NOTICE
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2013 IL App (5th) 120509-U

NO. 5-12-0509

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

HOME FEDERAL SAVINGS & LOAN ASSOCIATION,	)	Appeal from the Circuit Court of Madison County.
Plaintiff-Appellee and Cross-Appellant,	)	
v.	)	No. 08-L-1098
ABSTRACTS & TITLES, INC., an Illinois Corporation,	)	Honorable Stephen A. Stobbs, Judge, presiding.
Defendant-Appellant and Cross-Appellee.	)	

PRESIDING JUSTICE SPOMER delivered the judgment of the court.
Justices Stewart and Wexstten concurred in the judgment.

ORDER

¶ 1 *Held*: Under current case law, the defendant was not entitled to a jury trial on the plaintiff's complaint for a breach of fiduciary duty, which is considered an equitable claim despite the fact that the plaintiff sought money damages. The circuit court did not err in finding that defendant's failure to abide by escrow instructions caused the plaintiff to incur damages. The circuit court's damages calculation was not against the manifest weight of the evidence and was not an abuse of discretion. The circuit court's failure to award prejudgment interest was warranted where the plaintiff did not request the interest in its proposed findings of fact and conclusions of law following trial.

¶ 2 The defendant, Abstracts & Titles, Inc., an Illinois corporation (Abstracts & Titles), appeals the October 22, 2012, order of the circuit court of Madison County which entered a judgment in the amount of $423,812.30 in favor of the plaintiff, Home Federal Savings & Loan Association (Home Federal), on its complaint for a breach of fiduciary duty. On appeal, Abstracts & Titles argues that it was entitled to a jury trial and that the circuit court erred when it found that its failure to abide by escrow instructions was the proximate cause

of Home Federal's damages. Home Federal cross-appeals, arguing that the circuit court's damages calculation failed to compensate it for its actual loss and that the circuit court erred in failing to award prejudgment interest. For the reasons that follow, we affirm.

¶ 3 FACTS

¶ 4 On January 28, 2009, Home Federal filed a 20-count amended complaint against Abstracts & Titles alleging causes of action for a breach of contract for Abstracts & Titles's failure to abide by escrow agreements pursuant to which Abstracts & Titles was to disburse proceeds of loans made by Home Federal to Prime Development, Inc. (PDI), to construct homes on 10 lots in Madison County. On November 10, 2010, Home Federal filed an amendment to its amended complaint with leave of court, adding count XXI, a cause of action for a breach of fiduciary duty for Abstracts & Titles's failure, as escrow agent for Home Federal, to abide by the escrow instructions.

¶ 5 On or about May 10, 2011, Home Federal voluntarily dismissed counts I through XX of its amended complaint, leaving count XXI, for breach of fiduciary duty, as the only claim remaining. On that same date, Home Federal filed a motion to strike Abstracts & Titles's jury demand on the basis that a breach of fiduciary duty claim is purely equitable, and as such, Abstracts & Titles was not entitled to a jury trial. Over Abstracts & Titles's objection, the circuit court granted Home Federal's motion to strike Abstracts & Titles's jury demand on March 20, 2012.

¶ 6 In August 2012, a bench trial commenced on Home Federal's claim for a breach of fiduciary duty. The following facts, recited by the circuit court in its judgment order of October 22, 2012, are not in dispute for purposes of this appeal. Pursuant to the escrow agreements for each of the 10 parcels of land, Abstracts & Titles was obligated to verify the completion of work related to each of PDI's periodic pay requests, by obtaining signed contractor affidavits, and inspecting the work, before disbursing Home Federal's loan

proceeds to PDI. In addition, Abstracts & Titles was obligated to retain, from each periodic pay request, 10% of the amount requested, which would be held and not released until the project was completed. Abstracts & Titles did not obtain the required contractor affidavits for any of the 10 building projects and did not properly inspect the construction prior to disbursing Home Federal's funds to PDI. Further, Abstracts & Titles did not retain the required 10% from each pay request and disbursed funds to PDI even though it knew that the amount of loan proceeds remaining after disbursement would be insufficient to complete the projects.

¶ 7 Although Abstracts & Titles argued that it was not liable for any failure to follow the escrow instructions because the parties tacitly modified or amended the escrow agreements, orally or by course of performance, the circuit court found that Abstracts & Titles's evidence on this point was not credible, and that finding is not the subject of this appeal. The remaining findings of the circuit court, regarding damages and proximate cause, are the subjects of this appeal and cross-appeal from the circuit court's October 22, 2012, judgment.

¶ 8 The circuit court found that because Abstracts & Titles failed in its responsibility to Home Federal to ensure that the homes were completed to the extent represented by PDI in their periodic pay requests and affidavits, Abstracts & Titles was liable to Home Federal for any resulting damages caused by its breach. The circuit court found, however, that Abstracts & Titles did not guarantee the ultimate sale or sale price of the homes. For that reason, the circuit court rejected Home Federal's damages calculation, which was to award the entire amount of loan funds disbursed, minus the amount Home Federal recouped when it repossessed and sold the partially completed homes. Instead, the circuit court found the proper calculation was to determine the amount Abstracts & Titles overpaid PDI as compared to the status of the construction of the homes. In order to calculate this amount, the circuit court used Home Federal's original estimates regarding the costs to construct each home and

subtracted the estimates they put together when they repossessed each home as to how much cost would be involved to complete the construction, resulting in the value of each home to the extent it was completed at the time of repossession. Then the circuit court subtracted the amount of loan proceeds disbursed on each home from the value of each home as completed at the time of repossession, arriving at the amount of overpayment caused by Abstracts & Titles with respect to each home. This calculation is set forth in detail for each of the 10 properties in the circuit court's judgment. Pursuant to the calculation, the circuit court awarded Home Federal $423,812.30.

¶ 9 Following the circuit court's October 22, 2012, judgment order, Home Federal began proceedings to collect the judgment from Abstracts & Titles. On November 5, 2012, Abstracts & Titles filed a motion for relief from judgment pursuant to section 2-1203 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1203 (West 2012)). However, before obtaining a ruling on its motion, Abstracts & Titles filed a notice of appeal. On December 10, 2012, Abstracts & Titles was granted leave to withdraw its motion for relief from judgment, making December 10, 2012, the effective date of its notice of appeal pursuant to Illinois Supreme Court Rule 303(a)(2) (eff. June 4, 2008). On January 8, 2013, Home Federal filed its notice of cross-appeal. Pursuant to Illinois Supreme Court Rule 305 (eff. July 1, 2004), Home Federal's collection efforts were stayed pending the appeal and cross-appeal. Additional facts will be set forth as necessary throughout the remainder of this order.

¶ 10 ANALYSIS

¶ 11 1. *Abstracts & Titles's Appeal*

¶ 12 a. *Right to Jury Trial*

¶ 13 Beginning with Abstracts & Titles's appeal, we will first determine whether the circuit court erred in granting Home Federal's motion to strike Abstracts & Titles's jury demand on the basis that Home Federal's claim for a breach of fiduciary duty is an equitable claim to

which the right to jury trial does not attach. Abstracts & Titles argues that because Home Federal's claims are actually claims for breach of contract and Home Federal is seeking money damages, this action is an action at law for which Abstracts & Titles is entitled to a jury trial. A litigant's right to a jury trial is a legal determination that this court reviews *de novo*. *Bank One, N.A. v. Borse*, 351 Ill. App. 3d 482, 487 (2004) (citing *Martin v. Heinold Commodities, Inc.*, 163 Ill. 2d 33, 74-77 (1994)).

¶ 14 A discussion of the principles guiding the right to a jury trial in Illinois was set forth by the First District of our court in *Podromos v. Everen Securities, Inc.*, 389 Ill. App. 3d 157, 173-74 (2009), as follows:

> "The Illinois Constitution provides that the right to a jury trial 'as heretofore enjoyed shall remain inviolate.' Ill. Const. 1970, art. I, § 13. The supreme court has construed that section as guaranteeing a right to a jury trial as it existed at common law. See *Martin*, 163 Ill. 2d at 72. Therefore, in Illinois, the right to a jury trial only attaches in those actions where such right existed under the English common law at the time the Illinois Constitution was adopted. See *Martin*, 163 Ill. 2d at 73-74."

¶ 15 At common law, equitable claims were creations of the courts of chancery and were tried without the right to a jury. *Bank One, N.A. v. Borse*, 351 Ill. App. 3d 482, 488 (2004) (citing *Martin*, 163 Ill. 2d at 78). Pursuant to these principles, this court must determine whether Home Federal's claim would have been considered an equitable claim at common law. It has been held that an escrowee owes a fiduciary duty to act only according to the terms of the escrow instructions, as such instructions are analogous to a trust agreement. See *Toro Petroleum Corp. v. Newell*, 33 Ill. App. 3d 223, 228 (1974). For this reason, a breach of an escrow contract may be pled in terms of a breach of contract or a breach of fiduciary duty. *Id.* at 228-29. Here, Home Federal, as master of its complaint, chose to plead Abstracts & Titles's breach of the escrow contract as a breach of fiduciary duty claim and to

voluntarily dismiss its claims for a breach of contract. However, the remedy Home Federal sought under either theory was the money damages it suffered as a result of Abstracts & Titles's failure to abide by the escrow contract. Would Abstracts & Titles have been entitled to a jury trial under the English common law at the time the Illinois Constitution was adopted? We find that Illinois Supreme Court case law on the subject is unclear.

¶ 16 The Illinois Supreme Court has recognized that "[i]t is one of the oldest heads of chancery jurisdiction to execute and control trusts and trust funds." *Hopkins v. Granger*, 52 Ill. 504, 510 (1869). The court has also made clear that "[e]quity will assume jurisdiction and impose a constructive trust to prevent a person from holding for his own benefit an advantage gained by the abuse of a fiduciary relationship." *People ex rel. Daley v. Warren Motors, Inc.*, 114 Ill. 2d 305, 314 (1986). In addition, when considering whether to conform to the view of the Restatement (Second) of Torts § 874 (1979) that a breach of a fiduciary duty is a tort, the court has stated that a breach of fiduciary duty is controlled by the substantive laws of agency, contract, and equity. *Kinzer v. City of Chicago*, 128 Ill. 2d 437, 445 (1989). However, the court in *Martin*, while distinguishing case law suggesting that the right to a jury trial depends on the relief sought, expressly declined to address the question of whether or not a breach of fiduciary duty claim is always equitable because the remedies sought for the breach of a fiduciary duty in that case, an accounting and a constructive trust, were purely equitable remedies. 163 Ill. 2d at 74-79.

¶ 17 Based on our reading of the foregoing Illinois Supreme Court precedent, it is unclear whether a breach of fiduciary duty claim, seeking money damages based on the failure of an escrowee to follow the escrow contract, is an equitable claim to which the right to a jury trial does not attach. Nevertheless, relying on *Martin* and *Kinzer*, the First and Second Districts of our court have held that a breach of a fiduciary duty claim is an equitable claim that is tried without the right to a jury trial, no matter the remedy sought. *Podromos*, 389 Ill. App.

3d at 174 (*leave to appeal denied*, 233 Ill. 2d 599 (2009)); *Bank One*, 351 Ill. App. 3d at 489 (*leave to appeal denied*, 212 Ill. 2d 528 (2004)). While our reading of *Martin* and *Kinzer* leaves open the question of whether a claim for money damages for a breach of fiduciary duty based solely on the failure of an escrowee to follow escrow instructions is purely equitable, the Illinois Supreme Court had an opportunity to clarify the law in this area in the wake of the *Bank One* and *Podromos* decisions, as petitions for leave to appeal to the Illinois Supreme Court were filed in each case and denied. *Podromos*, 233 Ill. 2d 599 (2009); *Bank One*, 212 Ill. 2d 528 (2004). Absent clarification from our highest court, we will follow the First and Second Districts and affirm the circuit court's order granting Home Federal's motion to strike Abstracts & Titles's jury demand.

¶ 18 b. *Causation*

¶ 19 Turning to Abstracts & Titles's second issue on appeal, we must determine whether the circuit court erred in finding that Abstracts & Titles's breach of its fiduciary duty to act only according to the terms of the escrow instructions was a proximate cause of Home Federal's damages. In a bench trial, the circuit court's findings will not be disturbed on review unless they are against the manifest weight of the evidence. *International Capital Corp. v. Moyer*, 347 Ill. App. 3d 116, 121 (2004). We give great deference to the circuit court's findings because, as the trier of fact, the circuit court is in a superior position to determine the credibility of the witnesses and determine the weight of the evidence. *Id.* at 122. A judgment is against the manifest weight of the evidence only if the opposite conclusion is clearly apparent or when findings appear to be unreasonable or not based on the evidence. *Id.*

¶ 20 Here, Abstracts & Titles is correct that proximate cause is a required element of a breach of a fiduciary duty claim. See *id.* On appeal, Abstracts & Titles argues that the circuit court's finding of proximate cause was against the manifest weight of the evidence

because the actual proximate cause of Home Federal's loss was that the loan amounts were insufficient to complete the homes from the start. In support of its position, Abstracts & Titles points to the plaintiff's damages expert's testimony that the damages he calculated were caused by the fact that the houses were not completed and by the downturn in the housing market. In addition, Abstracts and Titles points this court to the provision in the escrow agreements that "Abstracts & Titles *** does not insure either that the building will be completed or that the mortgage funds are sufficient to pay the costs to complete." We are unpersuaded. Regardless of the state of the housing market, the escrow agreement provided that prior to disbursing Home Federal's funds, Abstracts & Titles was to obtain contractor affidavits and inspect the work to verify that PDI's pay requests were commensurate with their previous estimates and the status of completion. As the circuit court noted in its judgment, as a proximate result of Abstracts & Titles's failure to meet these obligations, the homes were not completed to the extent of the payouts. As such, the circuit court did not err in finding proximate cause existed to support Home Federal's breach of fiduciary duty claim.

¶ 21 2. *Home Federal's Cross-Appeal*

¶ 22 a. *Damages*

¶ 23 Turning to Home Federal's cross-appeal, we must determine whether the circuit court erred in its method of calculating damages. Because Home Federal chose to forgo its legal claims for a breach of contract, and instead chose to pursue its claims in equity, we will employ the standard of review we use in reviewing a circuit court's decision to fashion a remedy in equity. "In fashioning a remedy, courts have broad discretion to grant the relief that equity requires." *Westcon/Dillingham Microtunneling v. Walsh Construction Co. of Illinois*, 319 Ill. App. 3d 870, 878 (2001). "A trial court abuses its discretion only when its ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would adopt the court's view." *People ex rel. Madigan v. Petco Petroleum Corp.*, 363 Ill. App. 3d 613, 634

(2006).

¶ 24 The circuit court's method of calculating damages is clearly distinguishable from the damages awarded by the circuit court in *Toro Petroleum*, where the circuit court arrived at an arbitrary damages figure based on what it perceived as the plaintiff's " 'colossal negligence and stupidity.' " 33 Ill. App. 3d at 229. Here, the circuit court took great care to fashion a money damages calculation that held Abstracts & Titles responsible for the losses occasioned by its acts, without holding them to the standard of a guarantor of the ultimate sale price of the homes or the status of the housing market. By determining the value of each home at the time of repossession with reference to Home Federal's original construction-cost estimates, and subtracting that value from the amount of loan proceeds disbursed by Abstracts & Titles, the circuit court was able to calculate an amount of overpayment caused by Abstracts & Titles with respect to each home. We find no abuse of discretion.

¶ 25 b. *Prejudgment Interest*

¶ 26 The final issue raised in Home Federal's cross-appeal is whether the circuit court erred when it did not address Home Federal's request for prejudgment interest as stated in its prayer for relief. As with the circuit court's calculation of damages, our standard of review for this issue is whether the circuit court abused its discretion. *Westcon/Dillingham Microtunneling*, 319 Ill. App. 3d at 878. After review of the record on appeal, we find that the circuit court's failure to address prejudgment interest was not arbitrary, fanciful, or unreasonable. See *Madigan*, 363 Ill. App. 3d at 634. At the conclusion of the trial, the circuit court ordered the parties to submit closing arguments containing proposed findings of fact and conclusions of law. In its submission, Home Federal specifically set forth the calculation of damages it was advocating and set forth the specific compensatory and punitive damage amounts it was requesting. Home Federal did not request prejudgment interest in its written closing arguments and did not calculate prejudgment interest in its proposed award. Accordingly,

the circuit court addressed Home Federal's compensatory and punitive damages arguments in its judgment, but did not address prejudgment interest. We find that a reasonable person in the circuit court's position could find that Home Federal had abandoned its request for prejudgment interest based on its written closing argument and proposed findings. Accordingly, we find no abuse of discretion.

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, the judgment order of the circuit court is affirmed.

¶ 29 Affirmed.