STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of ROY J. MCGLOTHIN, Deceased.

SHEFFERLY, SILVERMAN & MORRIS, a Michigan Professional Corporation,

Petitioner-Appellee,

v

KATHLEEN ROGGENBUCH, Personal Representative of the Estate of ROY J. MCGLOTHIN, Deceased,

Respondent-Appellant.

UNPUBLISHED
June 1, 2001

No. 216737
Oakland Probate Court
LC No. 97-261293-CZ

Before: Bandstra, C.J., and Zahra and Meter, JJ.

PER CURIAM.

Defendant appeals by right from an opinion and order that awarded plaintiff attorney fees and damages relating to work that plaintiff, a law firm, performed on behalf of the company of defendant's decedent, Roy J. McGlothin. We affirm.

McGlothin's company, Big Rapids Mall Associates ("BRMA"), had been experiencing financial difficulties, so McGlothin and his business partner, August Urbanek, hired plaintiff to file a bankruptcy petition. Plaintiff filed a partnership bankruptcy petition, which was dismissed by the bankruptcy court, in part, because BRMA was not in fact a partnership. The bankruptcy court assessed sanctions against Geoffrey Silverman and John Hertzberg, attorneys with plaintiff, for filing the petition.

Plaintiff eventually instituted the instant lawsuit, claiming breach of contract and fraud and alleging that McGlothin fraudulently told Silverman and Hertzberg that BRMA was a partnership and helped cause the assessment of the sanctions. Plaintiff sought attorney fees for performing the bankruptcy work and damages for having to defend against the assessment of sanctions, which were eventually vacated by the Sixth Circuit Court of Appeals. The trial court found for plaintiff with regard to both the breach of contract and the fraud claims and awarded plaintiff a total of $50,952.12 in damages.

Defendant contends that there was insufficient evidence to support the trial court's finding with regard to fraud. We disagree. When reviewing a claim that the plaintiff presented insufficient evidence in a civil case, we must view the evidence in the light most favorable to the plaintiff and make all reasonable inferences in favor of the plaintiff. *Scott v Illinois Tool Works, Inc*, 217 Mich App 35, 41; 550 NW2d 809 (1996). Moreover, this Court reviews a trial court's findings of fact for clear error. *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 246; 533 NW2d 15 (1995). "A finding of fact is clearly erroneous only if there is no evidence to support it or if the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been made." *Id*.

The elements of fraud include: (1) that the defendant made a material representation; (2) that it was false; (3) that when he made it he knew it was false, or that he made it recklessly without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that the plaintiff should act on it; (5) that the plaintiff acted in reliance upon it; and (6) that the plaintiff thereby suffered injury. *Kuebler v Equitable Life Assurance Society of the United States*, 219 Mich App 1, 6; 555 NW2d 496 (1996).

The trial court found that each of these elements had been satisfied. The court's finding in this regard was not clearly erroneous. Indeed, it is undisputed that McGlothin signed the initial bankruptcy petition that listed the petitioning entity as "Big Rapids Mall Associates, a Michigan general partnership." This was tantamount to an assertion that McGlothin intended or believed BRMA to be a partnership (factor one). Moreover, the bankruptcy court concluded that BRMA was not a partnership and that McGlothin lied in representing BRMA as a partnership (factors two and three). By signing the petition, McGlothin evidenced an intent that plaintiff act on his assertion that BRMA was a partnership or that he intended BRMA to be a partnership (factor four). Moreover, plaintiff acted in reliance on McGlothin's assertion; indeed, Silverman testified that if he had known that McGlothin and Urbanek did not view BRMA as a partnership, he never would have filed for a partnership bankruptcy (factor five). Finally, plaintiff suffered damage when the bankruptcy court assessed sanctions for the filing of the petition (factor six). We are not left with a definite and firm conviction that a mistake has been made with respect to the trial court's findings on fraud. See *Hertz, supra* at 246.

Defendant makes numerous arguments against the court's finding of fraud. She contends that the fraud claim was insufficiently pleaded. MCR 2.112(B)(1) provides that allegations of fraud must be stated with particularity in pleadings. General allegations are not sufficient to state a fraud claim. *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995). Defendant contends that the complaint should have stated the specific allegation that McGlothin "falsely stated that he *intended* BRMA to be a partnership," because plaintiff claimed at trial that it did not rely on McGlothin's statement that BRMA was a partnership but that it rather relied on McGlothin's statement that he *intended* BRMA to be a partnership. We do not find this argument persuasive. The complaint alleged that "McGlothin falsely represented to [plaintiff] that [BRMA] was a Michigan partnership. . . ." Moreover, the trial court found that "decedent [falsely] represented that he was a general partner of [BRMA]." In our opinion, whether McGlothin stated "BRMA is a partnership" or whether he stated "I intend BRMA to be a partnership" was not outcome determinative. Indeed, either way, McGlothin would have been representing *his state of mind* with regard to BRMA's status. There was no evidence that

McGlothin was an expert in the makeup of partnerships such that the statement that "BRMA is a partnership" would have convinced plaintiff definitively that BRMA was indeed a partnership. Instead, McGlothin merely communicated his state of mind. Accordingly, the argument regarding the distinction between the two statements is unavailing.

Defendant additionally argues that plaintiff itself incurred no damages in this case because it was the individual attorneys, and not the law firm, that were sanctioned. This argument is similarly unpersuasive. Indeed, the law firm paid for the defense of the sanctions assessed against Silverman and Hertzberg. Accordingly, the law firm suffered damages. Moreover, defendant cites no authority in support of her argument, and it is therefore waived for purposes of this appeal. As stated in *Palo Group Foster Care, Inc v Dep't of Social Services*, 228 Mich App 140, 152; 577 NW2d 200 (1998), an appellant may not leave it up to this Court to search for authority to sustain his position.

Finally, defendant argues that plaintiff had actual knowledge regarding whether a partnership existed and therefore could not have *reasonably* relied on McGlothin's allegedly fraudulent statement. However, Silverman testified that if McGlothin had indicated that he did not believe BRMA was a partnership, the law firm never would have filed a petition for a partnership bankruptcy. The firm's reliance was not unreasonable. Indeed, Silverman testified that the intent of the parties is a large factor in determining whether an entity is a partnership, and plaintiff had no way to know that McGlothin lied when representing that he believed BRMA to be a partnership. Reversal of the finding of fraud is unwarranted.

Defendant next argues that there was insufficient evidence to support the trial court's finding with regard to breach of contract. Given that the award of damages in this case was sufficiently supported by the finding of fraud, we need not address this issue. However, even if we *were* required to reach this issue, we would find no error.

The essential elements of a contract are: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Koenig v South Haven*, 221 Mich App 711, 722; 562 NW2d 509 (1997), reversed in part on other grounds 460 Mich 667 (1999). The factor at issue here is factor four. Mutuality of agreement means that there is mutual assent on all essential terms of the contract. *Reed v Citizen Ins Co of America*, 198 Mich App 443, 449; 499 NW2d 22 (1993). Both parties' assent must be manifested in some objective form. *Id.*

The trial court concluded that there was a mutuality of agreement because McGlothin represented himself as a general partner in signing the bankruptcy paperwork and therefore consented to being personally liable for the attorney fees. This finding was not clearly erroneous.

Indeed, McGlothin signed the initial bankruptcy petition as a "corporate or partnership debtor." The petition listed the petitioning entity as "Big Rapid Mall Associates, a Michigan general partnership" and listed plaintiff as the "law firm or attorney." Moreover, McGlothin subsequently held himself out to plaintiff as a "general partner" of BRMA. Under these circumstances, there is support for the trial court's finding that McGlothin consented to being personally liable for the attorney fees incurred during the bankruptcy proceedings. Indeed, the trial court evidently concluded that McGlothin, an experienced businessman, would have been

aware when he signed the bankruptcy paperwork that he was representing himself as a general partner, that general partners are personally liable for the debts of the partnership, and that he would therefore be personally liable for plaintiff's attorney fees. Furthermore, plaintiff's filing of the bankruptcy petition on behalf of a "general partnership" of which McGlothin was a partner supported the trial court's implicit finding that plaintiff expected McGlothin to be personally liable for the fees.

It does not appear definitively and firmly that the trial court made a mistake with regard to the breach of contract claim, since the trial court's finding of mutuality of agreement found adequate support in the record. It cannot be said that the instant court committed *clear error* in reaching its conclusions that an express contract for McGlothin to pay plaintiff's legal fees existed. See generally *Hertz, supra* at 246.[1]

Defendant next argues that the trial court should not have awarded damages for the money plaintiff spent opposing and appealing the sanctions because it was plaintiff's own errors (and not any actions by McGlothin) that caused the assessment of sanctions in this case and because only Silverman and Hertzberg, and not plaintiff, were assessed sanctions. We disagree. As discussed earlier, the finding that McGlothin did in fact contribute to the assessment of sanctions in this case was not clearly erroneous. Accordingly, the trial court properly concluded that McGlothin should pay damages to plaintiff, who paid for defending Silverman and Hertzberg against the imposition of the sanctions.

Defendant additionally argues that that the attorneys in fact were sanctioned not for the partnership issue but for an unrelated issue, and therefore any alleged misrepresentations by McGlothin about the partnership did not result in the sanctions. Again, we disagree. Indeed, when the bankruptcy court's opinion is read as a whole, it is apparent that the bankruptcy court was viewing the two issues (the absence of a partnership and the unrelated issue) together. Indeed, the bankruptcy court stated that "a 'conglomerate of factors,' emblematic of bad faith, should be scrutinized before coming to a conclusion." It further stated that "because the attorneys and clients shared responsibility for the litigation strategy, the Court will impose sanctions upon all parties jointly and severally." Clearly, the court used the partnership issue in imposing sanctions against the attorneys. Defendant's argument to the contrary is without merit.

Finally, defendant contends that the trial court erred in its award of damages because under MCL 449.151 and 155; MSA 20.131 and 135, McGlothin, if liable at all, was liable only for his proportionate share of the total obligation owed to plaintiff, since plaintiff reached a settlement with Urbanek.

MCL 449.151; MSA 20.131 states:

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[1] Defendant additionally contends that MRPC 1.5(b) somehow barred a finding of contract liability in this case. Defendant did not raise this argument below, and it is therefore not preserved for appellate review. See *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 718; 591 NW2d 676 (1998).

> That whenever any firm or copartnership shall be dissolved by mutual consent or otherwise it shall and may be lawful for any 1 or more of the individuals composing such firm or copartnership to make a separate settlement or compromise with any 1 or all of the creditors of such firm or copartnership and such settlement or compromise shall be a full and complete discharge both in law and in equity to the debtor or debtors making such settlement or compromise and to such debtor or debtors only of and from all and every liability to the creditor or creditors with whom the same is made or incurred by reason of his or their connection with such firm or copartnership. Provided however, that in case of such settlement or compromise the copartner or copartners who are not parties to the same shall be discharged from all liability to the creditor or creditors except for their joint ratable portion of such copartnership debt.

MCL 449.155; MSA 20.135 states:

> The provisions of this act shall extend to joint debtors in the same manner as it now extends to copartners and such joint debtors are hereby authorized individually to settle or compromise and be discharged from their joint indebtedness in the same manner as is herein provided for the settlement and compromise of copartners.

Defendant argues on appeal that she should be liable for only 19.69867 percent of the total breach of contract damages in this case, because McGlothin only owned that percentage of BRMA. She further argues that she should be liable for only twenty percent of the fraud damages, because August Urbanek and three Urbanek Trusts each also made the same material misrepresentation as did McGlothin about the existence of a partnership (such that McGlothin comprised only 1/5 of the alleged tortfeasors).

We first note that we need not consider the amount of damages due on the breach of contract claim, since the trial court considered the fees plaintiff incurred in initially representing BRMA during the bankruptcy proceedings as well as the money spent defending the sanctions to have arisen out of the fraud. In other words, the total damages award can be supported solely by the fraud claim without even reaching the breach of contract claim.

With regard to the damages resulting from the fraud, the trial court implicitly found that defendant was responsible for only half of these damages because McGlothin was a joint tortfeasor with Urbanek. In light of the existing record, this finding was not clearly erroneous. See generally *Hertz, supra* at 246. Indeed, the evidence indicates that it was Urbanek and McGlothin who made misrepresentations prior to the filing of the bankruptcy petition. We do not have a definite and firm conviction that the trial court erred in implicitly concluding that there were only two tortfeasors in this case. See *id*.

The court stated that it was holding defendant "responsible for one half of the appellate costs incurred by plaintiff." The total, actual damages arising from the fraud and uncontested (in terms of amount) at trial were $104,348 (representing the outstanding bankruptcy attorney fees and the money spent defending against the sanctions [including the approximately $9,000 paid to an outside firm] before the subtraction of a settlement reached with Urbanek). One-half of

$104,348 equals $52,174. Therefore, assuming, without deciding, that MCL 449.151 and 155; MSA 20.131 and 135 are applicable in this situation, defendant does not have a legitimate argument for relief, because the trial court awarded only $50,952.12 in damages.

Affirmed.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Patrick M. Meter