2015 IL App (1st) 140595-U

No. 1-14-0595

Fourth Division
March 31, 2015

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PARKSIDE AT KILANI, LLC, a Hawaii Limited Liability Company, FALAHUD DIN SHAMS, A/K/A PHIL SHAMS and ZAHINDA SHAMS, Plaintiffs -Appellants, v. TREMONT REALTY CAPITAL, a Delaware Corporation and North American Capital Markets, Inc., a Minnesota Corporation, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 09-L-13050 Honorable Susan F. Zwick, Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court properly determined that defendant performed under the terms of the parties agreements, thus there was no breach of contract; that the evidence was insufficient to establish an agency relationship between the parties, thus there was no breach of fiduciary duties; that the evidence failed to support a claim under the Illinois Consumer Fraud and Deceptive Practices Act; and that the evidence was insufficient to sustain a claim of common law fraud.

¶ 2 Plaintiffs, Parkside at Kilani, LLC, (Parkside), Falahud Din "Phil" Shams (Shams) and Zahinda Shams brought this action against defendants, Tremont Realty Capital (Tremont)

and North American Capital Markets, Inc., (NACM)[1] alleging that Tremont, acting in its capacity as financial and development consultant, violated the express terms of two engagement contracts entered into by the parties, and also alleging Tremont, as Parkside's agent, breached its fiduciary duties.

¶ 3 BACKGROUND

¶ 4 The following facts are gleaned from the record, which includes a disputed bystanders report. Parkside is a Hawaiian limited liability company created to develop commercial real estate properties in Hawaii. On November 18, 2005, Shams, on behalf of Parkside entered into a real estate contract to purchase vacant land for commercial development. Shams approached several lenders about debt financing for the development, but none were interested.

¶ 5 In late 2005, Shams approached Marcus Carbajal (Carbajal) of Omega Financial Group about equity financing for the project, and asked if he could refer Parkside to any lenders who might be able to provide debt financing. Carbajal referred Shams to Tony Kolomayets (Kolomayets) of Tremont. Kolomayets was the senior director of Tremont's Chicago office. Tremont is in the commercial real estate brokerage business. It assists clients in obtaining real estate loans for commercial real estate acquisitions, development and construction.

¶ 6 Shams explained to Kolomayets that he had approached several banks about debt financing but they were not interested. Kolomayets explained that it would be difficult to find a lender due to Parkside's lack of real estate development experience. Kolomayets further explained that Tremont's fees would be higher than normal because of Parkside's lack of

[1] North American Capital Markets, Inc. did not participate at trial and is not part of this appeal.

experience and because Parkside had no staff to speak of, and the engagement would involve more work on the part of Tremont.

¶ 7 Kolomayets explained that Tremont's primary focus would be on obtaining an acquisition loan to secure the development opportunity and Tremont would need to show potential lenders the scope of the project, what the development plans were and what the total project costs would be. Kolomayets explained to Shams that a loan for a condominium development would most likely be structured in two phases: an initial acquisition loan to acquire the land, followed by a construction loan that would be contingent on obtaining a certain level of pre-sales.

¶ 8 On February 28, 2006, Parkside entered into two written agreements with Tremont to provide financial and development services regarding the acquisition and development of property under contract in Oahu, Hawaii.

¶ 9 The Finance Consultant Agreement specifically states:

> "This letter when countersigned by you will confirm that Phil Shams (the "Client"), has engaged Tremont Realty Capital ("TRC"), as the Client's financing consultant on an exclusive basis with respect to the debt, equity, and/or mezzanine debt financing.
>
> TRC agrees to use good faith efforts in assisting the Client in obtaining financing, but makes no guarantees regarding replacement or acceptance by any lender. The client conforms to the best of its knowledge and after reasonable investigation, that all information furnished by it to TRC will be true, complete and accurate.
>
> 1. TRC's services pursuant to this engagement will be as follows:
>
> a. Obtain senior acquisition loan for the above captioned property.

b. Assist the Client in negotiating the terms and conditions of debt, equity and mezzanine financing.

c. Coordinated inter-creditor agreement between acquisition lender and equity/mezzanine debt lender.

2. The fees and costs payable to TRC are as follows:

a. Success Fee- If the Client closes on any acquisition loan of any kind for the property, or accepts any commitment during the 120 day period following the execution of this agreement (the "Term"), the Client will pay or cause to be paid, TRC a Success Fee of $150,000. The fee will be paid out of the loan closing in the first draw of the loan."

b. In the event the client has not received a financing commitment with respect to the project prior to the expiration of the agreement, but a commitment for the project is received from contacted and registered client during engagement period, within 120 days following the expiration of TRC's engagement, the client will pay or cause to be paid to TRC the Success Fee."

* * *

¶ 10 The Development Consultant Agreement specifically states:

"This letter when countersigned by you will confirm that Phil Shams ("the Client"), has engaged Tremont Realty Capitial ("TRC"), as the Client's development consultant on an exclusive basis with respect to the debt, equity, and/or mezzanine debt financing.

TRC agrees to use good faith efforts in assisting the Client in the development and conversion process. The client confirms to the best of its knowledge and after

reasonable investigation, that all information furnished by it to TRC will be true, complete and accurate.

1. TRC's services pursuant to this engagement will be as follow:

a. Review the Project.

b. Prepare the Budget

c. Coordinate presale marketing information

d. Prepare financing memorandum

e. Coordinate closing of acquisition loan and equity funding

2. The fees and costs payable to TRC are as follows:

a. Success Fee- If the Client closes on any acquisition loan of any kind for the property, or accepts any commitment during the 120 day period following the execution of this agreement (the "Term"), the Client will pay or cause to be paid, TRC a Success Fee of $175,000. The fee will be paid out of the loan closing in the first draw of the loan."

b. In the event the client has not received a financing commitment with respect to the project prior to the expiration of the agreement, but a commitment for the project is received from contacted and registered clients during engagement period, within 120 days following the expiration of TRC's engagement, the client will pay or cause to be paid to TRC the Success Fee."

* * *

¶ 11 Following the signing of these engagement contracts, Kolomayets visited Hawaii for several days to review the project. During this trip, he looked at the property under contract, visited several condominium developments and met individuals involved in the Parkside

project. He reviewed information regarding advertising, presentation materials and mailings. He also met with Parkside's contractor about the project and the construction budget.

¶ 12 Parkside and Tremont both participated in preparing the financing memorandum. Tremont prepared several marketing and financing memoranda and multiple budgets for the development project. Tremont presented the financing memorandum to 25 to 40 prospective lenders, but none were interested.

¶ 13 Terry Nerhus, a business acquaintance of Kolomayets, informed him that North American Capital Markets (NACM), a loan syndicator, might be interested in syndicating a loan for Parkside. A loan syndicator puts together a group of banks in which each participating bank funds a portion of a loan.

¶ 14 After speaking with NACM, Kolomayets received an engagement letter from NACM. After reviewing this with Parkside, Parkside signed the engagement letter which provided that NACM would receive a 2% placement fee based on the acquisition loan and a $35,000 upfront referral fee.

¶ 15 NACM subsequently syndicated a loan for Parkside with Bank of Bozeman (Bozeman) being the lead bank. The loan was for the acquisition of the subject property and for the construction of sales models at the property. Mark Gannon, the president of Bozeman, testified at his evidence deposition, that in the NACM marketing proposal, $10 million was requested, but only $4,394,061 million was provided to obtain the property and to build two sales models.

¶ 16 One week prior to the closing, Parkside received drafts of the loan documents. Parkside was aware the closing was for $4.4 million, not the requested $10 million. Nonetheless, Parkside decided to close on the lesser amount due to time constraints in closing on the

purchase of the property and having the property appraised. One of the loan conditions was that Parkside was required to obtain 50% pre-sale commitments prior to disbursement of additional funds.

¶ 17 On September 28, 2006, Shams received an e-mail from Dana Taylor (Taylor) a loan officer at Bozeman, setting forth various disbursements to be made from the Bozeman loan, including Tremont's fees of $325,000 and $192,651 to NACM. Taylor asked to be advised if there were any discrepancies. Shams responded that "the figures look fine." Tremont paid part of its fees to third parties as referral fees. Specifically, Tremont paid Carbajal $160,000 for introducing Parkside to Tremont, and $56,000 to Mr. Nerhus for the referral to NACM.

¶ 18 The original loan contained a 6-month maturity date. At the time of the closing, Parkside anticipated that the developer's public report for the project would be approved by the Hawaii real estate commission. Parkside was prohibited by Hawaiian state law from entering into legally binding pre-sale agreements with prospective buyers until the State approved the condominium filings. When the original loan expired on March 31, 2007, an extension, at Parkside's request, was given. The new expiration date was July 31, 2007. Approval of the public report also occurred on July 31, 2007.

¶ 19 Parkside was unable to obtain extra extensions of the existing loan or additional funding from Bozeman because Parkside had failed to enter into a contract for the sale of a single condominium. The loan was not extended past July 31, 2007, and with the loan over 30 days past due, Bozeman initiated collection proceedings against Parkside on September 12, 2007.

¶ 20 According to Carbajal, who formed the investor group that provided the equity financing to Parkside, the project failed because of the delays in Parkside obtaining the required

approval of its public report, Parkside's failure to achieve the level of pre-sales required for additional construction financing and deterioration of the real estate market.

¶ 21 Shams testified that he had real estate investment experience. He previously purchased an office building and also structured the acquisition of a hotel in the amount of $3.5 million. In 2006, Shams, in a separate development opportunity, closed a $2.35 million acquisition loan for another property.

¶ 22 On November 4, 2009, Parkside filed a complaint against Tremont alleging violations of the Real Estate Settlement Procedures Act of 1974, breach of contract, violation of the Consumer Fraud and Deceptive Practices Act and breach of fiduciary duty. Tremont filed a motion to dismiss on February 10, 2010. Parkside motioned and was granted leave to amend its pleadings on May 16, 2010. Parkside was subsequently granted leave to file a second amended complaint, which was filed June 23, 2011. Tremont again filed a motion to dismiss, which was denied.

¶ 23 Parkside's second amended complaint alleged that Tremont breached various contractual and fiduciary duties by providing duplicative deceptive service, procuring payment of excessive and duplicative fees, failure to provide services contracted for and perpetrating fraud upon Parkside.

¶ 24 Extensive discovery ensued and the case proceeded to a bench trial on November 8, 2013. Parkside presented Shams and Dr. Thomas Musil (Musil) as its expert witness. Tremont presented Kolomayets, Carjabal and Benjamin Nummy (Nummy) as its expert witness. The evidence depositions of Mark Gannan and Dana Taylor were also admitted into evidence at trial.

¶ 25 At the conclusion of the three day bench trial Tremont filed a motion for a directed finding, which was denied. The trial court filed its memorandum order on January 23, 2014, which we summarize, in relevant part, below. The court found that the evidence presented at trial "failed to support the allegations contained in [Parkside's] recent complaint, and specifically failed to support [Parkside] on the claims of breach of contract, common law fraud, violation of the Illinois Consumer Fraud Act and breach of fiduciary duty."

¶ 26 The court made the following additional findings. Musil's opinion that the work was substandard was undermined by NACM's adoption of the financing memorandum prepared by Tremont, which formed the basis for Bozeman's approval of the acquisition loan. Tremont arranged for NACM to step in and assist in the financing arrangement; however, "neither contract dictated the method to which the results were to be obtained." Thus, "[t]he testimony of the witnesses, as well as the supporting documents establishes that the terms of the contracts between Tremont and Parkside were fulfilled."

¶ 27 Further, in its order, the court noted that "the evidence showed that the ultimate decision, to sign or not sign, rested with Parkside, and the ultimate control over payment of Tremont's fees likewise rested with Parkside." Further, the facts did not meet the requirements of a fiduciary relationship through agency and "[w]ithout agency, there can be no fiduciary duty."

¶ 28 Additionally, the trial court reasoned that "[t]he commercial nature of the transaction, as well as the evolution of the agreement establishes that all parties had options during the negotiations." At the time of closing "all parties knew that the loan was $4.3 million and was designated for acquisition of the land and construction of the sales models." The "fees charged were not exclusive to the mortgage; the second contract required Tremont to create a construction budget and plan as well as financing agreement and marketing strategy."

¶ 29 Finally, the trial court found that Parkside's basis for common law fraud were representations made to Shams concerning the amount of the loan and the availability of the proceeds of the loan. Further the "[t]estimony and documentary evidence establishes that these representations, if made, were between Parkside and NACM." The court noted that these statements were directly contradicted by the loan documents signed by Shams and Bozeman. It is from this order that Parkside appeals. For the reasons that follow, we affirm.

¶ 30 ANALYSIS

¶ 31 On appeal, Parkside raises the following issues for review: (1) whether Tremont breached its agreements; (2) whether agency and breach of fiduciary duty were established; (3) whether Tremont violated the Illinois Consumer Fraud and Deceptive Practices Act; and (4) whether sufficient evidence was presented to establish common law fraud. Tremont responds that the trial court properly dismissed all of Parkside's claims.

¶ 32 A reviewing court should not overturn a trial court's findings merely because it does not agree with the lower court or because it might have reached a different conclusion had it been the fact finder. *Bazydlo v. Volant*, 164 Ill. 2d 207, 214 (1995). The trial judge, as the trier of fact, is in a position superior to a reviewing court to observe witnesses while testifying, to judge their credibility, and to determine the weight their testimony should receive. *Id.* at 214-15. Consequently, where the testimony is conflicting in a bench trial, the trial court's findings will not be disturbed unless they are against the manifest weight of the evidence. *Id.* at 215 (citing *In re Application of the County Treasurer*, 131 Ill. 2d 541, 549 (1989)). A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence. *Bazydlo*, 164 Ill. 2d at 215 (citing *Johnson v. Abbott Laboratories, Inc*. 238 Ill. App. 3d 898, 905 (1992)).

¶ 33 Here, the trial court also construed and ruled on the legal effect of documents. In reviewing the trial court's conclusions of law we apply a *de novo* standard of review. *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002) (citing *Norskog v. Pfiel*, 197 Ill. 2d 60, 70-71 (2001)). We now turn to the issues before us.

¶ 34 A. Breach of Contract

¶ 35 Parkside argues that Tremont breached both the Finance Consultant Agreement and the Development Consultant Agreement. In this appeal, he advances several arguments in support of his claims.

¶ 36 The basic rules of contract interpretation are well settled. In construing a contract, the primary objective is to give effect to the intention of the parties. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011) (citing *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007)). A court will first look to the language of the contract itself to determine the parties' intent. *Thompson*, 241 Ill. 2d at 441 (citing *Gallagher*, 226 Ill. 2d at 233). A court will not resort to rules of construction where an agreement is clear and unambiguous. *McDonald's Corporation v. Mazur*, 127 Ill. App. 3d 608, 613 (1984) (citing *Harris Trust & Savings Bank v. Hirsch*, 112 Ill. App. 3d 895, 899 (1983)).

¶ 37 Parkside first argues that Tremont explicitly agreed to undertake and use good faith efforts in both an advisory and review capacity under the terms of the agreements to assist Parkside in obtaining a commercial loan to develop the subject property. Tremont did not obtain or locate potential lenders but only introduced it to NACM. Further, Tremont was required to perform more services than to simply locate and introduce potential lenders to Parkside. Under the terms of the agreements, Tremont was required to be an active participant throughout the entire loan process on Parkside's behalf, and failed to do so.

¶ 38 Regarding the Finance Consultant Agreement in particular, Parkside contends that the debt financing was procured by NACM through Bozeman and not by Tremont. In that regard, Parkside points to Musil's opinion testimony in which he stated that because Tremont did not directly obtain financing Tremont failed to successfully execute its contractual duties. Tremont was required to negotiate the terms and conditions of the debt financing, which it failed to do. Thus, Tremont's breach required it to expend more money, *i.e.* fees to NACM for the procurement of the debt financing. The agreement with NACM only entitled NACM to 2% of the actual loan amount received. However, Parkside paid NACM a 2% fee based on an approximate $10 million loan, resulting in an overpayment of fees to NACM. Parkside maintains that had Tremont provided advisory services, as contracted, Parkside would not have incurred excessive fees paid to NACM.

¶ 39 Tremont responds that it performed according to the agreements and points to the fact that Parkside closed on an acquisition loan. He notes Kolomayets' testimony concerning Shams' inexperience and lack of development expertise, which categorized Parkside as a substantial risk to any potential lender. Due to the risk categorization, Tremont could not find a lender willing to provide the financing to Parkside on its own. Kolomayets testified that he contacted 25 to 40 prospective lenders regarding financing for Parkside without success. He ultimately introduced Parkside to NACM, which successfully syndicated approximately a $4.4 million acquisition loan for Parkside. Tremont maintains that it fully performed its duties under the agreements, and therefore, its fees were earned when Parkside closed on the acquisition loan from Bozeman. Tremont further maintains that Parkside closing on an acquisition loan is, in fact, proof that it did not breach the agreements.

¶ 40 Tremont points out that the only type of loan referred to in the Finance Consultant Agreement is an acquisition loan for the undeveloped land Parkside contracted to purchase. In Tremont's view, the trial court properly found that nowhere in the agreements was Tremont required to obtain a loan for Parkside in the amount of $9 million to $10 million to finance both the acquisition of the land and the construction of the project. Further, Tremont offers that Kolomayets testified that he discussed the terms of NACM's engagement letter with Shams and advised him that if he did not want to enter into the NACM engagement, Tremont could continue searching other prospective lenders. Parkside signed the engagement letter from NACM on the same day that it was received.

¶ 41 Tremont argues that Parkside was aware that an acquisition loan was necessary to finance the project and then the loan would be remarketed for a construction loan. The construction loan would be contingent upon Parkside achieving a 50% condominium pre-sale level. Additionally, it is undisputed Parkside had no pre-sales by July 31, 2007. Tremont maintains that the construction loan would not have been funded because Parkside never achieved the 50% pre-sale level required for funding of the construction loan.

¶ 42 Regarding the "overpayment" of fees to NACM, Tremont notes that the evidence established that Taylor sent an email to Shams setting forth certain disbursements from the loan proceeds including Tremont's fees of $325,000 and $192,651 to NACM. Tremont never instructed Parkside to pay NACM anything more than the placement fee set forth in NACM's engagement letter. Unbeknownst to Tremont, Shams, in response to Taylor's email, stated that "the figures look fine." Tremont maintains because it was not notified or consulted as to the fees Parkside disbursed to NACM, it is not responsible for those fees.

¶ 43 Parkside next argues that Tremont breached the agreement by not advising Parkside prior to closing that the terms of the loan actually obtained on Parkside's behalf by NACM differed materially from the loan terms Parkside initially bargained for. Shams testified that he first learned of the actual loan amount and costs shortly before closing. Parkside contends its decision to accept the loan terms and pay the fees actually charged by Tremont and NACM were based upon incomplete and misleading information provided by Tremont, as well as material information omitted by Tremont, which would have affected Parkside's decision to accept or reject the loan. Parkside agreed to pay the higher fees based upon the cumulative documents received from Tremont and NACM, prior to closing, leading Parkside to believe that additional funds were committed to without further fees and costs.

¶ 44 Tremont maintains that it informed Parkside of the amount of the loan in late August, 2012. Further, Tremont contends that Shams testified that he received the papers for the closing one week prior to closing, disproving Parkside's argument that it believed it was acquiring a loan commitment of $10 million at the time of closing.

¶ 45 Regarding the Development Consultant Agreement, Parkside contends that Tremont breached the agreement by failing to review the project. According to Parkside, Musil testified that Tremont's work was substandard and lacking in detail. In that regard, Musil noted that the budget numbers were in rounded format, and the general contractor was misidentified in the literature prepared by Tremont.

¶ 46 Tremont responds that Kolomayets traveled to Hawaii for three to four days to review the project. He inspected the project, visited several condominium developments and met with various individuals who were working on the project, including an appraiser and realtors. He also reviewed information regarding mailings, presentation materials, advertising, internet

strategy and signage. Additionally, he met with Parkside's contractor about the project and the construction budget. Kolomayets testified he prepared between four and eight versions of a financing memorandum to reflect changes in the budget and other facts.

¶ 47 Tremont points to its expert opinion witness, Nummy, who testified that the financing memoranda prepared by Tremont, including the project budgets, were not defective or deficient in any way. Nummy further attested to the fact that Tremont provided services related to coordinating presale marketing information. Tremont additionally refers to the testimony of Kolomayets who testified that he discussed sales and marketing strategy for the project with the realtors and reviewed marketing information. Tremont contends, and Parkside agrees, that with respect to coordinating closing of the acquisition loan and equity financing, these services were not necessary because the equity lender and equity financing were already in place prior to Tremont's involvement. Thus, Tremont argues that the testimony and supporting evidence prove that it performed according to the agreements.

¶ 48 We note here the trial court's finding that Musil's opinion regarding the caliber of Tremont's work was undermined by NACM's adoption of the financing memorandum. Based upon the evidence, the court determined that the terms of the agreements had been satisfied. On this record, we are unable to conclude that the trial court's findings were against the manifest weight of the evidence. See *Bazydlo*, 164 Ill. 2d at 215. (A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence.).

¶ 49 Parkside makes the additional argument that the trial court erroneously relied on the fact that there were two separate agreements with two separate fees and not the fact that both fees were contingent upon the acquisition of one loan. We perceive Parkside's argument to be

premised on the notion that the trial court's interpretation of the contracts was erroneous. Our review of the record reveals that the trial court's understanding of the contracts was correct. Thus, we reject the argument.

¶ 50 B. Agency and Fiduciary Duty

¶ 51 We next turn to Parkside's contention that Tremont and Parkside were in an agency relationship and that Tremont breached its fiduciary duty. Tremont maintains that it merely had a business relationship with Parkside, memorialized in two agreements, which did not create a fiduciary duty. At the conclusion of the bench trial in this matter, the trial court determined that no agency relationship existed, thus, no fiduciary duty arose, and therefore, no breach.

¶ 52 Generally, the question of whether an agency relationship exists and the scope of the purported agent's authority, are questions of fact. *Kaporovskiy v. Grecian Delight Foods, Incl.*, 338 Ill. App. 3d 206, 210 (2003) (citing *Progress Printing Corp. v. Jane Byrne Political Committee*, 235 Ill. App. 3d 292, 306 (1992)). Breach of fiduciary duty claims are controlled by the substantive laws of agency, contract and equity. *Capitol Indemnity Corp. v. Steward Smith Intermediaries, Inc.*, 229 Ill. App. 3d 119, 124 (1992). A fiduciary relationship may occur as a matter of law, or it may arise as a result of the special circumstances of the parties' relationship where one places trust in another so that the latter gains superiority and influence over the former. *Benson v. Stafford*, 407 Ill. App. 3d 912 (2010). The mere fact that the parties have engaged in business transactions or have a contractual relationship is not of itself sufficient to establish a fiduciary relationship. *Id.* at 913.

¶ 53 To determine whether a fiduciary relationship exists, courts look at factors including the degree of kinship between the parties, the disparity of business experience between the parties, and the extent to which the servient party entrusted the handling of the business to the dominant party and placed its trust and confidence in it. *Id.* (citing *State Security Insurance, Co. v. Frank B. Hall & Co.*, 258 Ill. App. 3d 588, 595 (1994). To adequately plead a claim for breach of fiduciary duty under Illinois law, the plaintiff must allege: (1) the existence of a fiduciary duty, (2) a breach of that duty, and (3) an injury resulting from that breach. *Bernstein Grazian, L.C. v. Grazian and Volpe, P.C.*, 402 Ill. App. 3d 961, 976 (2010) (citing *Covinsky v. Hannah Marine Corp.*, 388 Ill. App. 3d 478, 489 (2009)).

¶ 54 Initially we note the parties' disagreement regarding the appropriate standard of review of the trial court's decision on this issue. Parkside contends that we should review the trial court's decision under the "*de novo*" standard. Tremont, on the other hand, urges "manifest weight of the evidence" as the proper standard. In a bench trial, the trial court must weigh the evidence and make findings of fact. In close cases, where findings of fact depend on the credibility of witnesses, it is particularly true that a reviewing court will defer to the findings of the trial court unless they are against the manifest weight of the evidence. See *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002). In this case, over the course of trial, the trial judge heard witness testimony, assessed credibility, and resolved any conflicts in the evidence presented. Accordingly, we review the trial court's decision under the more deferential manifest weight standard.

¶ 55 Parkside first argues that the written agreements between the parties created an agency relationship. It is Parkside's contention that the relationship was more involved than simply bringing together the borrower and the lender. The exclusive nature of the agreement

penalized Parkside for dealing with any other lender or seeking assistance from a third party, thus increasing Parkside's reliance on Tremont. Parkside maintains that it was essentially "locked in" by the terms of the agreements, thus creating an exclusive relationship with Tremont. Parkside argues that, like in *Allabastro v. Cummins*, 90 Ill. App. 3d 394 (1980), Parkside's reliance on Tremont, created by the terms of the agreements, resulted in Tremont serving as Parkside's agent. In further support of its contention, Parkside further notes the exclusive nature of the parties' relationship in *Allabastro*.

¶ 56 We further find *Allabastro* factually distinguishable. There, the court found the existence of a principal agent relationship based upon express language in the parties' agreement which identified the defendants as the plaintiff's exclusive agent for purposes of obtaining a loan for the plaintiff. Nothing in the contracts in this case expressly defines the relationship of the parties as principal and agent, or exclusive, for that matter. In the absence of such language, we decline to speculate regarding the intent of the parties at the time the agreements were first executed.

¶ 57 Parkside additionally cites to *Deleon v. Beneficial Construction Co.*, 55 F. Supp. 2d 819 (1999), as well as to *City of Chicago v. Barnett*, 404 Ill. 136 (1949) for the general proposition that a mortgage broker is a borrower's agent by definition and as a matter of law. Parkside maintains that *DeLeon* is analogous to the instant case because, like the defendant in *DeLeon*, Tremont "passed off" Parkside's acquisition loan to another mortgage broker, NACM, which substantially increased Parkside's costs.

¶ 58 With respect to *Barnett*, we note that the term "broker" as used in that case was considered narrowly in the context of a city ordinance. Thus, any reliance on *Barnett* is misplaced. *DeLeon* is equally unavailing. There, a mortgage company was engaged to find

financing for the plaintiff borrower, for which it would be paid a percentage of the loan amount. Instead of searching the market, the mortgage company referred the plaintiffs to a lender with whom the company had a referral agreement. As a result, the plaintiffs alleged that they had to pay a greater interest rate, closing costs and finance charges than they would have if the mortgage company had done its job. The court stated that " '[a] person who undertakes to manage some affair for another, on the authority for the account of the latter, who is called a principal, is an agent.' " *Deleon*, 55 F. Supp. at 828. The court determined that the plaintiffs stated a claim for breach of fiduciary duty because the mortgage company did not comparatively shop for a mortgage as contracted. *Id.*

¶ 59 Tremont rejects *DeLeon* as analogous for the simple reason that, unlike the broker in *DeLeon*, Tremont did perform the services for which it was retained. Tremont did not "pass the borrower on to another lender." Tremont is not a lender, but was retained to find a lender. It did so in the form of NACM, a loan syndicator. Tremont further maintains that it did not refer Parkside to NACM to perform the same services Tremont had contracted to perform but, rather, to syndicate a loan to Parkside, which NACM did. Tremont asserts that NACM was acting as a loan syndicator rather than as a mortgage broker, with specialized services that resulted in Parkside closing on an acquisition loan.

¶ 60 We agree with Tremont. Even were we to accept *DeLeon* as the law of the land in Illinois, we would find it distinguishable for the reasons which Tremont cites. Further, we note that the procedural posture of the present case is completely different than that in *DeLeon*. As Tremont points out, *DeLeon* was limited to the context of a motion to dismiss. Here, the case was decided after a trial on the merits.

¶ 61 Parkside next argues that Tremont, acting as Parkside's mortgage broker, had particular knowledge and expertise in obtaining commercial loans and in commercial development. The exclusive nature of the parties' relationship required a high level of reliance and trust and therefore, a fiduciary relationship was created. In support, Parkside maintains that Tremont had a substantially superior level of business experience, including experience in the acquisition of commercial loans. Tremont's level of experience, combined with its promise to assist in acquiring a loan, plus the exclusivity of the parties' relationship, are factors that led Parkside to trust Tremont which placed Tremont in a position of superiority. Parkside further maintains that the time constraint to find financing for the acquisition of the property is another factor to be considered in the special circumstances of the parties.

¶ 62 Tremont responds that Parkside was fully capable of attending to its business affairs. In support, Tremont points to Shams' business, financial and his substantial real estate investment experience, noting in particular Parkside's management of a structured acquisition of a hotel in Bloomington, Illinois in the amount of $3.5 million.

¶ 63 As noted above, a fiduciary relationship may occur as a matter of law, or it may arise as a result of the special circumstances of the parties' relationship where one places trust in another so that the latter gains superiority and influence over the former. See *Benson*, 407 Ill. App. 3d at 912. Here, Parkside has not provided sufficient facts to support a finding that the level of trust identified in *Benson* existed between the parties here. Neither has Parkside demonstrated that they were dominated by Tremont. Moreover, even if we were to find the requisite level of trust, " '[t]he fact that one party trusts the other is insufficient ' " to establish a fiduciary relationship. *Benson*, 407 Ill. App. 3d at 915 (citing *Lagen v. Balcor Co.*, 274 Ill.

App. 3d 11, 21 (1995)) (quoting *Pommier v. Peoples Bank Marycrest*, 967 F. 2d 1115, 1119 (1992)).

¶ 64 As its third and final argument in support of the existence of an agency relationship, Parkside asserts that the trial court erred in relying on control as the determining a factor in the context of a broker-borrower relationship. According to Parkside, *Allabastro* and *DeLeon* provide the correct analyses and should be followed. In reaching its determination on the control factor, the court incorrectly applied *Kaporovskiy v. Grecian Delight Foods, Inc.*, 338 Ill. App. 3d 206 (2003).

¶ 65 Parkside contends that the trial court's reliance on *Kaporovskiy* for the proposition that control is the standard to be applied to find agency, was misplaced. Parkside argues that the absence of control and ownership on part of the alleged principal over the alleged agent is not fatal to the existence of an agency relationship. They are merely factors to consider, along with the situation of the parties, their conduct and other relevant circumstances.

¶ 66 Tremont responds that the trial court was correct in stating that under Illinois law, the party claiming an agency relationship needs to establish that "the principal has the right to control the manner in which the agent performs his work and the agent has the ability to subject the principal to personal liability." *Kaporovskiy*, 338 Ill. App. 3d at 210. In that regard, Tremont notes that they exerted no control over Parkside; Parkside was free to enter into any contract of its choosing; Tremont did not have the authority to accept or decline an offer on Parkside's behalf; and, finally, Tremont did not have authority to bind Parkside.

¶ 67 The trial court noted that the common law did not establish an automatic or legally presumed agency relationship between borrowers and brokers. The court went on to explain that an agency relationship exists when the principal has the right to control the manner in

which the agent performs his work and the agent has the ability to subject the principal to personal liability. In this case, the court concluded that Parkside had not demonstrated any control, or right to control Tremont's actions or methods, facts, the court stated, are the hallmarks of agency. Accordingly, the court ruled that in the absence of agency, there could be no fiduciary duty, merely the contractual obligations between two parties.

¶ 68 Based upon our review of the record on appeal, we cannot say that the trial court's determination that no agency relationship existed was against the manifest weight of the evidence. In the absence of agency, there was no fiduciary duty and thus, no breach.

¶ 69 C. Illinois Consumer Fraud and Deceptive Business Practices Act

¶ 70 Parkside's next contention on appeal is that Tremont's actions in their business dealings violated the Illinois Consumer Fraud and Deceptive Business Practices Act, (ICFA) 815 ILCS 505/1 *et. seq*. (West 2012).

¶ 71 Section 2 of the ICFA provides:

> "[U]nfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the 'Uniform Deceptive Trade Practices Act' * * * in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby." 815 ILCS 505/2 (West 2008).

¶ 72 To state a cause of action under the Illinois Consumer Fraud Act, five elements must be proven: (1) a deceptive act or unfair practice by defendant; (2) defendant's intent that plaintiff

rely on the deception; (3) that the deception occurred in the course of conduct involving trade or commerce; (4) the plaintiff sustained actual damages; and (5) such damages were proximately caused by the defendant's deception. *Dubey*, 395 Ill. App. 3d at 354 (citing *White v. Daimler Chrysler Corp*., 368 Ill. App. 3d 278, 283 (2006)).

¶ 73 We note the appropriate standard of proof for a statutory fraud claim is preponderance of the evidence. *Dubey v. Public Storage Inc*., 395 Ill. App. 3d 342, 353 (2009) (citing *Hanson-Suminski v. Rohrman Midwest Motors, Inc*., 386 Ill. App. 3d 585, 592 (2008)). A proposition proved by a preponderance of the evidence is one that has been found to be more probably true than not true. *Dubey*, 395 Ill. App. At 353 (citing *Hanson-Suminski*, 386 Ill. App. 3d at 592).

¶ 74 Parkside's Consumer Fraud claim is two-fold, one based upon allegations of deceptive and oppressive conduct and the other based on allegations of excessive fees. With respect to the conduct claim, Parkside argues that representations were made by Tremont that the financing would be in excess of 9.5 million. Parkside's decision to close on the loan was, in part, based on misinformation from Tremont, as well as Tremont's failure to disclose referral fees. Regrding fees, Parkside alleges that the fees charged by Tremont and NACM were based on the $9.5 million and were excessive in light of the actual loan of $4.3 million. Parkside maintains that the trial court's finding that Tremont did not violate the ICFA was error.

¶ 75 Illinois courts determine whether conduct is unfair under the Act on a case-by-case basis. *Dubey*, 395 Ill. App. 3d at 354 (citing *Saunders v. Michigan Avenue National Bank*, 278 Ill. App. 3d 307, 313 (1996)). The factors which constitute unfair conduct are: (1) whether the practice offends public policy; (2) whether it is oppressive; and (3) whether it causes consumers substantial injury. *Dubey*, 395 Ill. App. 3d at 354 (citing *Saunders*, 278 Ill. App.

3d at 313) (quoting *Federal Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 245 (1972)). A practice can be unfair without meeting all three criteria of unfairness. *Dubey,* 395 Ill. App. 3d at 354 (citing *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 418 (2002)). Rather, a practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. *Dubey*, 395 Ill. App. 3d at 354 (citing *Robinson*, 201 Ill. 2d at 418).

¶ 76 A complaint stating a claim under the ICFA "must state with particularity and specificity the deceptive [unfair] manner of defendant's acts or practices and the failure to make such averments require the dismissal of the complaint." *Demetrio*, 388 Ill. App. 3d 15, 20 (2009) (citing *Pantoja-Cahue v. Ford Motor Credit Co.*, 375 Ill. App. 3d 49, 61 (2007)) (quoting *Robinson*, 201 Ill. 2d at 418). Cases in Illinois have established that charging an unconscionably high price generally is insufficient to establish a claim for unfairness under the ICFA. *Robinson*, 201 Ill. 2d at 418. The defendant's conduct must violate public policy, or be so oppressive as to leave the consumer with little alternative but to submit, and cause injury to the consumer. *Saunders*, 278 Ill. App. 3d at 307 (citing *People ex rel. Hartigan v. Knecht Services, Inc.*, 216 Ill. App. 3d 843 (1991)).

¶ 77 Parkside contends that the trial court's reliance on *Demitrio*, 388 Ill. App. 3d at 20, does, in fact, support its argument that Tremont's conduct was oppressive and unfair because it left Parkside with only two choices. In *Demetrio*, the defendant's employees discovered that the plaintiff's vehicle had been wrongly repossessed. *Id.* at 18. Rather than return the vehicle and allow the plaintiff to pay $2,202.54 and bring his account current as set forth under the terms of the seven-day extension letter, the defendant decided to retain the wrongful possession of the vehicle until the plaintiff paid off the entire outstanding balance of $39,695.04. *Id*. at 21.

The court determined the defendant's conduct to be oppressive because it left the plaintiff with only one of two options: pay the entire outstanding balance of $39,695.04 or lose his vehicle. *Id*. Moreover after the defendant sold the vehicle and applied the net proceeds to the balance of the installment contract, it held the plaintiff responsible for the remainder and for the costs related to the repossession and sale of the vehicle. *Id*. at 22. The court determined the defendant's actions to be in violation of the ICFA. *Id*. Parkside maintains that this is illustrative of its plight. Parkside argues that the time sensitive nature of the loan acquisition left it with no choice. Either forfeit the business development opportunity that the real estate contract provided to Parkside or close and pay the fees as charged for the loan requested, not the loan actually received.

¶ 78 Here, the trial court found that "[t]he commercial nature of the transaction, as well as the evolution of the agreement establishes that all parties had options during the negotiations." The court further found that at the time of closing "all parties knew that the loan was $4.3 million and was designated for acquisition of the land and construction of the sales models." Further, the trial court found that the "fees charged were not exclusive to the mortgage; the second contract required Tremont to create a construction budget and plan as well as financing agreement and marketing strategy." The trial court found that the facts failed to support [Parkside's] claim that Tremont's actions violated the ICFA.

¶ 79 We agree. We find a total absence of oppressiveness and lack of meaningful choice necessary to establish unfairness. Parkside not only had control over entering the Bozeman loan, but was free to decline and look for another loan. See *Demitrio*, 388 Ill. App. 3d at 20 (The defendant's conduct must violate public policy or be so oppressive as to leave the consumer with little alternative but to submit, and cause injury to the consumer.).

¶ 80 With respect to the fees, Parkside maintains that the excessive fees when combined with other unfulfilled promises and misrepresentations by Tremont, made the agreement unconscionable and unfair. Parkside maintains that the total fees received by Tremont, $325,000 per the agreements, were based on the procurement of a single loan which made them excessive. Parkside also maintains that NACM's services were duplicative of Tremont's services and thus their fees of $192,651, also based upon the procurement of the same loan, is further evidence of excessive fees and unfairness. Parkside contends that the fee paid NACM was based upon $9.5 million that Parkside assumed was being committed to. Further, Parkside contends that it had no viable options but to close because of the timing constraints it was under and the short notice it received as to the actual amount of the loan, $4.4 million.

¶ 81 Tremont responds that the two agreements with Parkside were for different services. The services Tremont would be providing to Parkside went beyond those typically performed by a commercial real estate loan broker in assisting a client in obtaining financing. Kolomayets explained that the fact Shams had no prior real estate development experience and that Parkside had in essence no staff to prepare and review project budgets, market overview and analyses, and coordinate pre-sale marketing information, meant Tremont would be responsible for much of that work.

¶ 82 Tremont offers that Kolomayets testified that he explained to Shams that Tremont's fee would be higher than normal because Sham's lack of development experience and track record as a developer would make it more difficult to sell potential lenders on the idea of making a loan to Parkside. Tremont further contends that its fee under the Development Consultant Agreement included a premium because fees for development consultant services are generally billed on an hourly or flat-fee basis and payable whether or not a loan is

obtained, whereas Tremont's fee would be entirely contingent upon Parkside closing on a loan. Further, Tremont maintains that the services provided by NACM were not duplicative because Tremont approached NACM as a loan syndicator, not a commercial real estate loan broker. Additionally, Tremont points out that NACM's engagement letter clearly reflects it was acting as a loan syndicator because it makes multiple references to a "Lead Bank," which only exists in a loan syndicate

¶ 83 Based on the facts in the record, we do not believe that Parkside has proved either that Tremont's conduct was oppressive or that the fees charged were excessive as that term has been construed for purposes of a claim under the Act. We agree with the trial court's finding that Parkside failed to prove a violation of the ICFA. 815 ILCS 505/2 (West 2008).

¶ 84 D. Common Law Fraud

¶ 85 Parkside's final argument on appeal is that the trial court erred in finding insufficient evidence to support its claim of common law fraud. To state a claim for common law fraud, a plaintiff must allege: "(1) a false statement of material fact; (2) the party making the statement knew or believed it to be untrue; (3) the party to whom the statement was made had a right to rely on the statement; (4) the party to whom the statement was made did rely on the statement; (5) the statement was made for the purpose of inducing the other party to act; and (6) the reliance by the person to whom the statement was made led to that person's injury. *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 528 (1997); *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 185-86 (1982).

¶ 86 Parkside contends that it established by overwhelming and convincing evidence that fraud by Tremont occurred and that a grave injustice was perpetrated against it by Tremont. Parkside relies on the fact that Shams testified that Kolomayets informed him that additional

financing was in place and committed to after the initial closing. Parkside further argues that the high percentage of Tremont's fees resulting in referral fees to others is indicative of their excessive fees. Parkside maintains that the misrepresentation as to the loan amount being committed to and the nondisclosure of referral fees paid to third parties, established the elements of fraud.

¶ 87 Tremont again offers Kolomayets' testimony in which he testified that he explained to Shams that Tremont's primary focus would be on obtaining an acquisition loan for the property, to secure the development opportunity, and once the required level of pre-sales was obtained the loan could be re-marketed as a construction loan that would refinance the acquisition loan and provide construction financing for the project. Tremont further contends that Shams knew as of August 22, 2006, that the total loan amount committed by Bozeman was $4.3 million. Further, Tremont contends there is ample evidence that Shams was aware that additional construction financing would have been contingent on a 50% pre-sale requirement, which Parkside never achieved. Parkside was no worse off with no commitment for additional construction financing in place than it would have been if a commitment had been in place, because it never satisfied the pre-sale prerequisite for construction financing.

¶ 88 The trial court found that Parkside’s basis for common law fraud was representations made to Shams concerning the amount of the loan and the availability of the proceeds of the loan. The court further found that the "[t]estimony and documentary evidence establishes that these representations, if made, were between Parkside and NACM." The trial court also found that these statements were directly contradicted by the loan documents signed by Shams and Bozeman.

¶ 89 We are in accord with the trial court's determination of this issue. In light of the elements necessary to support a claim for common law fraud, and after our review of the record, we conclude the trial court properly found that the evidence presented was insufficient to sustain the action against Tremont. See *Cramer*, 174 Ill. 2d at 528.

¶ 90 CONCLUSION

¶ 91 Accordingly, for the reasons set forth above, we affirm the judgment of the circuit court.

¶ 92 Affirmed.