IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

BETTY PARMER,

Plaintiff,

v.

Civil Action No. 14-C-374
Presiding Judge: Christopher C. Wilkes
Resolution Judge: Russell M. Clawges, Jr.

UNITED BANK, INC., a West Virginia corporation; and RANDALL WILLIAMS,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pending before the Court is Defendants' United Bank, Inc. ("United") and Randall Williams ("Mr. Williams") motion for summary judgment on all counts ("Motion"). All parties have fully briefed the issues. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. After a full review of the memorandums and all pertinent legal authority, the Court finds that there is no genuine dispute as to any material fact and the Defendants are entitled to judgment as a matter of law on all counts in the Complaint.

I. FINDINGS OF FACT

On April 21, 2014, Plaintiff Betty Parmer filed this action. Her Complaint seeks damages from United and Mr. Williams for alleged negligence, breach of fiduciary duty, and conspiracy. She claims United, on April 19, 2012, should not have loaned her $2.5 million to purchase notes with a face value of $4.4 million from the Milan Puskar Trust and that Mr. Williams should have disclosed certain adverse information about Mr. Brozik's personal circumstances, businesses, and the SAFE judgment against both for $1.132 million.

She also claims the Defendants had a conflict of interest because Douglas Leech was a co-trustee of the Puskar Trust and one of twenty-five (25) directors of the holding company that owns United Bank. There is no evidence to support this portion of the claim. Additionally, the record, among other things, establishes that Mrs. Parmer knew before she borrowed the $2.5 million for the benefit of her nephew, Mitchell Brozik, that his business, Secure US, was in trouble, could not borrow the money, and needed the funds to pay its debts, and fund its operations. She had previously posted substantial collateral for a United loan to her nephew and loaned him several hundred thousand dollars for his business. She knew and understood before she bought the Puskar Trust Notes that they were collateralized by the assets of Secure US, a security business which her nephew then owned and controlled, and that she would acquire that collateral when she bought the Puskar Trust Notes and foreclosed on them. Plaintiff's expert, John Brady, valued the Secure US assets at the time of Mrs. Parmer's Puskar Trust Note purchase at between $5.2 and $6.4 million.

On April 19, 2012, neither Mr. Williams nor United provided any financial or investment services to Mrs. Parmer. Douglas Leech played no role in United Bank's decision to loan Mrs. Parmer the $2.5 million she sought and borrowed. Mrs. Parmer appears to have been a sophisticated, experienced business woman and investor. She and her former husband had owned 23 businesses and she had extensive brokerage and real estate investments worth several millions of dollars. She was a borrower, depositor, and stockholder of the Bank, but she was not a trust or advisory brokerage client and was not present at the Bank on April 19, 2012, for those purposes.

Plaintiff also asserts that United and Mr. Williams were negligent in making, pursuant to a Management Agreement that she admits she signed and which contains a power of attorney for Mr. Brozik, two subsequent business loans totaling $827,000. Those funds were used directly to

purchase business vehicles or for operating capital for Secure US, which after her purchase of the Puskar Trust Notes belonged to Mrs. Parmer. Plaintiff challenges the legal validity of the Management Agreement, because it was not notarized in her presence. Parmer alleges the power of attorney was invalid but does not allege fraud, duress, intoxication, incapacity, or any other legal basis for this claim. Further, Plaintiff has not produced any evidence that United or Mr. Williams knew there was any issue with the notarization of the Management Agreement. There is no dispute that Plaintiff signed the Management Agreement; that United and Mr. Williams had a copy of the signed Management Agreement; or any evidence to dispute Mr. Williams' testimony that he discussed the Management Agreement and two subsequent loans with Mrs. Parmer; and she acknowledged her Secure US assets and collateral were supporting those loans.

Plaintiff also claims United and Mr. Williams conspired with Messrs. Brozik and his lawyer, Brandon Kupec, to conduct, without her knowledge, a foreclosure on and secured party sale of the Secure US assets, which subjected her to liability for a judgment of SAFE against Mr. Brozik and Secure US. Mrs. Parmer also alleges United and Mr. Williams had a fiduciary duty to disclose to her various information about Mr. Brozik and his businesses, which if disclosed, she says would have led her not to purchase the Puskar Trust Notes.

In September 2013, Plaintiff sued Mitchell Brozik, Thomas Kupec, Brandon Kupec, Gregory Morgan, and MB Security, LLC, asserting, *inter alia,* the same causes of action related to the same transactions about which she complains against United and Mr. Williams. (*See* Complaint in *Parmer v. Mitchell Brozik et al.*, Circuit Court of Monongalia County Case No. 13-C-651, ("*Parmer v. Brozik*")). In *Parmer v. Brozik,* Plaintiff argued that attorneys Gregory Morgan, Thomas Kupec, and Brandon Kupec represented Plaintiff in her financial transactions, including the $2.5 million Puskar Trust Note purchase and secured party/foreclosure sale and

owed her a fiduciary duty; that Mitchell Brozik, Brandon Kupec, and Thomas Kupec fraudulently induced Plaintiff to participate in the $2.5 million purchase of the Puskar Trust Notes and acquisition of the assets of Secure US; that the Kupecs were negligent in their handling of Plaintiff's transactions and subjected Mrs. Parmer to personal liability for the SAFE judgment claims; and that Brozik, Morgan, and the Kupecs conspired to damage Plaintiff through the these transactions, the execution of the Management Agreement, and two subsequent business loans totaling $827,000. Plaintiff conducted extensive discovery in *Brozik v. Parmer* and tried the case to a jury in November and December of 2015.

The jury found, in relevant part:

1. Greg Morgan and Thomas Kupec were not liable;
2. Brandon Kupec committed negligence or malpractice in his representation of Betty Parmer;
3. Betty Parmer was negligent and her negligence proximately caused her damages;
4. Brandon Kupec and Betty Parmer were each 50% negligent with respect to the transactions at issue;
5. Mitchell Brozik and MB Security, LLC breached fiduciary duties owed to Betty Parmer for the same transactions; and
6. Mitchell Brozik and MB Security, LLC committed fraud with respect to the same transactions and were liable for $1.7 million in damages to Mrs. Parmer.

See Jury Questionnaire and Verdict Form.

II. CONCLUSIONS OF LAW

Summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of law. *San Francisco v. Wendy's Int'l Inc.*, 221 W.Va. 734, 750, 656 S.E.2d 485 (2007). "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. Pt. 9, *Law v. Monongahela Power Co.*, 210 W.Va. 549, 558 S.E.2d 349 (2001). A motion for summary judgment should be denied "even where there is no dispute to the evidentiary facts

in the case but only as to the conclusions to be drawn therefrom." Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). When considering a motion for summary judgment, the court "must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion." *Id.*

However, if the moving party has properly supported their motion for summary judgment with affirmative evidence that there is no genuine issue of material fact, then "the burden of production shifts to the nonmoving party 'who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f)." *Id.* at 60. Otherwise, the movant is entitled to summary judgment.

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

W. Va. R. Civ. P. 56,

Based upon the authority which follows: 1) Plaintiff's negligence must fail for lack of a valid legal duty; 2) Plaintiff has no breach of fiduciary duty claim because Plaintiff does not allege a breach of contract and a bank owes no fiduciary duty to a borrower absent special circumstances not present in this case; and 3) Plaintiff's civil conspiracy claim fails because Plaintiff has yet to present any evidence of Defendants' wrongdoing.

In any negligence claim, a Plaintiff must establish that the defendant breached a duty owed to the Plaintiff. Whether the Defendants owed Plaintiff a duty is a matter of law for the Court. *Aikens v. Debow, 208 W.Va. 486, 541 S.E.2d 576, 581 (2000)*. Here, the Plaintiff's claims

of negligence fail because she has not established any duty owed to her. Syl. pt. 1, *Parsley v. General Motors Acceptance Corp.*, 167 W.Va. 866, 280 S.E.2d 703 (1981). West Virginia law holds that a bank has no implied duty of good faith and fair dealing absent a breach of contract claim. *Evans v. United Bank, Inc.*, 235 W. Va. 619, 775 S.E.2d 500 (2015). (West Virginia law implies a covenant of good faith and fair dealing in every contract for purposes of evaluating a party's performance of that contract and that covenant does not provide a cause of action apart from a breach of contract claim.) In the case at bar, Plaintiff does not allege a breach of contract claim. Thus, Plaintiff's claim of negligence also fails for lack of a duty owed. Further, there is no authority to support a claim against a bank for it making a loan to a customer to buy notes from an independent Trust when a director of a holding company which owns a bank is a co-trustee of the Trust. Accordingly, it is appropriate to dismiss the Plaintiff's negligence claim against the defendants.

Plaintiff's second count alleges the existence and breach of a fiduciary duty requiring Defendants to act in the best interests of Mrs. Parmer. Plaintiff cites no West Virginia or binding authority for the existence of a fiduciary duty in this action. Nor has the Court found any basis for the application of a fiduciary duty. The jury in *Parmer v. Brozik* found that Brandon Kupec committed "negligence or malpractice," *see* Verdict ¶ 6, which necessarily involves a finding that he owed Plaintiff a duty of care as her counsel or her advisor. Having proven that allegation, Plaintiff now seeks also to cast United and Mr. Williams as her advisors. The Court finds no merit in this argument.

Regarding the loans to MB Security, Plaintiff offered extensive revisions to the Management Agreement, including specific changes regarding the scope of the power of attorney. *See* Transcript of Testimony of Betty Parmer, at 140-41; Transcript of Testimony of

Brandon Kupec, at 37-38. Plaintiff authorized Mr. Brozik, her nephew, to pledge the assets of Secure US as collateral, particularly when he used the borrowings secured by the assets in the furtherance of the business she owned and had, by written contract, given him the right to manage, "as if it were his own". The $2.5 million loan was a straightforward transaction, secured by cash collateral or the equivalent. United was merely the lender.

Unless a plaintiff can prove a "special relationship", a lender does not owe any duty to its borrower beyond the terms of the loan agreement. *Taylor v. Robert W. Ackerman, P.C.*, No 14-0961 (W.Va. June 22, 2015), at 3, 7; *White v. Amg Constr. Lending Ctr.*, 226 W.Va. 339, 700 S.E.2d 791, 798 (2010). Plaintiff does not allege a breach of the loan agreement. Whether a "special relationship" exists is a matter of law to be determined by the Court under *Aikens v Debow*, 208 W.Va. 486, 499, 541 S.E.2d 576, 589 (2000).

Plaintiff was a sophisticated borrower with considerable investing experience. In cash collateral and immediately available funds alone, or the equivalent, Mrs. Parmer had more than two and one-half times the amount she agreed to borrow from United and she produced an Edward Jones brokerage account statement to demonstrate her financial strength and stock-investing acumen. Plaintiff's Complaint confirms at paragraph 9 that she agreed to borrow money for her nephew's benefit. Plaintiff's prior testimony established that she did not believe Mr. Williams (or United) misled her or withheld documents from her, and that he took an hour to review those documents with her before she signed them. Plaintiff has not claimed a breach of contract and has admitted that Mr. Williams refused to answer her question about whether she should borrow the money. Plaintiff admitted that she knew that she might never be repaid the money she was borrowing, but knowingly borrowed it because she wanted to help her nephew. She previously testified that she "let her heart overrule her head".

Plaintiff's claim of a breach of fiduciary duty is an attempt to recover where Plaintiff has no claim under the terms of the loans to which she agreed. Because the Plaintiff has failed to demonstrate a special relationship between United Bank and Mr. Williams and herself, this Court must find that neither Defendant owed the Plaintiff a fiduciary duty. Therefore, Plaintiff's claim for breach of the same fails as a matter of law.

Count III alleges that United, through Mr. Williams, conspired with Mitchell Brozik and Brandon Kupec to commit the acts of which she complains. After 20 months of discovery, Plaintiff cannot produce any evidence to support this claim against United or Mr. Williams. "A civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means." Syl. pt. 8, in part, *Dunn v. Rockwell*, 689 S.E. 2d 255, 225 W.Va. 43 (2009). The record is devoid of any evidence that anything unlawful occurred as to United and Mr. Williams, or that Defendants were motivated by any unlawful purpose. Plaintiff testified in *Parmer v. Brozik* that Mr. Williams did not counsel her one way or the other about whether to borrow the initial $2.5 million. Parmer Trial Testimony at 131-32. Plaintiff admits she contacted Mr. Williams about borrowing $2.5 million to buy the Puskar Trust Notes to help her nephew, and that Mr. Williams assisted her with the loan. There is no evidence the bank treated this as anything other than as a routine commercial loan. Subsequent loans to MB Security were made pursuant to a power of attorney in a Management Agreement which Plaintiff admits she signed and which she acknowledges she negotiated with her nephew and his attorney (Brandon Kupec), whom the jury found was also Mrs. Parmer's attorney. Parmer Trial Testimony at 140-41. Plaintiff has failed to present any evidence of conspiracy, requiring judgment for Defendants as a matter of law.

Plaintiff has failed to present any evidence to show a genuine issue for trial or successfully rehabilitated the evidence presented by Defendants. Neither has Plaintiff submitted an affidavit explaining why further discovery is needed; nor would one be appropriate. The case above captioned has already been once continued and parties have had over 20 months of discovery. Further, Plaintiff has had full and fair opportunity to cross examine Mr. Williams in the sister case of *Parmer v. Mitchell Brozik et al.*, Circuit Court of Monongalia County Case No. 13-C-651.

THEREFORE, having made these Findings of Fact and Conclusions of Law, the Court ORDERS that Defendants' Motion for Summary Judgment is GRANTED and ORDERS that Plaintiff's Complaint be dismissed with prejudice in its entirety. Parties shall bear their own costs and fees. This being a FINAL ORDER, the Court directs the Circuit Clerk of Monongalia County to retire the above-captioned matter from the docket and place it among the causes ended. The Circuit Clerk of Monongalia County is directed to distribute attested copies of this Order to all counsel of record; the Resolution Judge, the Honorable Russell M. Clawges, Jr., at the Monongalia County Courthouse, 243 High Street, Division 2, Morgantown, WV 26505; and the Business Court Division Central Office, Berkeley County Judicial Center, 380 W. South Street, Martinsburg, West Virginia 25401.

ENTER this 12 day of February, 2016.

CHRISTOPHER C. WILKES, JUDGE
BUSINESS COURT DIVISION

ENTERED Feb 12 2016

DOCKET LINE #: 113

JEAN FRIEND, CIRCUIT CLERK