2012 IL App (1st) 103560-U

FIFTH DIVISION
October 26, 2012

1-10-3560

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

OAK BROOK BANK, an Illinois state-chartered bank,	)	
	)	
Plaintiff-Appellant,	)	Appeal from the Circuit
	)	Court of Cook County,
v.	)	
	)	No. 04 L 1249
CROWLEY, BARRETT & KARABA, LTD., ALAN RAUH ORSCHEL, GREGORY M. WHITE, CHARLES W. SIRAGUSA, THOMAS F. KARABA, AND SCOTT D.H. REDMAN,	)	
	)	Honorable
Defendants-Appellees.	)	Brigid Mary McGrath,
	)	Judge Presiding.

ORDER

JUSTICE TAYLOR delivered the judgment of the court.[1]
Presiding Justice McBride and Justice Howse concurred in the judgment.

¶ 1 *Held*: Any error by the circuit court in requiring plaintiff to elect between its legal malpractice and breach of contract claims before trial was harmless, where the claims were based on identical facts. Further, any error in admitting evidence of

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[1]Justice Joseph Gordon originally authored this order. Justice Taylor has adopted this as the court's order following Justice Gordon's passing, having listened to the audio recording of the oral argument.

plaintiff's contributory negligence does not warrant reversal where the jury entered a general verdict finding defendants not liable. Lastly, the issue of whether the court correctly limited plaintiff's damages was moot where the jury found no liability.

¶ 2 This appeal arises from a professional negligence and breach of contract action brought by plaintiff Oak Brook Bank, against defendants, the law firm of Crowley, Barrett & Karaba, Ltd., and attorneys Alan Orschel, Gregory M. White, Charles W. Siragusa, Thomas F. Karaba and Scott Redman. Defendants represented plaintiff in a loan transaction with real estate developers Jeffery Grossman and Donald Grauer, for the purpose of constructing a multi-story building at 60 W. Erie. The developers subsequently defaulted on the loan after taking their initial disbursement at closing, as well as subsequent disbursement to fund that project. Plaintiff brought this action against defendants, claiming that they were negligent in failing to discover that the building proposed by the developers was not in conformance with the pertinent zoning ordinance in that the size of the building exceeded zoning restrictions. According to plaintiff, if defendants had advised plaintiff that the planned building could not be developed as planned due to the zoning restrictions, plaintiff would not have closed on the loan agreement with the developers and would not have made neither the initial, nor any subsequent disbursements in connection with that loan. Before trial, the circuit court granted partial summary judgment for defendants, in which it limited plaintiff's damages to the amount it disbursed at the initial closing, to the exclusion of subsequent disbursements. Additionally, the court ruled in *limine*: (1) granting defendants' motion which required plaintiff to choose between its professional negligence and breach of contract claims prior to trial; and (2) denying plaintiff's motions to

exclude evidence of plaintiff's alleged contributory negligence. The jury subsequently entered a judgment for the defendants. It is from these rulings in limine that this appeal is taken.

¶ 3BACKGROUND

¶ 4 The record shows, and the parties do not dispute, that on January 28, 2000, the head of plaintiff's commercial real estate division, Jeff Brown, was approached by the developers, Gorssman and Grauer, for a loan to build a high-rise residential condominium at 60 W. Erie, Chicago. Brown then referred that matter to a loan officer named Molly Oelerich, who performed the due diligence on the proposed loan under Brown's supervision. In doing so, Oelerich checked the developers' credit references, and officers from six banks at which Grossman had loans, gave him positive recommendations. Thus, on March 22, 2000, plaintiff conditionally approved a $19.5 million line of credit for Grossman and Grauer to build a 22 story condominium building.

¶ 5 Once the loan was conditionally approved, plaintiff hired defendants Redman and his law firm, Crowley, Barrett & Karaba, to represent it in the loan transaction. At that time, Oelerich gave Redman a copy of the written loan approval so that he would know the conditions for approval, namely, the conditions that must be met for closing the loan. Accordingly, Redman drafted a commitment letter enumerating plaintiff's conditions for closing on the loan, and prepared a construction loan agreement reflecting plaintiff's terms.

¶ 6 Section 5.1 of the loan agreement enumerated certain conditions that the borrowers would be required to satisfy before the plaintiff made any disbursements under the loan, that had not already been met prior to closing. However, section 5.1, by its own terms, exempted from those conditions the initial disbursement, made at closing. Instead, that first disbursement was subject

to its own set of conditions, contained in a separate document entitled SCHEDULE 5.1, which did not contain any condition regarding zoning compliance, nor did it contain any other conditions pertinent to this appeal. The conditions enumerated under Section 5.1, namely, those applicable only to subsequent disbursements, are not here at issue except for the condition designated as subparagraph 5.1(x) of Section 5.1, which states that the borrower must produce "[e]vidence of the Construction Project's compliance with all applicable zoning laws and ordinances" at the time of such subsequent disbursements.

¶ 7 The loan closed on October 6, 2000, at which time plaintiff disbursed $4,476,981.59 to the developers. It is undisputed that at that time, the building could not be constructed according to the existing plans because it did not conform to the city's zoning ordinances, which impose restrictions for buildings. An important aspect of those restrictions is the allowed floor area ratio ("FAR"), which determines how large a building may be built on a given property. It appears that the building originally proposed by the developers had a FAR that exceeded the maximum allowed under the pertinent ordinances and therefore, could not be built as planned. While it appears that the developers sought an amendment of the zoning ordinance for authorization to construct a planned unit development ("PUD"), the Chicago Plan Commission[2] apparently denied their requested PUD on May 18, 2000, a fact that was not disclosed to the plaintiff or to the appraiser of the proposed building.

¶ 8 Following closing and the initial disbursement, plaintiff made additional disbursements at the developers' request, and in 2002, construction began on a smaller building that the one

[2]While the record reflects the it was the Chicago Plan Commission that denied authorization for the PUD, we note that such requests are normally handled by the Zoning Commission, and would require approval by the Appeals Board.

represented by the developers. It appears, however, that the conditions in section 5.1 for subsequent disbursements, such as evidence of zoning compliance, were not met by the developers before the plaintiff continued to fund the construction. As noted above, Grossman and Grauer defaulted. Grossman was ultimately convicted of bank fraud and imprisoned, and Grauer committed suicide.

¶ 9 In April 2002, while the developers were under investigation for fraud, the plaintiff received a federal grand jury subpoena seeking documents related to the loan for construction of the building at 60 W. Erie. At that time, after over $17 million had been disbursed, the plaintiff found that, the construction at 60 W. Erie was on a smaller building with fewer units. While the originally proposed building, pursuant to which the loan was approved, contemplated a 22-story building with 54 units, zoning restrictions permitted only the construction of a building of substantially reduced size. It appears that, at that point, the plaintiff completed construction of the smaller building , which did comply with the zoning requirements, and sold the units. As a result, the plaintiff incurred a loss of $17,604,566.

¶ 10 On February 4, 2004, plaintiff filed suit against defendants, and on January 18, 2010, it went to trial on its first amended complaint. Count I of that complaint alleged that plaintiffs committed legal malpractice in their representation of plaintiff in drafting the loan agreement and in the closing on the 60 W. Erie loan. Plaintiff alleged that defendants breached the applicable standard of care by, *inter alia*, failing to verify that the proposed building complied with the applicable zoning ordinances, and by failing to advise plaintiff that the proposed building could not be lawfully constructed on that site. Count II of that complaint alleged that defendants had breached their contractual obligations with plaintiff "by failing to act within the standard of care"

set forth in count I.

¶ 11 In support of its contentions, plaintiff alleged in that complaint that when defendants were hired to represent plaintiff, they undertook the duty to verify that the appropriate zoning requirements were met before closing on the loan. Defendants, however, have claimed throughout the proceedings below that they were hired only to document the loan transaction and to draft a loan agreement for the financing of the 60 W. Erie project.

¶ 12 At trial, plaintiff, first called its vice-president George Clam, who stated, in pertinent part, that the bank decided to hire defendants to represent them in connection with the 60 W. Erie loan because it was a "big loan" for the bank, and he wanted attorneys who had the appropriate expertise to deal with that type of project. According to Clam, an officer of the developers' credit references had identified Redman and Crowley, Barrett & Karaba as a law firm that was familiar with this type of project, and that they had previously done an excellent job with his bank. Clam further averred that he would not have closed on the loan if he had known that zoning approval had not been obtained.

¶ 13 Furthermore, Clam averred that when plaintiff made subsequent disbursements, it was not aware at that time that the developers were constructing a smaller building, or that the originally contemplated building had not been approved by the zoning authorities. According to Clam, it was not until the developers were under investigation for bank fraud that plaintiff learned that the developers had never obtained the requisite zoning approval to construct the building described in their loan application.

¶ 14 On cross-examination, defendants evoked Clam’s testimony that in January 2000, the plaintiff was looking to expand its loan portfolio by $72 million to “excite the greed of

investment banks and brokers" and improve what it perceived as a "depressed" stock price of $16 per share. He further acknowledged that in order to accomplish that objective, the bank implemented quotas for employees to generate new business, and Oelerich was assigned to call on Chicago area builders.

¶ 15 In addition, Clam admitted that the loan "could have been handled better," in that the bank did not perform an audit and an assessment of the project as required by its own loan policy. He further acknowledged that a substantial portion of Grossman's financial statements at that time consisted of anticipated profits on the 60 W. Erie project, which had not yet been realized. In fact, he stated that both Grossman's and Grauer's assets were not solid, and were valued in an "unusual way." While the plaintiff originally required Grossman to guarantee the loan on the project, it later relented on that requirement. In addition, Clam acknowledged that before approving the loan, plaintiff became aware that Grossman had filed for bankruptcy, but proceeded to close on the loan after receiving a "comfort letter" from David Missner, a partner from a firm named Piper Marbury Rudnick & Wolfe, which vouched for Grossman's character. Clam admitted that if he had known at the time that the statements in the letter were "inaccurate and incomplete," plaintiff would not have approved the loan.

¶ 16 With regard to the scope of defendants' responsibilities in connection with the 60 W. Erie loan, Clam explained during cross-examination that there are six steps in a bank's lending process, namely, origination, underwriting, structuring, approval, documentation and administration. He acknowledged, however, that defendants were involved only in the documentation step of the process, while the plaintiff was itself responsible for the other five steps.

¶ 17 Plaintiff next called Oelerich, who testified that when the bank hired the defendants, her expectations were that they would prepare the loan documents and advise the plaintiff of any issues that came up along the way. She further testified that she expected defendants to review certain legal documents, such as those relating to zoning. Oelerich expected them to gather all the information needed for closing, and act as the plaintiff's "advocate" at closing. According to Oelerich, the outside counsel usually prepares a checklist of everything that must be done and documents that must be gathered before closing, which Redman did.

¶ 18 Further, Oelerich acknowledged that she exchanged e-mails with Redman prior to closing, which were also admitted into evidence at that time. She explained that on August 30, 2000, after reviewing the initial checklist that Redman had sent her, she wrote him an e-mail stating that the checklist "[n]eed[s] PUD, zoning, et cetera." According to Oelerich, she wanted to know that the proposed building could, in fact, be built. She acknowledged Redman's response e-mail, in which he asked her whether she was asking for PUD and zoning endorsements on the title insurance policy, which would ensure the plaintiff that the building could be built as outlined in the PUD. Oelerich then replied to Redman that she wanted to see copies of any PUD and zoning documents, as well as have them endorsed, to which Redman responded "okay." At that point, Oelerich believed that Redman was not only going to provide her copies of the pertinent PUD and zoning documents, but that he was also going to verify that the building could be built. She acknowledged that in response to her e-mail, Redman added "PUD documents" and "evidence of zoning approvals and related documents" to the checklist.

¶ 19 Additionally, Oelerich acknowledged that on or about August 31, 2000, Oelerich received an appraisal of the proposed building, which stated:

¶ 20 "According to the letter from Paul W. Shadle of Piper Marbury Rudnik & Wolfe dated August 28, 2000, the application for approval of a residential planned development was considered and approved by the Chicago City Council Committee on Zoning at its hearing held on August 22, 2000. *** According to the information provided by Lucien LaGrange & Associates [the architects] dated June 21, 2000, the subject building will have 91,503 SF attributable to FAR. This exceeds the 86,853 SF number which is calculated at a FAR of 9.9 and a site size of 8,772."

¶ 21 While Oelerich acknowledged that she understood that appraisal to mean that the project had been approved and the PUD granted, she did not take the information relating to the FAR to mean anything, and did not understand how those numbers were calculated. She stated that she relied on attorneys to verify that the PUD was in place.

¶ 22 Oelerich further acknowledged that on September 20, 2000, she sent Redman a new e-mail, also admitted into evidence, in which she states that there was "a FAR issue relative to the subject property which should be covered in the PUD," and that "for now we just want to verify they can build the originally planned building." She further stated in that e-mail, "[i]t is my understanding that the PUD covers that," and that "perhaps you [Redman] know more about this." According to Oelerich, the point of that e-mail was to let Redman know that the plaintiff needed evidence that the building could be built. She explained that after sending Redman that e-mail, he never advised her that he could not verify that the building could be built, nor did he tell her that there was no PUD and no zoning in place. She acknowledged, however, that in his response, Redman stated that he had "not seen a form PUD document."

¶ 23 Furthermore, Oelerich acknowledged that on September 28, 2000, she received a

document from the developers, titled "reports of committees," which, like her correspondence, was admitted into evidence. The document was apparently an incomplete draft PUD, which contained a statement the "maximum permitted floor area ratio" was 7.7. Oelerich testified that the statement about the FAR did not mean anything to her, but since the document appeared to be related to zoning, she faxed it to Redman. According to Oelerich, Redman did not advise her that the zoning for this building was not in place, neither did he advise her to assume that it could not be built. In fact, she averred that if Redman had, in fact, advised her that he could not verify whether the zoning was in place or whether the building could be built, she would not have allowed him to close on the loan.

¶ 24 Plaintiff next called Redman as an adverse witness, at which time Redman acknowledged that at closing, he did not assume that the building could be built because they had not received a PUD. With regard to his e-mail exchanges with Oelerich, Redman explained that when Oelerich wrote him that the checklist needed a PUD and zoning documents, he understood that she wanted to add those documents to the closing checklist, not that she expected Redman to procure those documents himself. According to Redman, it was the borrower's responsibility to provide documentation showing that the proposed building was in compliance with the zoning ordinances or that the appropriate PUD had been granted.

¶ 25 Moreover, Redman explained that when Oelerich stated that there was a "FAR issue" that should be covered in the PUD, he did not know what the issue was. He understood that Oelerich had "some sort of PUD document" which may contain the answer to the FAR issue. Redman further explained that when Oelerich told him that "for now, we just want to verify that the building can be built," he understood that by "we," Oelerich meant that the bank was going to

make that verification. He believed that he was expected to verify only whether the borrower had delivered the documentation that they had to produce in order to satisfy the loan's conditions. According to Redman, he told Oelerich that they did not have that documentation. In fact, contrary to Oelerich's testimony, Redman averred that he told Oelerich to assume that the building could not be built.

¶ 26 When asked whether he went ahead with the loan despite the fact that there was no evidence of compliance with zoning, Redman testified that he told the bank before closing that the building could not be built, since they received a title policy that shows that the PUD was not there. According to Redman, he explained to Oelerich that without evidence of zoning compliance and without the plans and specifications, nobody could verify that the building can be built. At that time, he told Oelerich that the borrowers had not satisfied their conditions, and therefore, the bank could either "pull the plug" on the loan or close it as a refinance loan on the property. According to Redman, he advised Oelerich that the bank should not lend them additional funds, beyond the refinance, until the borrowers fulfill those conditions.

¶ 27 Plaintiff later called Philip Kayman, an Illinois attorney, as its expert witness. Kayman testified that after reviewing "various documents" that were given to him in connection with this case, he formed the opinion that defendants failed to adhere to the required professional standard of care in their representation of plaintiff and the 60 W. Erie loan. He stated that, in his opinion, defendants breached the standard of care by failing to perform the necessary procedures to determine whether or not the proposed building could be built under the pertinent zoning laws. He stated that defendants had been asked by the bank to make that verification, and were advised that it was important to plaintiff that the contemplated building could, in fact, be constructed.

¶ 28 After the plaintiff rested, defendants introduced during their case-in-chief, the testimony of their expert, real estate attorney Arthur Pape, who stated that real estate attorneys, such as Redman, do not give their clients their opinion "as to zoning." Instead, that type of opinion is within the purview of zoning attorneys and title companies. Pape further stated that it is the borrower's responsibility, not the attorney's, to make sure that the project can be completed and complies with the zoning restrictions.

¶ 29 On February 10, 2010, the jury returned a verdict for defendants and the circuit court entered a judgment in their favor.

¶ 30 Prior to trial, however, the circuit court ruled on a motion for summary judgment and on three motions in *limine*. Defendants, in their motion for partial summary judgment, asked the court to limit their exposure to the amount of the initial disbursement, which was made at closing. In that motion, defendants argued that plaintiff had failed to present any expert testimony that defendants had violated the standard of care "outside the context of the first disbursement." According to defendants, Kayman, in his deposition, limited his opinion with regard to defendants' standard of care to the facts surrounding the initial disbursement.

¶ 31 In support of their motion, defendants submitted Kayman's deposition testimony, in which he testified that "the evidence shows that [defendants] CBK prepared *** a loan agreement that, in light of the factual context in which it was to be applied, simply did not work for this transaction, and then closed the transaction using that agreement." He acknowledged that he did not know the factual contexts of any disbursements made beyond the initial disbursement, and that his opinions were limited to the analysis of defendant's representation "up through the initial disbursement." When asked whether he believed that the defendants would be liable for

the bank's losses from the subsequent disbursements if the bank did not require the borrowers to fulfill the conditions for those disbursements, Kayman stated that he did not know under those facts.

¶ 32 Defendants also submitted an excerpt of Oelerich's deposition testimony, in which she acknowledged, in pertinent part, that on August 1, 2000, before receiving the appraisal discussed at trial, she received an appraisal that stated that the developer's plans exceeds the maximum approved FAR.

¶ 33 In response, plaintiff argued that it did not matter that he did not commit additional acts of malpractice after the initial disbursement because if they had not committed their original act of malpractice, the plaintiff would not have closed on the loan in the first place. Plaintiff explained that the damages suffered as a result of the later disbursements made pursuant to the loan were proximately caused by defendants' negligence in connection with the closing of the loan.

¶ 34 Similarly to defendants, plaintiff submitted excerpts from Oelerich's testimony in support of their response. Her deposition was consistent with her trial testimony with regard to her e-mail exchanges with Redman and her expectations of outside counsel in connection with the loan. However, when asked who would typically verify the borrower's compliance with the agreement after closing, she replied that it could be "any number of people," such as lending officers, construction administrators, or an auditor. While Oelerich testified that it was defendants' responsibility to verify compliance with subparagraph 5.1(x), the condition which required the borrowers to provide evidence of zoning, she understood that to be a condition precedent to closing the loan, not a post-closing condition. Furthermore, plaintiff submitted

Redman's deposition, which, like Oelerich's, was consistent with his trial testimony.

¶ 35 Plaintiff further introduced, in opposing defendants' motion, Kayman's supplemental disclosures pursuant to Rule 213(f), in which he stated that defendants breached their duty, after closing, "by amend[ing] the 60 W. Erie loan documents without taking any steps to determine whether the material deficiencies in the Loan (which again, [defendants] knew or should have known of) had been corrected or if the Loan was even performing." In doing so, plaintiff did not appear to argue that defendants' post-closing negligence was in any way related to its subsequent disbursements, but merely that defendants were incorrect in claiming that there was no evidence that defendants committed additional negligent acts post-closing.

¶ 36 Defendants, in their reply, argued that the plaintiff's losses from subsequent disbursements were not proximately caused by defendants' alleged pre-closing failure to verify zoning. According to defendants, plaintiffs made those disbursements in spite of the fact that the borrowers had not fulfilled the loan condition in Section 5.1 that required them to provide evidence that the building was in compliance with the applicable zoning ordinances. Defendants claim that it was not foreseeable to them that plaintiff would ignore the "protections" of the loan and make those disbursements without evidence of zoning.

¶ 37 On December 8, 2009, the circuit court granted defendants' motion, which prevented plaintiff from recovering damages for subsequent distributions beyond what was disbursed at closing. In doing so, the court stated that Kayman "didn't go so far as to state the factual context of the loan was all right in regard to subsequent disclosures [sic] given the applicability of 5.1." It further notes, "I don't even get to the foreseeability analysis. I'm looking at straight 213's. That's expert opinion." The court acknowledges, however, that it "would agree that it's

foreseeable that the bank would comply with the terms of the loan," and that at the time the later disbursements were made, "[t]hey would have known that construction wasn't going on had they complied with the terms of the agreement." Plaintiff filed a motion to reconsider, which was denied on January 29, 2010.

¶ 38 After the court's ruling on summary judgment, but before trial, defendants filed a motion in *limine*, which sought to bar evidence regarding plaintiff's breach of contract claim, on the ground that it was merely duplicative of plaintiff's professional negligence claim. On January 7, 2010, the circuit court granted defendants' motion, finding that the separate counts of negligence and breach of contract could not both go to trial, and ordered plaintiff to choose one of those counts and dismiss the other before trial. The circuit court stated that in reaching its decision, it assumed that plaintiff's claims had been pleaded in the alternative. Following that ruling, the plaintiff elected to proceed on their professional negligence claim.

¶ 39 Plaintiff filed two motions in *limine.* One of them sought to bar admission of evidence that plaintiff's actions which did not interfere with defendants' performance of their duties, and to bar argument that those actions are evidence of contributory negligence or comparative fault. Plaintiff's other motion sought to bar argument or evidence of plaintiff's conduct in deciding to make the loan on the 60 W. Erie project constituted contributory or comparative negligence. On January 7, 2010, the circuit court denied plaintiff's motions. In doing so, it found that there is no requirement under Illinois law that acts constituting contributory negligence or comparative fault relate to the attorney's representation or take place after the attorney's retention.

¶ 40 Pursuant to its rulings in *limine*, the circuit court, at the conclusion of trial, rejected plaintiff's proffered jury instruction on its breach of contract claim based on the court's earlier

ruling. Similarly, the court rejected plaintiff's jury instruction related to contributory negligence. The court subsequently denied plaintiff's motion to vacate the judgment and its motion for a new trial.

¶ 41ANALYSIS

¶ 42 On appeal, plaintiff now contends that the circuit court erred in requiring it to choose between its negligence and breach of contract claims prior to trial. According to plaintiff, a claimant may bring claims of negligence and breach of contract if it seeks recovery in the alternative, and therefore, plaintiff should not have been required to choose which count it wanted to pursue before trial.

¶ 43 We first note that motions in *limine* are generally addressed to the circuit court's inherent power to admit or exclude evidence, and will not be disturbed absent an abuse of discretion. *Beehn v. Eppard*, 321 Ill. App. 3d 677, 680 (2001) (citing *People v. Williams*, 188 Ill. 2d 365, 369 (1999)). However, a circuit court must exercise its discretion within the bounds of the law, and when the court' exercise of discretion is based on an erroneous conclusion of law, as plaintiff argues in this case, our review is *de novo*. Id. at 680-81.

¶ 44 In support of its contention, plaintiff correctly notes that our supreme court has unequivocally held that "a complaint against a lawyer for professional malpractice may be couched in either contract or tort and that recovery may be sought in the alternative." Collins v. Reynard, 154 Ill. 2d 48, 50 (1992). In doing so, our supreme court stated that this ruling "was grounded on precedent rather than logic," noting that certainty in the law allows parties to understand their rights and duties and "facilitates rationality and planning in matters of commerce and social intercourse." Id.

¶ 45 Defendants respond that even if plaintiff's claims are brought in the alternative, it could not have brought both claims to trial because those counts are based on the same operative facts and are, therefore, duplicative. According to defendants, the holding in Collins does not apply to plaintiff's complaint because its counts of negligence and breach of contract are based on the same operative facts. However, as explained below, it appears that while a party may not generally bring two claims based on the same set of facts, an exception is made where claims of legal negligence and breach of contract are brought in the alternative.

¶ 46 In support of their argument, defendants cite Majumdar v. Lurie, 274 Ill. App. 3d 267, 273 (1995), in which this court found that where claims of legal malpractice based on negligence and breach of contract are based on the same operative facts, the plaintiff could bring both claims to trial. However, the court in that case based its ruling with respect to the plaintiff's breach of contract claim not only on the fact that it was duplicative of the negligence claim, but also on the fact that those two claims were not pleaded in the alternative. Id. Further, we are cognizant that in upholding the circuit court's dismissal of that plaintiff's claim of breach of fiduciary duty, this court did not consider whether that claim had been pled in the alternative, as it did in upholding the dismissal of the breach of contract claim. Id. Instead, when considering the interrelationship between plaintiff's claims of negligence and breach of fiduciary duty, the court based its ruling only on the fact that those claims were based on the same operative facts. The court stated:

¶ 47 "In this case, however, counts I [negligence] and II [breach of contract] of the plaintiff's second-amended complaint are the same. Admittedly, count II has seven more paragraphs than count I, one of which is an allegation that plaintiffs performed all aspects of their contract with the defendants, but the six remaining additional paragraphs contain nothing by way of factual

allegation that had not already been stated in count I. Counts I and II of the plaintiff's second-amended complaint are not plead in the alternative; they are duplicative. Further, although an action for legal malpractice is conceptually distinct from an action for breach of fiduciary duty [count III] because not all legal malpractice rises to the level of breach of fiduciary, when, as in this case, the same operative facts support actions for legal malpractice and breach of fiduciary duty resulting in the same injury to the client, the actions are identical and the later should be dismissed as duplicative." Id. at 273-74. (Emphasis added) (internal citations omitted).

¶ 48 Thus, the holding in Majumdar indicates that the plaintiff would have been permitted to plead both claims of negligence and breach of contract if he had done so in the alternative. This would be consonant with the decision of our supreme court in Collins, which addressed both negligence and breach of contract counts where pled in the alternative. Collins, however, did not purport to likewise preserve counts of negligence and breach of fiduciary duty. See Collins, 154 Ill. 2d at 50. This distinction is reflected in Majumdar, which, in turn, did not purport to preserve a claim of breach of fiduciary duty where it was duplicative of a negligence claim. See Majumdar, Id. at 273-74.

¶ 49 The same distinction between a claim of breach of contract and a claim of breach of fiduciary duty was made in Nettleton v. Stogsdill, 387 Ill. App. 3d 743, 761-63 (2008), where the court found that pleading in the alternative could save duplicative claims of legal negligence and breach of contract, but would not save duplicative claims of professional negligence and breach of fiduciary duty. The distinction was based on the fact that the holding in Collins specifically preserves claims of negligence and breach of contract when pleaded in the alternative, and did not address any questions as to the relationship between claims of negligence and breach of

fiduciary duty. In that case, the plaintiff brought claims of professional negligence, breach of contract and breach of fiduciary duty against her divorce attorney based on his actions in being unprepared for trial on her first dissolution petition and in failing to present the requisite proof during the plaintiff's case in chief. Id at 760. As a result of those actions, plaintiff did not obtain a dissolution of marriage on her first petition. The court found that all three of her claims were based on the same operative facts and were, therefore, duplicative. Id. at 761-62. While the court held that her claim of breach of fiduciary duty was correctly dismissed based solely on the fact that it was duplicative of her negligence claim, it held that her claim of breach of contract was subject to dismissal, not merely because it was duplicative, but specifically because it was not pled in the alternative. Id. at 762-63. In doing so, the court unequivocally stated, albeit in dictum, that "[a]lthough plaintiff's claims of breach of contract and legal malpractice were based on the same conduct, they should not have been dismissed if they were pleaded in the alternative." Id. at 762 (citing Collins, 154 Ill. 2d at 50); see also Radtke v. Murphy, 312 Ill. App. 3d 657, 665 (2000) (finding that where the plaintiff's claims of legal malpractice and breach of agency are duplicative, they should have been pleaded in the alternative).

¶ 50 We are cognizant that our supreme court in Neade, 193 Ill. 2d at 445, apparently cited Collins for the proposition that, notwithstanding the general rule that a plaintiff may plead multiple claims in the alternative, he may not plead duplicative claims of negligence and breach of fiduciary duty, even in the alternative. However, Neade does not purport to deny the impact of alternative pleadings with respect to counts sounding in breach of contract and counts sounding in negligence. Nor does it purport to overrule the holding in Nettleton or the purported holding in Majumdar to that effect.

¶ 51 Nevertheless, even if the thrust of Collins, as referred to in Neade, 193 Ill. 2d at 445, would be to preserve alternative counts of breach of contract and legal malpractice only if those counts are not duplicative, the result in this case would remain unchanged since any error in forcing the plaintiff to elect between its negligence and breach of contract claims before trial was harmless. It is well established that "[g]enerally, an error is not reversible unless it is shown that the error was substantially prejudicial and thereby unduly affected the outcome of the trial." Schaffner v. Chicago & North Western Transportation Co., 161 Ill. App. 3d 742, 754 (1987); aff'd, 129 Ill. 2d 1 (1989). For instance in Union Planters Bank, N.A., v. Thompson Coburn LLP, 402 Ill. App. 3d 317 (2010), where a plaintiff waived its negligence claim, the court found that even if the plaintiff had been improperly forced to choose between its negligence and breach of contract counts, it would have suffered no prejudice because "the plaintiff was allowed to present all of its evidence to the jury and acknowledged that it would have been foolish to take both counts to the jury."

¶ 52 In this case, the plaintiff's claims of negligence and breach of contract were based on identical factual allegations, namely, that defendants undertook the duty to verify that the proposed building could be built, but failed to do so. As in Union Planters, plaintiff presented all of its evidence pertaining to the scope of defendants' representation of plaintiff in connection with the 60 W. Erie loan, including Oelerich's testimony that she relied on Redman to verify that the building could be built. Plaintiff does not contend that it would have presented additional evidence if the court had allowed it to bring both claims to trial. Instead, plaintiff merely argues that if it had brought both claims, the jury may have believed the defendants' expert's testimony that the standard of care did not oblige defendants to verify zoning, but at the same time credited

Oelerich's testimony that defendants agreed to make that verification. However, even when grounded in tort, an action for legal malpractice arises out of an express or implied contract for legal services. Majumdar, 274 Ill. App. 3d at 270. Thus, since the duty owed by an attorney to a client arises out of a contractual relationship, an attorney's duty, even in the context of negligence, is necessarily limited by the scope of that contract. Id.; see also Simon v. Wilson, 291 Ill. App. 3d 495, 509 (1997) ("An attorney's duty to a client is measured by the representation sought by the client and the scope of the authority conferred."). In fact, in the plaintiff's first amended complaint, it specifically alleges that defendants committed breach of contract by "failing to act within the standard of care." Under these circumstances, we conclude that even if the trial court improperly required the plaintiff to elect only one claim to bring to trial, the outcome would have been the same.

¶ 53 Plaintiffs next contend that the trial court erred in denying plaintiff's motions in limine to bar arguments and evidence of plaintiff's contributory negligence to the extent that it referred to activities prior to its retention of defendants, which did not interfere with defendants' abilities to perform their duties. According to plaintiff, any lack of diligence in approving and underwriting the loan to the developers did not interfere with defendants' ability to verify their compliance with zoning, and therefore, should not have been admitted as evidence of comparative or contributory negligence. In support of its argument, plaintiff relies on our supreme court's holding in Board of Trustees of Comm. College Dist. No. 508, County of Cook v. Coopers & Lybrand, 208 Ill. 2d 359, 271 (2003), in which the court held that, in the context of accounting malpractice, a plaintiff's actions that did not interfere with the defendant's performance of his services cannot be asserted as evidence of contributory negligence.

¶ 54 Defendant responds that any contributory negligence that was a proximate of the plaintiff's damages is admissible notwithstanding the holding in Coopers & Lybrand. They maintain that the audit interference doctrine is a narrow rule which is only applicable to accounting malpractice, and not in the context of legal malpractice. According to defendant, Illinois law has not placed a similar limitation to the circumstances under which a legal malpractice defendant may assert contributory negligence as a defense. Defendant maintains that unlike accountants who are employed to remedy his clients' possible mistakes, defendants were hired to process the transactional completion of the loan, not to remedy the bank's allegedly poor practices in underwriting and approving the loan.

¶ 55 In Coopers & Lybrand, 208 Ill. 2d at 262-63, defendant, an accounting firm, was hired to conduct an audit of certain city colleges financial statements from 1993, but failed to find that a series of improper investments had been made during that year. The college's Board of trustees brought an action for negligence against the accounting firm, in which it claimed that if defendant had discovered those improper investments, the Board would have taken action to stop them. Id. at 263. In affirming the lower courts' decisions, our supreme court rejected the defendant's argument that the college Board's oversight of the treasurer's investment activities could be considered evidence of contributory negligence. Id. at 468-73. In doing so, the court adopted the audit interference doctrine, which provides that "the negligence of an employer who hires an accountant to audit the business is a defense only when it has contributed to the accountant's failure to perform his contract and to perform the truth." Id. at 266. The court found that the audit interference doctrine, in the context of accounting malpractice, was consistent with the principles recited in the Restatement (Third) of Torts, which is not limited to accountants and

provides that " 'in a case involving negligent rendition of a service, *** a factfinder does not consider any plaintiff's conduct that created the condition the service was employed to remedy.' " Id. at 271 (quoting Restatement (Third) of Torts: Apportionment of Liability § 7, cmt. m at 70 (2000)).

¶ 56 Furthermore, in Coppers & Lybrand, our supreme court noted in that its holding was not only consistent with the Restatement, but also with its previous holding in Owens v. Stokoe, 115 Ill. 2d 177, 183-84 (1986), in which the court held that an oral surgeon who caused nerve damage to a patient could not assert that patient's poor oral hygiene as contributory negligence to his injury. Id. The court in Lybrand stated that "just as the patient's poor dental hygiene could not be asserted as a defense to the negligent infliction of surgical injury, a client's poor business practices cannot be asserted as a defense to the auditor's negligent failure to discover and report the client's noncompliance with investment policy and legal requirements." Id (citing Owens, 115 Ill. 2d at 183-84). Thus, our supreme court's decision in Lybrand seems to indicate that the audit interference doctrine would be applicable to other service providers, at least insofar as they are hired to remedy a condition caused by the plaintiff's negligence.

¶ 57 Here, an argument could be made that if the scope of defendants' duty to the plaintiff encompassed verification of the borrowers' satisfactory compliance with the loan's conditions, they would, in fact, be employed to avert the damage caused by plaintiff's prior negligence in approving and underwriting the loan. Further, it appears that the plaintiff's alleged negligence in the approving and underwriting stages of the loan process did not interfere with defendants' performance in documenting the loan and handling the closing. However, even if the evidence of plaintiff's negligence should not have been admitted, it could not be deemed legally prejudicial,

given the state of the law with regard to general verdicts. As defendants correctly note, the jury in this case returned a general verdict in favor of defendants, which could have been based on a finding that defendants did not breach any duties, in which case the plaintiff's contributory negligence would be of no consequence.

¶ 58 It is well established that "[w]hen a jury returns a general verdict and more than one theory is presented, the verdict will be upheld if there was sufficient evidence to sustain either theory, and the objecting party, having failed to request a special interrogatory as to the grounds for the verdict, cannot complain. Krklus v. Stanley, 359 Ill. App. 3d 471, 479 (2005) (citing Dillon v. Evanston Hospital, 199 Ill. 2d 483, 492 (2002); Witherel v. Weimer, 118 Ill. 2d 321, 329 (1987)). For instance, in Orzel v. Szewczyk, 391 Ill. App. 3d 283, 290 (2009), where the jury returned a general verdict for defendant in a legal malpractice action, this court affirmed the judgment, regardless of whether the trial court properly instructed the jury on contributory negligence. The court noted that the verdict form used by the jury did not distinguish between a finding that the plaintiff had not met the burden of proving negligence from a finding that the plaintiff was more than 50 percent negligent. Id at 289. Under those circumstances, without a special interrogatory, the court could not determine how the jury reached its decision, which may have been decided on the basis that plaintiff failed to meet the burden of proof, without even considering the contributory negligence issue. Id at 290.

¶ 59 Similarly, in Krklus, 359 Ill. App. 3d at 479, the plaintiff in a medical malpractice case argued on appeal that the trial court erred, not only in submitting jury instructions on contributory negligence, but also in admitting evidence of such negligence. The court, however, affirmed the trial court's judgment in favor of defendant because where the jury entered a general verdict,

which was silent on the jury's reasons for finding in favor of defendant. Id. Under those circumstances, the jury could have reached that verdict because either: (1) defendant was not negligent; or (2) defendant was negligent, but the plaintiff's contributory negligence was more than 50 percent of the proximate cause of his death. Id. Since plaintiff failed to request a special interrogatory and there was sufficient evidence presented at trial to support a finding that the defendant was not negligent, the court refused to reverse the judgment based on the plaintiff's challenge to the introduction of evidence of comparative negligence. Id.

¶ 60 Here, similarly to Orzel and Krkus, the jury in this case entered a general verdict in favor of defendants, which did not specify whether it was based on a finding that defendants were not negligent, or on a finding that they were negligent but the plaintiff's own contributory negligence was more than 50 percent the cause of their losses. As in Krkus, defendants introduced expert testimony that the applicable standard of care did not require the defendants to verify whether the proposed building complied with the applicable zoning ordinances. Further, Redman testified that he told plaintiff to assume that the building could not be built because the borrowers had not presented evidence of zoning compliance at the time of closing. He further testified that at that time, he advised plaintiff that they did not have to close because the borrowers had not satisfied the conditions for closing. While plaintiff introduced expert testimony that defendants breached the applicable standard of care, and Oelerich testified that they never advised plaintiff to assume the building could not be built, the jury could have believed the evidence introduced by the defendants. Since plaintiff did not request a special interrogatory, we cannot determine whether the jury even considered the issue of contributory negligence, or whether it simply found that defendants were not negligent based on the evidence presented at trial. Thus, we conclude that

any error with regard to the introduction of evidence of plaintiff's contributory negligence does not warrant reversal of the trial court's judgment.

¶ 61 Plaintiff next contends that the trial court erred in granting defendants' motion for partial summary judgment which limited the plaintiff's alleged damages to the amount of the initial disbursement made at the loan closing. As noted above, the circuit court based its ruling on the finding that there was no adequate expert testimony that the later disbursements were "related to" defendants' actions which led to that initial disbursement, since plaintiff's expert limited his opinion with regard to defendants' breach of the standard of care to defendants' actions leading to the first disbursement. According to plaintiff, if it had known that the building had no zoning, it would not have closed the loan agreement in the first place, and therefore, would not have made the initial, or any of the subsequent disbursements to the borrowers. Plaintiff argues that the circuit court improperly made a factual finding that at the time plaintiff made the subsequent disbursements, it knew, or should have known, that the proposed building did not comply with the zoning restrictions. However, plaintiff contends that plaintiff's knowledge at the time of the later disbursements was a disputed issue of fact, and summary judgment based on the circuit court's finding was, therefore, improper.

¶ 62 Defendants respond that the circuit court's ruling was not based on a finding of fact with respect to the causal connection between defendants' actions and the damages incurred as a result of the later disbursements. According to defendants, the circuit court's finding was based on the plaintiff's failure to present expert testimony that defendants continue to breach the standard of care after the initial disbursement was made. Alternatively, defendants contend that even if the circuit court's ruling had been based on the lack of a causal connection between plaintiff's alleged

negligence before the initial disbursement and the losses suffered from the later disbursements, that ruling would still be correct. Defendants claim that when the plaintiff made the later disbursements, the borrowers had not complied with the conditions required for those disbursements enumerated in Section 5.1 of the loan agreement, such as the requirement to present evidence that any zoning requirements had been met. They maintain that it would not be foreseeable for plaintiff, or any attorney, at the time of closing, that the plaintiff would make later disbursements to the borrowers without those conditions being fulfilled.

¶ 63 Moreover, defendant contends that the issue of whether the circuit court correctly limited the plaintiff's potential damages to those resulting from the initial disbursement is moot because the jury has already determined that defendants are not even liable for those initial losses. Defendants explain that plaintiff's theory is that, absent defendants' alleged negligence in failing to verify zoning, plaintiff would not have closed on the loan agreement in the first place, and therefore, not made any disbursements, at closing or otherwise. Thus, defendants maintain, once the jury found that defendants were not liable for the initial disbursement, it follows that defendants are likewise not liable for any subsequent disbursements pursuant to that loan agreement. We agree.

¶ 64 It is well established that courts in Illinois "do not decide moot questions, render advisory opinions, or consider issues where the result will not be affected regardless of how those issues are decided." In re Alfred H.H., 233 Ill. 2d 345, 351 (2009). The determination of whether an issue on appeal is moot is a question of law, which we review de novo. Wright Development Group, LLC v. Walsh, 238 Ill. 2d 620, 632-33 (2010). An issue is moot when no actual controversy exists or where intervening events occur that render it impossible for the court

to grant effectual relief to the complaining party. People v. S.L.C., 115 Ill. 2d 33, 39 (1986). For instance, this court has held that where a plaintiff claimed that an agent of his trustees had breached his fiduciary duty by merely being involved in the management of the trust, that question was moot once the court determined that the trustees had not breached their fiduciary duty. See McClormick v. McCormick, 180 Ill. App. 3d 184, 207-08 (1988); see also LaMonte v. City of Belleville, 41 Ill. App. 3d 697, 705 (1976) (where a police officer was found not liable for assault and battery arising out of an incident where plaintiff was shot by the officer as a robbery suspect, question of whether the municipal corporation that employed the police officer was liable became moot).

¶ 65 In this case, plaintiff acknowledges that its claim is a "simple one," namely, that "absent the defendants' wrongdoing, it would have never made the 60 W. Erie loan. Thus, its contention that the circuit court erroneously limited its potential damages when it granted a partial summary judgment hinges on plaintiff's contention that defendants' alleged negligence prior to closing was the proximate cause of all disbursements made to the borrowers, not only the initial one. However, if the later disbursements did, in fact, result from defendants' failure to verify the zoning requirements prior to closing, the jury's finding that defendants were not liable renders the question of the subsequent losses moot. As noted above, in the absence of special interrogatories, we cannot determine how the jury reached its decision, which may have been decided on a finding that the plaintiff failed to prove that defendant owed a duty to verify zoning. If the jury's verdict was based on a finding that defendants breached no duty in failing to verify zoning compliance, they would not be liable for any damages caused by such failure.

¶ 66 Plaintiff nevertheless argues that at the time of the hearing, Kayman, plaintiff's expert,

testified that defendants were negligent not only in their performance prior to closing, but also in their representation of plaintiff after the initial disbursement. Plaintiff notes that in his Rule 213 disclosures, Kayman opined that the defendants breached their standard of care after the loan closed "by amend[ing] the 60 W. Erie loan documents without taking any steps to determine whether the material deficiencies in the Loan (which again, [defendants] knew or should have known of) had been corrected or if the Loan was even performing." According to plaintiff, a reasonable jury could have found that, even if defendants were not negligent before closing, their subsequent post-closing negligence caused plaintiff damages from subsequent disbursements.

¶ 67 We first note that the circuit court did not address plaintiff's contention that summary judgment was not warranted because plaintiff introduced Kayman's testimony that defendants committed additional negligent acts after closing. Since the trial court did not rule on that argument, such a contention is not before this court and we will not independently rule on that issue. See, e.g., Lurgio v. Commonwealth Edison Co., 394 Ill. App. 3d 957, 968 (2009) (issue of whether defendant failed to properly maintain, install, or properly supervise of its power lines and property had not been ruled upon below and was, therefore, not before this court).

¶ 68 In any event, even if we were to reach that argument, the result would remain unchanged. Kayman specifically stated in his deposition that he was not rendering an opinion on defendants' conduct surrounding the subsequent disbursements because he did not know the factual context of those later disbursements. While Kayman stated in his disclosures under Rule 213(f), that defendants breached their duty in amending the loan agreement without determining if the deficiencies had been corrected, he does not state that such breach was in any way part of the factual context of any later disbursement. Thus, that statement does not appear to negate his

testimony that his opinion of defendants' negligence was limited to defendants' representation of plaintiff within the factual context of the initial disbursement.

¶ 69 Lastly, plaintiff contends that it was prejudiced by "inconsistent rulings" that the circuit court made during trial on the basis of its partial summary judgment ruling. According to plaintiff, the circuit court's ruling on summary judgment barred both parties from introducing evidence related to events that took place after the loan closing and initial disbursement. Plaintiff maintains, however, that notwithstanding that ruling, the circuit court allowed defendants to question witnesses about the value of the mortgage on the property at 60 W. Erie and the value of title insurance on the property. The bank argues that such testimony was evidence of its failure to mitigate the initial losses of $4.6 million, which should have been barred pursuant to the summary judgment ruling. Plaintiff apparently claims that while the court allowed defendants to introduce evidence that the bank's losses were less than the entire amount of its initial disbursement, it still barred plaintiff from introducing evidence that its losses were greater than the initial $4.6 million and included its subsequent disbursements.

¶ 70 We note, however, that plaintiff has failed to state a cogent argument to support the notion that such arguably inconsistent treatment should be grounds for reversal of the circuit court's judgment, or to cite any authority in support of that proposition as required by Rule 341(h)(7). Plaintiff merely states that the court's "inconsistent application of its rulings" confused the jury and prejudiced plaintiff. Since respondent has failed to comply with Rule 341(h) and articulate a cohesive legal argument supported by authority, we cannot reach the merits of his contention. Bank of Ravenswood v. Maiorella, 104 Ill. App. 3d 1072, 1074 (1982).

¶ 71 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 72 Affirmed.