STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1635

Todd Enterprises, LLC, et al.,
Appellants,

vs.

MidCountry Bank,
formerly First Federal fsb, a federal savings association,
Respondent,

David Larson,
individually and as an officer of MidCountry Bank,
formerly First Federal fsb, a federal savings bank,
Respondent,

MidCountry Bank,
formerly First Federal fsb, a federal savings association,
Third Party Plaintiff,

vs.

Jeffrey L. Eldridge, et al.,
Third Party Defendants.

Filed August 12, 2013
Affirmed in part, reversed in part, and remanded
Kalitowski, Judge

Pine County District Court
File No. 58-CV-10-85

Marc G. Kurzman, Carol Grant, Kurzman Grant Law Office, Minneapolis, Minnesota (for appellants)

Justin P. Weinberg, Matthew C. Berger, Keith P. Duffy, Gislason & Hunter LLP, New Ulm, Minnesota (for respondent MidCountry Bank)

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Considered and decided by Kalitowski, Presiding Judge; Johnson, Chief Judge; and Toussaint, Judge.*

U N P U B L I S H E D O P I N I O N

KALITOWSKI, Judge

In this appeal from a district court's order and judgment adopting a jury verdict, appellants Todd Enterprises, LLC and Todd and Carolyn Bork argue that the district court erred by excluding expert testimony at trial, by denying their request for rescission of certain loan documents, and by ordering a receiver to sell their property without going through mortgage foreclosure proceedings. By notice of related appeal, respondents MidCountry Bank and David Larson argue that appellants failed to file a proper notice of appeal and that the district court erred by finding a fiduciary relationship and by awarding attorney fees. We affirm in part, reverse in part, and remand.

FACTS

This case arises out of certain loan transactions between Todd Enterprises and MidCountry and the Borks and MidCountry. The Borks own Todd Enterprises, through which they own and operate a tree farm. David Larson is the loan officer who represented MidCountry in the loan transactions.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

In October 2005, the Borks signed one promissory note on behalf of Todd Enterprises in the amount of $2,429,000 (the Todd Enterprises note) and one promissory note on their own behalf in the amount of $636,000 (the Bork note). Both notes were signed in order to refinance existing loans from MidCountry. To secure these notes, they also executed mortgages on three properties. The parties dispute which mortgages were intended to secure which promissory notes. The Borks contend that (1) the Todd Enterprises note was secured by a mortgage on Minnesota property owned by Todd Enterprises and (2) the Bork note was secured by one mortgage on Minnesota property owned by the Borks and one mortgage on Wisconsin property owned by the Borks. But the recorded loan documents show that (1) the Todd Enterprises note was secured by the mortgage on the Minnesota property owned by Todd Enterprises and the mortgage on the Minnesota property owned by the Borks and (2) the Bork note was secured by only the mortgage on the Wisconsin property owned by the Borks.

After the loan documents were signed, Todd Enterprises and the Borks defaulted on their payments. They sued MidCountry and Larson, alleging four counts: breach of fiduciary duties, fraud, rescission, and promissory estoppel. MidCountry counterclaimed with various allegations of breach of contract in relation to Todd Enterprises's and the Borks' payment defaults. The district court appointed a receiver for the mortgaged property and subsequently authorized the receiver to sell certain property and assets of the tree farm.

A jury found that a fiduciary relationship had been established between the Borks and Larson, that Larson had breached his fiduciary duties in regard to certain loan

transactions, and that the Borks were entitled to $636,000 in damages. The jury also found that no fraud was committed in connection with the loan transactions. Following the trial, the district court denied the Borks' motion to rescind the loan documents based on the theory of constructive fraud. The district court issued findings of fact and an order adopting the jury's findings. The district court subsequently granted a motion by MidCountry to amend the findings to reflect the Borks' remaining indebtedness under the loan documents. Both parties appeal.

D E C I S I O N

I.

MidCountry asserts that the Borks failed to properly file a notice of appeal. Generally, "[a]n appeal may be taken from a judgment within 60 days after its entry, and from an appealable order within 60 days after service by any party of written notice of its filing." Minn. R. Civ. App. P. 104.01, subd. 1. If, however, a party files a proper and timely motion to amend or make findings under Minn. R. Civ. P. 52.02, the time for appeal "runs for all parties from the service by any party of notice of filing of the order disposing of the last such motion outstanding." *Id.*, subd. 2(b). If such motion for amended findings is filed, a notice of appeal filed before the disposition of such a motion is premature. *Id.*, subd. 3.

Here, the district court issued findings of fact and an order for judgment on June 6, 2012, which adopted the jury's verdict awarding damages against MidCountry in the amount of $636,000. Judgment was entered on June 8, 2012, pursuant to the district court's order stating, "Let Judgment Be Entered Accordingly, There Being No Just

Reason for Delay." On June 19, 2012, MidCountry filed a motion for amended findings under Minn. R. Civ. P. 52.02, requesting that the district court amend the June 6, 2012 order to reflect the amount of the Borks' remaining indebtedness on certain MidCountry loans. After MidCountry's motion for amended findings but before the district court disposed of the motion, on September 12, 2012, the Borks filed a notice of appeal of the June 8, 2012 entry of judgment. The district court issued amended findings, an order, and judgment on MidCountry's motion to amend the findings on September 17, 2012, and judgment was entered accordingly on September 19, 2012.

MidCountry argues that the Borks failed to file a timely notice of appeal because, despite having appealed the June 8, 2013 entry of judgment, they did not appeal the September 19, 2012 entry of final judgment. Generally, we "may suspend the requirements or provisions" of the rules of civil appellate procedure in "the interest of expediting decision" or "for other good cause shown." Minn. R. Civ. App. 102. But we may not extend the time for filing a notice of appeal. *Id.*; Minn. R. Civ. App. P. 126.02.

Here, the Borks' appeal was premature. And our consideration of the appeal would not extend the time for filing a notice of appeal but, rather, would simply allow the Borks to move forward with a premature notice of appeal from the district court's June 8, 2013 entry of judgment. Moreover, because the district court's amended findings relate only to the amount of the Borks' remaining indebtedness to MidCountry and the Borks do not appeal that decision, the Borks' notice of appeal sufficiently notified MidCountry of the grounds for its appeal. *See Kelly v. Kelly*, 371 N.W.2d 193, 195-96 (Minn. 1985) (stating that notice of appeal should be liberally construed and generally is sufficient if it

"apprises the parties of the issues to be litigated on appeal"). Thus, no party would be prejudiced by our decision to reach the merits of the parties' arguments.

Finally, as explained below, both parties agree that the district court should not have ordered the sale of the Borks' mortgaged property without going through mortgage foreclosure proceedings. Because we agree that the district court erred, we conclude that it is appropriate for us in this case to reach the merits of the appeal.

II.

The Borks argue that the district court abused its discretion by declining to allow their expert to testify that a mortgage between the Borks and MidCountry was fraudulent. Expert testimony is admissible if: (1) the witness is qualified as an expert; (2) the expert's opinion has foundational reliability; and (3) the expert testimony would be helpful to the trier of fact. Minn. R. Evid. 702; *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 164 (Minn. 2012). "A district court's evidentiary ruling on the admissibility of an expert opinion rests within the sound discretion of the trial court and will not be reversed unless it is based on an erroneous view of the law or it is an abuse of discretion." *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 760 (Minn. 1998).

Here, the district court did not allow the Borks' expert to testify that the mortgage was fraudulent on the ground that the expert lacked foundation as to that question. To prove that a document was fraudulently made, a plaintiff must establish, among other elements, that the defendant made a false representation with the intention to induce another to act in reliance on it. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 368 (Minn. 2009). But an expert generally may not testify as to another's subjective

intent. *State v. Bouwman*, 328 N.W.2d 703, 705 (Minn. 1982). Moreover, there is no evidence that the Borks' expert knew or could have known the intent of Larson, on behalf of MidCountry, in making allegedly false representations. The expert was not present during the preparation, signing, or recording of the loan documents. Because the expert could not testify to intent, he could not testify that the document was fraudulently made. Thus, the district court did not abuse its discretion by refusing to allow the expert to testify that the mortgage was fraudulently made.

III.

The Borks argue that the district court erred by declining to order rescission of the mortgage based on the theory of constructive fraud. "Constructive fraud is, by definition, not actual fraud but conduct that the law treats as fraud, irrespective of the actor's intent or motive." *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209, 213 (Minn. 1984). The term "constructive fraud" is essentially another way of characterizing a finding of a breach of fiduciary duties. *Id.* On appeal, we review the district court's determination of the appropriate remedy for a breach of fiduciary duty for an abuse of discretion. *Commercial Assocs., Inc. v. Work Connection, Inc.*, 712 N.W.2d 772, 778 (Minn. App. 2006).

"The remedies of rescission and damages are mutually exclusive. . . ." *TJB Cos. v. Maryland Cas. Co.*, 504 N.W.2d 476, 477 (Minn. 1993). Here, the jury awarded money damages in the amount of $636,000, which represented the amount the jury determined would fairly compensate the Borks for the breach of fiduciary duty. The breach-of-fiduciary-duty claim is essentially the same as the constructive-fraud claim. *Perl*, 345

N.W.2d at 213. Thus, rescission is not appropriate because the jury already awarded money damages for the breach-of-fiduciary-duty claim and the two remedies are mutually exclusive. We conclude that the district court did not abuse its discretion by declining to order rescission.

IV.

The Borks argue that the district court erred by allowing the receiver to sell their property without affording them a right of redemption. MidCountry agrees. The district court appointed a receiver under the receivership statute in effect at that time, Minn. Stat. § 576.01, subd. 1(1) (2010),[1] which provides when a receiver may be appointed:

> A receiver may be appointed . . . before judgment, on the application of any party to the action who shall show an apparent right to property which is the subject of such action and is in the possession of an adverse party, and the property, or its rents and profits, are in danger of loss or material impairment.

The receivership statute also provides that a receiver shall be appointed "with the commencement of an action to foreclose a mortgage pursuant to chapter 581, and during the period of redemption, if the mortgage being foreclosed secured an original principal amount of $100,000 or more." Minn. Stat. § 576.01, subd. 2 (2010). Subdivision 2 also provides the authority of the receiver:

> The receiver shall collect the rents, profits and all other income of any kind, manage the mortgaged premises so to prevent waste, execute leases within or beyond the period of the receivership if approved by the court, pay [certain expenses], pay all expenses for normal maintenance of the

[1] The receivership statutes were renumbered in 2012 but contain substantially the same language. *See* Minn. Stat. § 576.25 (2012).

> mortgaged premises and perform the terms of any assignment of rents . . . .

Subdivision 2 further contemplates the sale of a mortgaged property through foreclosure proceedings with the right of redemption. *Id.* The statute does not authorize the receiver to sell mortgaged property in a manner that does not comply with the foreclosure proceedings provided in chapter 581.

Here, the district court authorized the receiver to market and sell the property in the receivership and authorized the purchase agreements. The Borks were not afforded any right of redemption. This is contrary to the statutes governing mortgage foreclosures, which allow for a right of redemption within the statutory time period. Minn. Stat. § 581.10 (2012). Because the ordered sales failed to provide for the right of redemption, we reverse and remand with the direction that the district court allow the mortgaged property to go through the appropriate statutory foreclosure proceedings.

V.

By notice of related appeal, MidCountry challenges the finding of a fiduciary relationship between MidCountry and the Borks. Specifically, MidCountry asserts that the Borks were not entitled to a jury trial on their breach-of-fiduciary-duty claim and that the district court erroneously found a fiduciary relationship in accordance with the jury verdict. *See Commercial Assocs.*, 712 N.W.2d at 778 ("Because actions for breach of a fiduciary duty generally sound in equity, there is no right to a jury trial on such claims." (quotation omitted)). The Borks concede that they may have had no right to a jury trial on this claim but assert that the district court properly adopted the jury's finding of a

breach of fiduciary duty as its own. Whether a fiduciary relationship exists is generally a question of fact. *Swenson v. Bender*, 764 N.W.2d 596, 601 (Minn. App. 2009). We may not set aside findings of fact on the existence of a fiduciary relationship unless they are clearly erroneous. *In re Trusts by Hormel*, 504 N.W.2d 505, 512 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993).

To recover for a breach of fiduciary duties, a claimant must establish that a fiduciary relationship existed and that the fiduciary breached a duty arising from that relationship. *Swenson*, 764 N.W.2d at 601. "A fiduciary relation exists when confidence is reposed on one side and there is resulting superiority on the other; and the relation and duties in it need not be legal but may be moral, social, domestic, or merely personal." *Midland Nat'l Bank of Minneapolis v. Perranoski*, 299 N.W.2d 404, 413 (Minn. 1980) (quotation omitted).

Generally, "when a bank transacts business with a depositor or other customer, it has no special duty to counsel the customer and inform him of every material fact relating to the transaction—including the bank's motive, if material, for participating in the transaction—unless special circumstances exist." *Klein v. First Edina Nat'l Bank*, 293 Minn. 418, 422, 196 N.W.2d 619, 623 (1972). But a fiduciary relationship may be established when "the bank knows or has reason to know that the customer is placing his trust and confidence in the bank and is relying on the bank so to counsel and inform him." *Id.*

In *Klein*, a banking customer had a 20-year relationship with the bank and sometimes socialized with the wife of the bank's president. *Id.* Despite her long-term

relationship with the bank, the customer had never met the loan officer with whom the challenged transactions occurred. *Id.* at 421, 196 N.W.2d at 622. The supreme court determined that this was insufficient to establish the type of special circumstances that would give rise to a fiduciary relationship because no evidence showed that a confidential relationship existed between the customer and the bank. *Id.* at 422, 196 N.W.2d at 623.

Similar to *Klein*, the Borks had a long-term relationship with MidCountry. But unlike *Klein*, the Borks also enjoyed a long-term relationship with Larson—the person with whom the challenged transactions occurred—in both a personal and professional capacity. The evidence revealed that Todd Bork and Larson had a personal friendship, that Larson offered the Borks financial and business advice, that Larson assisted the Borks in preparing financial statements, and that Larson knew that Todd Bork had no formal education and lacked a high school degree. There was also some evidence—although disputed—that Larson may have known that Todd Bork was suffering from depression severe enough to lower his ability to make reasoned decisions around the time of the October 2005 transactions. We conclude that on these facts, the finding that Larson knew or should have known that the Borks placed their trust and confidence in him and relied on him for advice was not clearly erroneous.

We reject MidCountry's reliance on our opinion in *Swenson* for the proposition that no fiduciary relationship can exist when the "trusting party should have known the [other party] was representing adverse interests." 764 N.W.2d at 602 (quotation omitted). *Swenson* considered the relationship between a student and her academic advisor, which is different than the relationship between a customer and a banker. *Id.* at 598. And the

supreme court in *Klein* contemplated the existence of a fiduciary relationship in the banker-customer context in cases where special circumstances are present. 293 Minn. at 422, 196 N.W.2d at 623. Moreover, the supreme court has found a fiduciary relationship in this context before. *See Hassman v. First State Bank of Swatara*, 183 Minn. 453, 236 N.W. 921 (1931). In *Hassman*, the supreme court found a fiduciary relationship when evidence showed that a customer had habitually sought the banker's advice for ten years, "that the trust and confidence so often reposed in country bankers by their customers existed," and that the customer had generally lacked good financial judgment in the past. *Id.* at 456, 236 N.W. at 922.

This case is similar to *Hassman* and dissimilar to *Klein* and *Swenson*. The fact that Larson was representing the interests of MidCountry does not preclude him from forming a fiduciary relationship with the Borks. Thus, we conclude that the district court's adoption of the jury's finding that Larson and the Borks had a fiduciary relationship was not clearly erroneous.

VI.

MidCountry argues that the district court erred by awarding attorney fees to the Borks. In Minnesota, a party generally cannot collect attorney fees absent authority by contract or by statute. *In re Silicone Implant Ins. Coverage Litig.*, 667 N.W.2d 405, 422 (Minn. 2003). We review the district court's award of attorney fees for an abuse of discretion. *Swenson*, 764 N.W.2d at 604.

Here, the district court awarded attorney fees to the Borks on the ground that the fees were allowed pursuant to a stipulation that the Borks' attorney would receive fees

"in the amount of $5,000 per month that was memorialized in the October 2010 Order." The referenced October 2010 order appoints a receiver for the Borks' properties and directs the receiver to "apply all sums collected [in operating the tree farm] to payment of the costs and expenses incurred in managing and operating the Tree Farm." The October 2010 order also provides the order of priority in which the receiver must pay expenses as follows: (1) the receiver's fees; (2) employee-related expenses; (3) liability and property casualty insurance premiums; (4) essential operating supplies; (5) real estate taxes; (6) the Borks' attorney fees, not to exceed $5,000 per 30-day period; and (7) MidCountry's attorney fees, not to exceed $5,000 per 30-day period. Thus, although the order evidences an agreement to pay attorney fees, those fees are sixth in the order of priorities. And the district court made no finding whether the receiver was able to make payments for those items higher in priority than the Borks' attorney fees, although the fees are only allowed to the extent that their payment is consistent with the agreement. *See Silicone Litig.*, 667 N.W.2d at 422 (noting that attorney fees are only recoverable by a prevailing party when there is statutory authorization or a contractual agreement allowing those fees).

In addition, the October 2010 order provides for attorney fees only out of the "revenues and income" from the tree farm. In awarding attorney fees, the district court directed the receiver to pay attorney fees "either from the proceeds of the sale of the first property sold or in the amount of $35,000.00 per month" for three months. But neither the October 2010 agreement nor any other agreement identified by the parties allows the receiver to pay attorney fees from the sale of the property. Thus, we conclude that the

district court erred by allowing fees to be paid from the proceeds of the sale of the property rather than only the "revenues and income." We, therefore, reverse and remand to the district court to consider appellants' request for attorney fees as provided for in the October 2010 agreement.

VII.

In sum, we (1) reject respondent's argument that we should dismiss appellants' appeal; (2) affirm the district court's evidentiary ruling, the district court's denial of appellants' request for rescission, and the district court's finding of a fiduciary relationship; and (3) reverse and remand the district court's order that the receiver sell appellants' property without going through mortgage foreclosure proceedings, and the district court's award of attorney fees to appellants.

Affirmed in part, reversed in part, and remanded.