IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

RONALD L. SKEEN,	)	C/A NO. 03A01-9810-CV-00355
	)	
Plaintiff-Appellant,	)	
	)	
	)	
v.	)	APPEAL AS OF RIGHT FROM THE
	)	JEFFERSON COUNTY CIRCUIT COURT
	)	
	)	
	)	
FIRST UNION NATIONAL BANK OF TENNESSEE,	)	
	)	
	)	HONORABLE REX HENRY OGLE,
Defendant-Appellee.	)	JUDGE

For Appellant	For Appellee
F. SCOTT MILLIGAN	MARK S. DESSAUER
Little & Milligan, PLLC	Hunter, Smith & Davis
Knoxville, Tennessee	Kingsport, Tennessee

O P I N I O N

AFFIRMED AND REMANDED

Susano, J.

Ronald L. Skeen ("Skeen") seeks compensatory and punitive damages, as well as other relief, from First Union National Bank of Tennessee ("the Bank"). His claim arises out of an alleged breach of a deposit agreement with the Bank, the Bank's alleged breach of its fiduciary duty, and other alleged misconduct. Following a bench trial, the trial court granted Skeen limited relief but denied the bulk of his claim. Skeen appeals, raising issues that present the following questions for our review:

> 1. Did the trial court err in ruling that Skeen's Variable Rate Individual Retirement Account ("VIRA") was based on an oral contract with the Bank's predecessor?
>
> 2. Did the trial court err in failing to construe Skeen's written VIRA contract to require the Bank to make minimum interest payments of ten percent as long as Skeen's funds remained on deposit?
>
> 3. Did the trial court err in failing to rule that the Bank was a fiduciary to Skeen and in failing to rule that the Bank had breached its fiduciary duty to Skeen regarding the administration of the VIRA?

We affirm.

I. *Facts and Procedural History*

Skeen originally opened his VIRA account at City & County Bank of Jefferson County on February 26, 1982.[1] At that

[1]City and County Bank of Jefferson County ("C&C") subsequently failed, and its assets were acquired by Merchants and Planters Bank, pursuant to a January 21, 1984, purchase and assumption agreement with the Federal Deposit Insurance Corporation ("FDIC"). Merchants and Planters Bank thereafter was purchased by Dominion Bankshares, which in turn was acquired by First Union National Bank in 1993; thus, First Union was sued in its capacity as ultimate successor-in-interest to C&C. For ease of reference, we will refer to the various entities collectively as "the Bank."

time, Skeen deposited $2,000 with the Bank and was issued a certificate of deposit ("CD"). He signed a document entitled "Deposit Agreement and Disclosure Statement For Your Individual Retirement Account" ("the Deposit Agreement"). That document provides, in pertinent part, as follows:

> § I.C The Bank specifically reserves the right to amend the terms and provisions of this Deposit Agreement and Disclosure Statement from time to time and at its sole discretion....

At the same time, Skeen also executed another document amending the Deposit Agreement. The amendment provides, in pertinent part, as follows:

> This agreement is between City & County Bank of Jefferson County and [Ronald Skeen]. This agreement amends Section II, C. to read as follows:
>
> In the case of an account at Bank designated as [a] VIRA account, interest on the account shall accrue on funds from the date of deposit to the date of withdrawal at a per annum rate indexed to the preceding week average option rate on 180-day Treasury Bills plus two percent.... This additional agreement to amend shall in no other way alter the terms, conditions or provisions otherwise set forth in the deposit agreement and disclosure statement for your individual retirement account.
>
> *In no instance shall the account bear interest at a rate of less than ten percent per annum* nor more than a rate of 16 percent per annum.

(Emphasis added.)

The CD was to mature and be renewed automatically

every 18 months until Skeen withdrew the funds. Thus, the CD initially matured and was renewed on August 26, 1983. Following a second renewal, on February 26, 1985, the Bank began paying less than 10% interest on the account. Skeen apparently earned 9% interest on the account from February 27, 1985 to February 26, 1988, at which time the CD was again renewed, but with an interest rate of 8%. Shortly thereafter, on April 25, 1988, the Bank sent a letter to Skeen stating that the account was then earning 8% interest. This notification was apparently the first indication that Skeen had that his CD was earning less than 10%. After Skeen complained to a representative of the Bank, the Bank agreed to deposit additional funds into the account to bring the interest rate up to 10%. The Bank also promised to pay him 10% interest until the next maturity date, August 26, 1989.[2]

The CD was once again renewed on August 26, 1989, at which point the Bank began paying interest of approximately 8% on the account. The CD matured and was renewed again on February 26, 1991, August 26, 1992, and February 26, 1994. In February, 1994, the Bank sent Skeen a letter advising him that because the Bank had elected to discontinue this type of account, the CD would not be renewed again after its next maturity date. The CD matured again on August 26, 1995, at which time it was not renewed. When Skeen did not redeem the CD, the Bank sent him another letter stating that his funds were no longer earning interest.

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[2]The Bank asserts that these concessions were made only "as a customer service matter." It contends that at the same time, Skeen was specifically told that he would not be paid 10% interest after August 26, 1989. Skeen, however, denies agreeing to any such reduction in the applicable rate. The trial court made no specific findings as to this question. Our decision in this case does not require us to resolve this conflict.

Skeen filed the instant action on September 22, 1995. Following a non-jury trial, the trial court awarded Skeen $807.52 as interest, based upon the normal rate paid on an 18-month CD, for the period from August 27, 1995 to February 28, 1998. The trial court found that the Bank had orally led Skeen to believe that his funds would earn interest at a minimum rate of 10% until withdrawn; however, the court noted that this oral agreement was not a part of the assumption agreement between the Merchants and Planters Bank and the FDIC, and that the FDIC is authorized to sell assets free and clear of any encumbrances other than those set forth in the assumption agreement. Thus, the trial court held that Skeen "is not entitled to recover on the basis of any oral agreement and is entitled only to recover as per the terms of his 18 month certificate of deposit..."; accordingly, it dismissed Skeen's remaining claims.

II. *Standard of Review*

Our review of this non-jury case is *de novo* upon the record of the proceedings below. Rule 13(d), T.R.A.P. The record comes to us with a presumption of correctness as to the trial court's factual findings, which presumption we must honor "unless the preponderance of the evidence is otherwise." ***Id.; Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993); ***Old Farm Bakery, Inc. v. Maxwell Assoc.***, 872 S.W.2d 682, 684 (Tenn.App. 1993). However, the presumption of correctness does not extend to the trial court's conclusions of law. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett***, 860 S.W.2d 857, 859 (Tenn. 1993).

III. *The Parties' Contentions*

Skeen argues that the trial court erred in basing its decision on the premise that Skeen's claims were founded on an alleged oral agreement. Skeen insists, on the contrary, that his claim is supported by the written documents executed by the parties.[3] Specifically, he argues that he was contractually entitled to receive at least 10% interest for the entire time his funds were in the VIRA, by virtue of the amendment executed concurrently with the Deposit Agreement. Skeen points to language in the amendment to the Deposit Agreement stating that "interest on the account shall accrue on funds from the date of deposit *to the date of withdrawal.*" (Emphasis added). He thus argues that the trial court erroneously failed to give effect to the amended portion of the agreement. Finally, Skeen contends that the Bank owed him a fiduciary duty and that its course of dealing amounts to a breach of that duty.

The Bank, meanwhile, argues that the trial court properly held that Skeen could not rely on the alleged oral agreement to sustain his claim. The Bank also insists that, even if Skeen's claim is based solely on the written documents, he still is not entitled to relief. In this context, the Bank relies upon the language of § I.C of the Deposit Agreement, which, as previously noted, reserves to the Bank the right "to amend the terms and provisions of [the Deposit Agreement] from

[3]Skeen acknowledges in his brief that the evidence did not establish an enforceable oral contract between the Bank and himself. He argues that the evidence regarding any oral representations made by the Bank was offered merely to explain the intention of the parties and the interpretation of the written documents.

time to time and at its sole discretion." The Bank also points out that the amendment to the Deposit Agreement provides that it does not alter any provisions of the Deposit Agreement other than § II.C of that document. With regard to Skeen's claim of a breach of fiduciary duty, the Bank contends that it never owed any duty to Skeen beyond that set forth in the Deposit Agreement. It cites § I.H of that document, which section provides as follows:

> Items received for deposit or collection are accepted on the following terms and conditions:
>
> (1) Bank acts only as Depositor's collecting agent and assumes no responsibility beyond the exercise of due care....

In addition, the Bank argues that even if a fiduciary relationship existed, there is no evidence to support a finding that it breached that duty. Finally, the Bank insists that the trial court erred in awarding Skeen interest on his funds for the period from August 27, 1995 -- one day after the final maturity date of the CD -- to February 28, 1998.[4]

IV. *Analysis*

After reviewing the record, we are of the opinion that

[4]The Bank also contends that Skeen's claims of breach of contract and breach of fiduciary duty are barred by the applicable statute of limitations, set forth at T.C.A. § 28-3-109(3). That section provides that "[a]ctions on contracts not otherwise expressly provided for" shall be commenced within six years of the accrual of the cause of action. The trial court denied the Bank's motion for summary judgment, which motion was partially based upon the defendant's statute of limitations defense. In its memorandum opinion, the trial court did not specifically address that defense on the merits, electing instead to address the substance of Skeen's claim. On this appeal, we have pretermitted consideration of the Bank's contention that Skeen's claim was filed beyond the period of limitations.

no breach of contract or breach of fiduciary duty occurred in this case. As noted earlier, the Deposit Agreement reserved for the Bank the right to amend, in the Bank's sole discretion, the Deposit Agreement's terms and provisions. The Bank exercised this right by electing to change the rate of interest payable on Skeen's account to 8% effective upon the maturity of his CD on August 26, 1989. Nothing in the contract between the parties prohibited the Bank from taking this action. By its terms, the amendment to the Deposit Agreement affects only § II.C of the Deposit Agreement; in fact, the amendment specifically provides that it "shall in no other way alter the terms, conditions or provisions otherwise set forth in the deposit agreement...." It is well-settled that absent fraud or mistake, a contract must be interpreted and enforced as written. ***NSA DBA Benefit Plan, Inc. v. Connecticut Gen. Life Ins. Co.***, 968 S.W.2d 791, 795 (Tenn.App. 1997); ***Ballard v. North American Life and Casualty Co.***, 667 S.W.2d 79, 82 (Tenn.App. 1983). We therefore find that the Bank acted within its rights under the Deposit Agreement when it began paying interest of less than 10% on Skeen's account. We cannot agree with Skeen's assertion that "[t]he Bank contracted away its ability to modify this provision further." On the contrary, the Bank specifically reserved the right to do exactly that. Accordingly, we hold that no breach of contract occurred in the instant case and that the trial court properly dismissed this aspect of Skeen's claim.

By the same token, the evidence does not make out a claim of breach of fiduciary duty by the Bank. As noted earlier, the Bank was contractually obligated to exercise nothing more

than due care for the benefit of the depositor. There is no evidence that the Bank failed to fulfill this obligation. Furthermore, even if a fiduciary duty existed above and beyond the duty set forth in the Deposit Agreement, there is no evidence to support a finding that such a duty was breached. As we have explained, the Bank acted reasonably and within the discretion afforded it by the Deposit Agreement in altering the applicable rate of interest upon maturity of Skeen's CD. Therefore, the trial court correctly dismissed his claim regarding the alleged breach of fiduciary duty.

Finally, we turn to the Bank's issue concerning the trial court's award of interest in the amount of $807.52 to Skeen. This amount represents the interest rate paid by the Bank on an 18-month CD, as applied to Skeen's funds over the period from August 27, 1995 to February 28, 1998. During this period, the Bank held, but paid no interest on, the funds in Skeen's account. Under these circumstances, we do not find that the trial court erred in awarding Skeen interest of $807.52.

V. *Conclusion*

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant. This case is remanded to the trial court for enforcement of the judgment and the collection of costs assessed there, all pursuant to applicable law.

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Charles D. Susano, Jr., J.

CONCUR:

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Houston M. Goddard, P.J.

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Herschel P. Franks, J.