

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI

CITIFINANCIAL SERVICES INC.)
)
 Plaintiff,) Case No. 06CC-004176
) (formerly 05AC-012757)
 vs.)
)
 TATYANA RASHRAGOVICH) Division 41
)
 Defendant/Third Party)
 Plaintiff, and)
)
 BRONISLAVA S. PODRABINOK,)
)
 Third-Party Defendant)

FILED

MAR 03 2009

JUAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

JUDGEMENT AND ORDER

This matter was called for trial on December 1, 2008. Third Party Plaintiff , Tatyana Rashrogovich was present and represented by attorney, Natalia D. McKinstry. Third Party Defendant, Bronislava S. Podrabinok, was present and represented by attorney John T. Yarbrough. Pursuant to Rule 73.01 (c), Third Party Plaintiff requested Findings of Fact . The court requested of both parties to submit proposed findings of fact and conclusions of law by December 16, 2008. The Court, now having considered the pleadings, testimony, exhibits and the proposed findings of fact and conclusions of law hereby enters the following Judgment and Order.

FINDINGS OF FACT

1. Third party Plaintiff Tatyana Rashragovich (Plaintiff) is, and at all times material hereto has been a resident of St. Louis, State of Missouri, residing at 11923 Barkman Dr., St. Louis, MO 63146.
2. Third-party Defendant Bronislava Podrabinok (Defendant) is, and at all times material

hereto has been a resident of the County of St. Louis, State of Missouri, residing at 182 Carmel Woods Drive, Ellisville, MO 63021.

3. The events described herein occurred in St. Louis County, Missouri.
4. The parties agree that Plaintiff prior to and at the time of the events and occurrences giving rise to her claims, worked for Defendant at the Astoria restaurant, where Defendant stated she is and was at the time a working partner.
5. There is no dispute that on or around January 8, 2004, two loans were obtained through Beneficial and CitiFinancial where both Plaintiff and Defendant were present.
6. Plaintiff signed loan agreements with both of the loan companies at the request of Defendant on January 8, 2004.
7. Both parties testified that they drove to the loan companies, in Defendant's car.
8. Defendant testified that she received billing statements on the loans taken at her home address of 182 Carmel Woods Drive, Ellisville, MO 63021.
9. A record of this case No. 06CC-004176, formerly Cause No. 05AC-012757, styled *CitiFinancial Services v. Rashragovich*, of which this Court took judicial notice and admitted to the record, demonstrates that on May 12, 2005, Defendant (Podrabinok) accepted service of process at her home address for Plaintiff, Tatyana Rashragovich in Cause No. 05AC-012757, and that a default judgment against Plaintiff (Rashragovich) was issued in Cause No. 05AC-012757 in the amount of \$18,825.08 plus court costs of \$40.00, which was subsequently vacated on November 23, 2005.
10. It has been stipulated that CitiFinancial Services, the original Plaintiff, dismissed with prejudice all claims against Third Party Plaintiff (Rashragovich), and (Rashragovich) dismissed with prejudice all her counterclaims against CitiFinancial Services, and said dismissal was approved by the Court.

11. The parties stipulated that Plaintiff has repaid \$5,994.41 to the Beneficial loan company.
12. Plaintiff testified that as a result of these events and the lawsuit filed against her, her health deteriorated, her family relationship suffered, and she incurred attorney fees and costs in defending herself against the claim by CitiFinancial.

COUNT I - FRAUD

FINDINGS OF FACT:

13. Plaintiff testified that, in addition to the loans from Beneficial (\$5,994.41) and the \$15,000 loan from CitiFinancial, she also made cash loans to Defendant over the course of several months, without promissory notes, on various conditions and that Defendant was paying her back some sums and then borrowed more, and that after making all credits, that the amount of unpaid cash loans is in excess of \$11,000.
14. Plaintiff testified that she believed Defendant's representations that Plaintiff was to be merely a co-signer on only [one] loan in the name of Defendant and that Defendant was going to take out insurance so that Plaintiff would never be liable under the loan should Defendant not repay the loan back and therefore Plaintiff would not be subject to any potential liability even as a co-signer.
15. Defendant testified that she was at Beneficial with Plaintiff when the loans were obtained and that she drove Plaintiff to a location to cash the check in the amount of \$5,994.41.
16. Defendant testified that her annual income at the time of the events was \$14,000 per year.

17. Defendant also admitted to taking at least \$18,000 in proceeds from the two loans which Plaintiff signed amounting to approximately \$3,000 from Beneficial and \$15,000 from CitiFinancial.
18. Plaintiff and Defendant both testified and there is no dispute that at some point in time, Defendant paid \$3,000.00 to Plaintiff as repayment of loans to Plaintiff made to Defendant.
19. Plaintiff's witness, Mr. Edward Kiknadze, testified that he took obtained about \$30,000 from loan companies in 2003 and loaned the money to Defendant and that he was never paid in full.
20. Defendant acknowledged Mr. Kidnadze's loan and further testified that she had other individuals taking loans for her ,but that she had repaid some loans and she is still paying on other loans.

CONCLUSIONS OF LAW:

21. To succeed on a claim of actionable fraud, a party must prove: 1) a representation, 2) its falsity, 3) its materiality, 4) the speaker's knowledge of its falsity, or his ignorance of its truth, 5) the speaker's intention that it should be acted on by the person and in the manner reasonably contemplated, 6) the hearer's ignorance of the falsity of the representation, 7) the hearer's reliance on the representation being true, 8) his right to rely thereon, and 9) the hearer's consequential and proximately caused injury. *Rhodes Engineering Company, Inc. v. Public Water Supply District Number 1 of Holt County, 128 S.W.3d 550, 567 (Mo. App. 2004).*
22. A hearer is entitled to rely upon representations when he lacks equal facilities for learning the truth and where the facts are peculiarly within the knowledge of the speaker and are

difficult for the hearer to ascertain. Essex v. Getty Oil Co., 661 S.W.2d 544, 550 (Mo.App. 1983); Cantrell v. Superior Loan Corp., 603 S.W.2d 627, 637 (Mo.App. 1980). "One who does not disclose a fact that he knows may justifiably induce another to act in a business transaction is obligated to disclose the fact only if he is under a duty to do so." TAYLOR, v. RICHLAND MOTORS and HAWKINS, and HILLCREST BANK, 159 S.W.3d 492, 2005 Mo. App. LEXIS 432.

23. Moreover, in an action for fraud, if a fiduciary relationship existed between the parties, proof of actual fraud was unnecessary. Schimmèr v. H. W. Freeman Constr. Co., No. 42477, Court of Appeals of Missouri, Eastern District, Division Three, 607 S.W.2d 767; 1980 Mo. App. LEXIS 2923, September 30, 1980
24. As stated in *Swon v. Huddleston*, 282 S.W.2d 18, 25-26[9] (Mo. 1955), "a breach of confidential relationship is, in itself, a constructive fraud." See also *Sassenrath v. Sassenrath*, 624 S.W.2d 77, 81 (Mo.App. 1981), *Mahler v. Tieman*, 550 S.W.2d 623, 628[6,7] (Mo.App. 1977), 5 Scott on Trusts § 462, at 302 (4th ed. 1989).
25. Here, while the court finds that Defendant misled Plaintiff with respect to the nature of the loan and she exerted her influence as Plaintiff's "boss" at the restaurant, the court was not convinced that the influence rose to such a level equating to the control and "undue influence" required for fraud. Further, Defendant testified that her daughter, who speaks English fluently was available to assist her in deciphering the documents as well as explaining the requests made by Defendant of Plaintiff.
26. The Court does not find credible sufficient testimony to establish fraud.
27. Punitive damages require a showing, by clear and convincing proof, of a culpable mental state on the part of the defendant, either by a wanton, willful or outrageous act, or reckless

disregard for an act's consequences. Courts review punitive damage awards using three guideposts: (1) the reprehensibility of the defendant's misconduct; (2) the disparity between the harm and the punitive award; and (3) the difference between the punitive award and penalties authorized or imposed in comparable cases. The reprehensibility guidepost considers if "the harm was the result of intentional malice, trickery, or deceit, or mere accident." Werremeyer v. K. C. Auto Salvage Co., No. SC 85551 (Mo. banc 2004).

28. The court did not find credible and sufficient testimony with respect to Defendant's intentional actions to warrant punitive damages.

COUNT II - BREACH OF CONTRACT

FINDINGS OF FACT:

29. No credible written agreement as to repayment on the proceeds of the loans of any other writing evidencing the mutual agreement to borrow or to loan monies were produced to the court.
30. Defendant testified and her Answers and Amended Answer admit that she made a promise to make payments on the loans but the terms were uncertain notwithstanding her testimony admitting that she failed to make such payments.
31. Defendant testified that she has made payments to Plaintiff for previous loans made, including an amount of \$3,000.00 cash given to Defendant.
33. The court does not find that the handwritten ledger made by plaintiff of a history of loans and payments of prior debts made by defendant to be sufficiently credible.

CONCLUSIONS OF LAW:

34. Elements of breach of contract are: (1) an agreement between parties capable of contracting; (2) mutual obligations arising thereunder; (3) a valid consideration; (4) performance by one party and that the party being sued has not performed obligations imposed by the contract; and (5) damages resulting from the breach.
35. The court does not find that there was a legally binding agreement or series of agreements between the Plaintiff and Defendant with respect to the cash loans and that the amount of damages is too speculative and uncertain.

COUNT III- INTENTIONAL INTERFERENCE WITH CREDIT EXPECTANCY

FINDINGS OF FACT:

36. Defendant admitted to receiving statements on the loan from Beneficial at her home address and not making payments on the loans for several months.
37. Plaintiff testified that she discovered information about the defaults on two loans, from Beneficial and CitiFinancial, when she attempted to refinance and was denied credit.
38. The court did not find sufficient and credible evidence that Plaintiff's credit history was clean of any negative reports nor that she had no other loans.

CONCLUSIONS OF LAW:

39. This tort is one sort of intentional interference with a business expectancy and is comprised of the following elements: (1) a valid credit expectancy; (2) defendant's knowledge of the expectancy; (3) a denial of credit induced or caused by defendant's intentional interference; (4) absence of justification; and (5) damages. Bell v. May

Department Store, 6 S.W.3d 871; 1999 Mo. LEXIS 69 (No. SC81719, SUPREME COURT OF MISSOURI).

40. The court does not find sufficient and credible evidence that Plaintiff had a valid credit expectancy merely because she applied for a home loan.

COUNT IV - UNJUST ENRICHMENT

FINDINGS OF FACT:

41. Plaintiff testified that the loan from Beneficial for which Plaintiff repaid \$5,994.41 to Beneficial was originally negotiated for the benefit of Defendant.
42. The court finds the testimony sufficient and credible that Plaintiff loaned funds to Defendant per her request, and that by doing so Plaintiff conferred a benefit upon Defendant who retained the funds without repaying them to Defendant and/or to Beneficial or CitiFinancial.
43. The court further finds that Defendant appreciated the fact of such benefit and accepted and retained the benefit under circumstances in which retention without repayment was inequitable, and that as direct and proximate result of non payment by Defendant of any monies beside the \$3,000.00 Plaintiff has been damaged.
44. The court finds that Defendant was unjustly enriched by the various transactions.

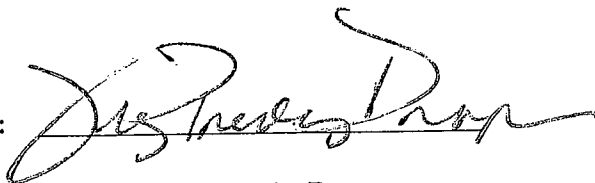
CONCLUSIONS OF LAW:

45. The elements of quasi contract and unjust enrichment -- all equitable in origin -- involve the same concept, revolving around and dependent upon "an obligation imposed by law because of the

conduct of the parties, or some special relationship between them, or because one of them would otherwise be unjustly enriched ... an implied-in-law contract is not actually a contract, but instead a remedy that allows the plaintiff to recover a benefit conferred on the defendant." Black's Law Dictionary, at 332.

WHEREFORE, it is hereby ordered that Judgment be in favor of Plaintiff, TATANA RASHROGOVICH in the amount of FIVE THOUSAND NINE HUNDRED AND NINETY FOUR DOLLARS AND FORTY ONE CENTS (\$5,994.41) and Plaintiff's claim, COUNT IV for UNJUST ENRICHMENT is GRANTED. The Court DENIES Plaintiff's COUNTS I (FRAUD); II (BREACH OF CONTRACT); and III (INTENTIONAL INTERFERENCE WITH CREDIT EXPECTANCY) are hereby DISMISSED. Thus, the Court finds that Plaintiff TATYANA RASHROGOVICH should receive damages in the amounts of \$5,994.41 plus statutory interest, attorney's fees in the amount of \$1,942.00 and costs in the amount of \$195.00.

So Ordered:



Judge Judy Preddy Draper

Date:

2.3.09