment to proceeding to closing. *Id.* at 26.

The trial court entered judgment against Bruder. Although the court acknowledged Bruder's reasons for rejecting the offered financing, it found that the parties were bound to the terms of the non-circumvention clause providing for the Consultant's Fee to be paid even if Bruder declined Seneca's financing offer.

But the Court of Appeals disagreed, concluding that Seneca could not recover the Consultant's Fee for presenting Bruder with a financing offer that was contingent on commission of what it asserted "would otherwise be a fraudulent and/or illegal act." *Bruder*, 183 N.E.3d at 302.

Seneca sought transfer, which we grant, vacating the Court of Appeals opinion. Ind. Appellate Rule 58(A).[1]

Discussion and Decision

In awarding damages to Seneca after the bench trial, the court entered findings and conclusions under Indiana Trial Rule 52(A). These findings, and the judgment, will not be set aside unless clearly erroneous, and due regard shall be given to the trial court's opportunity to judge witness credibility. *Steele-Giri v. Steele*, 51 N.E.3d 119, 123 (Ind. 2016).

Bruder appealed from the denial of his motion to correct error, and we review the trial court's decision for an abuse of discretion. *Renner v. Shepard-Bazant*, 172 N.E.3d 1208, 1212 (Ind. 2021). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or if the court has misinterpreted the law. *Berg v. Berg*, 170 N.E.3d 224, 227 (Ind. 2021). We review questions of law de novo. *Community Health Network, Inc. v. McKenzie*, 185 N.E.3d 368, 375 (Ind. 2022).

In reversing the judgment in Seneca's favor, the Court of Appeals found that payment of the Consultant's Fee was not due because Bruder did not violate the non-circumvention clause. *Bruder,* 183 N.E.3d at 306, fn.3. But Bruder's violation or non-violation is immaterial under the plain language of the non-circumvention clause, which provides that:

> [i]n 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

[1] Bruder's primary argument on appeal was that Seneca Mortgage Services could not enforce an agreement he entered with Seneca Mortgage **Financial** Services. But the trial court found that Seneca was a successor to Seneca Mortgage Financial Services, the Court of Appeals affirmed, and neither party challenges this holding on transfer. Accordingly, we summarily affirm Section I of the Court of Appeals opinion. *See* Ind. App. R. 58(A)(2).

> [his] 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. at 5–6 (emphasis added). This provision makes clear that the obligation to pay the Consultant's Fee was not triggered by any violation of the non-circumvention clause, but by Seneca's act of arranging for financing—whether or not Bruder chose to accept it.

Instead of addressing the bolded provision, the Court of Appeals found that the financing Seneca offered "included the perpetration of a fraud on the City of Indianapolis as a term of [the] arrangement." *Bruder,* 183 N.E.3d at 307. The record is devoid of evidence that would support this *sua sponte* holding. There is no indication as to what types of permits Bruder filed, nor does the record include any proposed financing terms or documents beyond the text messages between Bruder and Rusk in which they discussed the permit requirement. There also is no evidence that Seneca asked Bruder to "pull" the permits, rather than merely pay for them.

Moreover, the Court of Appeals provides no citation to support its holding that a permit applicant breaks the law by requesting that the permit issue before a real estate transaction closes. Bruder himself, an experienced contractor, testified that he was unaware of any specific legal or financial penalties associated with pulling permits before closing on a property, while Rusk testified that this requirement isn't unusual from the lender's side.

The Court of Appeals also stated that Seneca's counsel acknowledged that, had the parties simply walked away from the property deal, "Seneca would not be entitled to a commission." *Bruder,* 183 N.E.3d at 308. But this doesn't accurately reflect the context of this exchange and appears to conflate the terms "financing" and "commission":

> THE COURT: [H]ad Mr. Bruder just walked away from the close, and there was no financing, does that change your perspective?

> [SENECA'S COUNSEL]: Yeah, Your Honor, if he simply refused to close here (indiscernible) financing, and we all walked away from the closing, then, I think he would have a decent argument that he doesn't owe **financing** at all. I think paragraph six, probably could have been interpreted to say, he would still owe the **commission**, …

Tr. Vol. 2 at 42 (emphases added).

In sum, the Court of Appeals' analysis of the non-circumvention clause goes well beyond our deferential standard of review, which allows appellate courts to set aside a trial court's findings or judgment only if clearly erroneous. Ind. Tr. R. 52(A).

Conclusion

Because the contract provided for the payment of a two percent Consultant's Fee even if Bruder rejected Seneca's proposed financing, and because the record reveals nothing in Seneca's demands that would require Bruder to commit an illegal act, we affirm the trial court's judgment in Seneca's favor in all respects.

Rush, C.J., and David, Massa, Slaughter, and Goff, JJ., concur.

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