S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

SHELDON L. MILLER,

Plaintiff-Appellee,

UNPUBLISHED
May 5, 1998

v

No. 193112
Wayne Circuit Court
LC No. 90-012232-NZ

ARNOLD FINK,

Defendant-Appellant.

Before: Kelly, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court judgment in favor of plaintiff following a jury verdict which awarded plaintiff $818,962 in damages for defendant's fraud in a stock transaction. Prior to filing this lawsuit, plaintiff filed a complaint in federal district court alleging both state and federal claims. The federal claims, which were based on alleged violations of the Securities and Exchange Act of 1934, were dismissed pursuant to a motion for summary disposition. The state claims were remanded to state court, and a jury returned a verdict for plaintiff. We affirm.

Plaintiff is a partner in the law firm of Lopatin, Miller, Freedman, Bluestone, Erlich, Rosen & Bartnik. Defendant is an attorney employed by that firm. The factual basis for the claim began in 1986 when defendant approached plaintiff about an opportunity to purchase shares of stock in ShareData, Inc. Defendant recommended purchase of the stock based on the advice of his friend, David Horowitz, who was a director, officer and principal shareholder of ShareData. Plaintiff initially purchased 5,000 shares of ShareData stock. Defendant approached plaintiff a second time about purchasing additional stock from David Horowitz. The stock could not be traded publicly due to certain restrictions. Defendant told plaintiff that the stock could be purchased at a price that was slightly more than half of the over-the-counter price. Plaintiff purchased 100,000 shares of the stock at $2.25 per share. Defendant approached plaintiff a third time with information that the other two principals of ShareData, Zentz and Newman, were interested in selling two million additional shares of the stock for $2.00 per share. A few months later plaintiff learned that defendant had received two checks from Zentz and Newman for $187,500 as a commission on the sale. Plaintiff thereafter filed suit against defendant alleging a breach of a fiduciary duty.

After a trial on the merits, the jury returned a verdict for plaintiff finding (1) that a fiduciary relationship existed between plaintiff and defendant, (2) that defendant wrongfully breached the relationship, (3) that defendant's breach was the proximate cause of plaintiff's damages and (4) that plaintiff's damages amounted to $818,962.00. Subsequent to trial, defendant brought a motion for judgment notwithstanding the verdict or for a new trial and remittitur. The trial court denied the motion.

Defendant first argues that the trial court erred when it ruled that a June 11, 1986, agreement between Zentz, Newman and Horowitz, all principals of ShareData, was admissible under MRE 803(15). The document evidenced an agreement to consolidate stock holdings in both ShareData, Inc. and the Mid-America Venture Capital Fund and contribute the stock to a partnership to which the principals were equal partners. The agreement also provided that the commission due to defendant for his role in consummating the stock transaction with plaintiff would be paid out of the assets of the partnership.

Defendant claims the agreement should have been excluded at trial because it was inadmissible hearsay. We disagree. Although hearsay, the document was admissible under MRE 803(15), which allows the admission of "[a] statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document."

We find that the agreement at issue in the case at bar meets the necessary indicia of reliability for admitting it into evidence. *Botsford General Hospital v Citizens Ins Co,* 195 Mich App 127, 135; 489 NW2d 137 (1992); *People v Burton,* 177 Mich App 358; 441 NW2d 87 (1989). The trial court did not abuse its discretion in admitting the agreement into evidence. *Phinney v Perlmutter*, 222 Mich App 513, 528; 564 NW2d 532 (1997); *Sackett v Atyeo*, 217 Mich App 676, 683; 552 NW2d 536 (1996).

Next, defendant argues that the trial court erred in refusing to allow the admission of evidence supporting his claim that he was given assurances of continued employment with the law firm despite his role in the stock transaction. During trial, defense counsel attempted to elicit testimony from defendant that another partner at the firm, Albert Lopatin, had assured him that he did not think defendant had done anything wrong and that as long as Lopatin was with the firm, defendant would have a job. Defense counsel argued that he was attempting to impeach plaintiff's earlier testimony that defendant was not fired because of his concerns about defendant bringing an unlawful discharge lawsuit. The trial court properly ruled that the statement was hearsay and that it was inappropriate to impeach plaintiff in this manner.

Defendant argues that the trial court erred when it refused to admit evidence of plaintiff's alleged illegal acts, including violating certain security laws, mishandling investor funds, and failing to segregate investor money in an escrow or trust account. Defendant claims the admission of this evidence was necessary to bar plaintiff's claim under the wrongful conduct rule. Two requirements must be met before this rule is applied to bar a plaintiff's claim: (1) the conduct must be wholly or almost entirely prohibited under a penal or criminal statute, and (2) the illegal conduct must be causally connected to the transaction out of which the transaction arose. *Orzel v Scott Drug Co,* 449 Mich 550; 537 NW2d 208 (1995). Neither of these are met in the instant case.

Even if defendant were able to provide evidence of plaintiff's alleged illegal activities regarding his investment activities, the wrongful conduct rule still would not apply. Plaintiff's conduct must have been a proximate cause of his injuries for the rule to apply. *Id.* at 565. Plaintiff's injuries stemmed from defendant's breach of his fiduciary duty to plaintiff which resulted in the purchase of the stock at a inflated price to cover defendant's commission. This breach was unrelated to plaintiff's activities prior to purchasing the stock and therefore plaintiff's alleged wrongful conduct was not a proximate cause of his injuries.

Defendant next argues that evidence demonstrating that plaintiff invested money on behalf of other investors was admissible to impeach plaintiff's real motive for bringing the lawsuit against defendant, which was to avoid criticism from the people on whose behalf he invested. The trial court correctly ruled that plaintiff's motive for bringing the lawsuit was not relevant. MRE 401. The critical issue in the case at bar was whether defendant breached the fiduciary duty owed to plaintiff by defendant. Plaintiff's motive for the bringing the lawsuit is not probative on this issue and is therefore irrelevant. The trial court did not abuse its discretion in refusing to admit the evidence. *Phinney, supra; Sackett, supra.*

Next, defendant claims he should have been allowed to elicit testimony that Lopatin had given plaintiff $75,000 to use to purchase a portion of the stock that plaintiff purchased. Defendant argues that, under MRE 608(b), this evidence was necessary to impeach Lopatin's credibility by demonstrating his bias and interest. The trial court ruled that this testimony was marginally probative and its introduction might confuse the jurors. Given that this evidence was not particularly pertinent to the issue of whether defendant breached a fiduciary duty to plaintiff and that, in the trial court's estimation, it may have caused juror confusion, the court's ruling did not constitute an abuse of discretion. *Phinney, supra; Sackett, supra.*

Defendant's final evidentiary claim of error is based on the trial court's admission of plaintiff's testimony that he made a two million dollar investment. Defendant claims this testimony should have been excluded because the accounting record of a second million dollar investment had been destroyed. As a general rule, when a party either deliberately destroys or fails to produce evidence, it is presumed that the evidence would operate against that party. *Hamann v Ridge Tool Co*, 213 Mich App 252; 539 NW2d 753 (1995). In the instant case, though, there was ample evidence admitted at trial of plaintiff's two million dollar investment even in the absence of the documents of which defendant complains. So, although the specific evidence referenced by defendant was not produced, sufficient evidence of the transaction was introduced at trial. There was no abuse of discretion. *Phinney, supra; Sackett, supra.*

Defendant next contends that plaintiff's claim should fail because the stock purchased by plaintiff was the stock of Mid-America Venture Capital Fund, Inc., and not of ShareData. This argument is without merit. It was established at trial that although plaintiff purchased stock in the Mid-America Venture Capital Fund, plaintiff essentially purchased ShareData Stock.

Next, defendant argues that the price of the stock was not inflated because plaintiff purchased the stock at a price per share that was below the price being charged on the market. Therefore, plaintiff could have sold the stock for a profit. Defendant is essentially arguing that even if he breached his fiduciary duty to plaintiff, plaintiff did not suffer any economic damage. Defendant cites no authority to support this position; therefore the issue is waived. *People v Hanna*, 223 Mich App 466, 470; 567 NW2d 12 (1997); *Webb v Smith (After Second Remand)*, 224 Mich App 203, 210; 568 NW2d 378 (1997). In any case, defendant ignores that any profit plaintiff could have realized would necessarily have been reduced by the amount of the improper commission. In addition, defendant only speculates about the profit plaintiff could have realized from the sale of the stock. Defendant does not include in his argument any citations to the record or a summary of evidence presented at trial that supports the conclusion that selling the stock for a profit was a viable alternative for plaintiff, either by showing that there were prospective buyers for the stock or that plaintiff had refused an offer to purchase the stock.

Defendant claims two jury instruction errors on appeal. Defendant first contends that the trial court should have given an instruction on mitigation. In both contract and tort actions, a plaintiff has a duty to mitigate his damages. *Bak v Citizens Ins Co of America*, 199 Mich App 730, 736; 503 NW2d 94 (1993). However, as the trial court aptly stated, the damages here occurred when defendant received a commission on the purchase of stock. When plaintiff learned of the commission, the sale had been consummated and at that point could do nothing to minimize the loss he had already suffered due to purchasing the stock at the inflated price. An instruction on mitigation would have been inappropriate in the case at bar.

Defendant also argues that the trial court should have instructed the jury that it should find in favor of defendant if it found that defendant did not negotiate the stock transaction or that defendant did not know of a pre-existing agreement to pay him a commission. The instructions given by the trial court correctly reflected the definition of a fiduciary relationship, see *In re Jennings Estate*, 335 Mich 241, 244; 55 NW2d 812 (1952); *Nederlander v Nederlander*, 205 Mich App 123, 127; 517 NW2d 768 (1994), as well as defendant's theory of the case. Reversal is not required.

Defendant argues that the damage award should be reduced for three reasons: First, he did not receive the full commission and therefore plaintiff should not have been compensated for the entire \$375,000; second, interest awarded by the jury was inappropriate and should have been based on the rate provided in MCL 600.6013; MSA 27A.6013; and third, the award should have been reduced by the amount of the settlement plaintiff received from other tortfeasors.

Defendant argued that since he only received one-half of the \$375,000 commission payment, plaintiff was not entitled to damages based on the entire commission amount. There was evidence submitted at trial establishing that defendant did receive checks written to him totaling \$375,000. The checks had notations indicating that they were commission payments. Thus, there was sufficient evidence on which to base a finding that the commission defendant received totaled \$375,000. *Weiss v Hodge (After Remand)*, 223 Mich App 620, 637; 567 NW2d 468 (1997).

Defendant argues that the interest award which was based on the interest plaintiff might have earned on the amount of the commission was speculative. Any interest should have been based on the statutory rate provided in MCL 600.6013; MSA 27A.6013. Damages must be ascertained with a reasonable degree of certainty. *Body Rustproofing, Inc v Michigan Bell*, 149 Mich App 385, 391; 385 NW2d 797 (1986). In the case at bar, the jury awarded damages based on the amount of money plaintiff could have earned through investments on the amount by which his stock purchase price was inflated due to defendant's commission. See *Joerger v Gordon Food, Inc*, 224 Mich App 167, 172; 568 NW2d 365 (1997); *Body Rustproofing, supra* at 390.

Further, it is within the trial court's discretion to allow expert testimony on damages. *Phillips v Deihm*, 213 Mich App 389, 401; 541 NW2d 566 (1995). In the case at bar, plaintiff's expert, a certified public accountant, testified about the amount of money plaintiff could have earned had he invested the $375,000 paid to defendant as a commission between the time he first purchased the stock and the date on which the complaint was filed. Although the amount plaintiff could have earned cannot be determined exactly given the nature of investments, the jury did receive testimony on which they could base the damage award. Moreover, defendant submitted no evidence supporting his claim that the damage award should have been reduced by the abount of settlements received from other tortfeasors. The trial court's decision to grant or deny a motion for remittitur will not be reversed absent an abuse of discretion. *Szymanski v Brown*, 221 Mich App 423, 430; 562 NW2d 212 (1997). In light of the expert's testimony on this issue, an abuse of discretion is not evident. The trial court determined that the evidence presented at trial supported the jury award and did not substantiate defendant's remittitur claim. The trial court correctly ruled on all of defendant's damage claims. It did not abuse it discretion in refusing to grant remittitur since the damage award was adequately supported by the evidence. *Weiss, supra*.

Affirmed.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ Roman S. Gribbs