

STATE OF MICHIGAN
COURT OF APPEALS

ZLATE ONCEVSKI,

Plaintiff-Appellee,

v

STEALTH COMPOSITES, LLC, JAMES
JOHNSON, PHYLISS JOHNSON, GREGORY
KEARNY, GREG VANAVERY, EXPOSURE
PLUS, INC., EMERSON PROPERTIES CORP.,
KAREN NEAR, ROBERT NEAR, and
PURSHOTTAM DIO,

Defendants,

and

DARYL GOTTSCHALK,

Defendant-Appellant.

UNPUBLISHED

November 27, 2007

No. 272016

Oakland Circuit Court

LC No. 2002-043186-CB

Before: Servitto, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendant, Daryl Gottschalk, appeals as of right the trial court's judgment in favor of plaintiff. Because the trial court did not err in holding that plaintiff suffered damages due to defendant's misrepresentations or in excluding defendant's proposed testimony regarding plaintiff's mitigation of damages, we affirm.

Plaintiff sued defendant for fraudulent misrepresentation, claiming defendant induced him to loan \$100,000 to a third party, Stealth Composites, L.L.C. ("Stealth"). After a bench trial, the trial court found that defendant's conduct was misleading and plaintiff relied on defendant's representations in loaning the \$100,000 to Stealth. However, the trial court held that it did not need to determine whether defendant's conduct amounted to actual fraud, given that plaintiff could not pierce defendant's corporate veil. On plaintiff's appeal, this Court held that plaintiff did not need to pierce the corporate veil before defendant could be found individually liable. *Oncevski v Stealth Composites, LLC, et al*, unpublished opinion per curiam of the Court of Appeals, issued January 12, 2006 (Docket No. 255317). This Court further held that, based on

the lower court's findings, defendant was liable for fraudulent misrepresentation, and thus remanded this matter to the trial court for entry of a judgment in plaintiff's favor and for further proceedings on the issue of plaintiff's damages. *Id.* On remand, plaintiff was awarded \$133,289.18, plus statutory interest and costs, and case evaluation sanctions to be determined later.

Defendant now argues on appeal that the trial court erred by holding that plaintiff suffered damages because of defendant's misrepresentations. We disagree. This Court reviews a trial court's determination of damages after a bench trial for clear error. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 513; 667 NW2d 379 (2003).

The elements of fraudulent misrepresentation are:

(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [*Bergen v Baker*, 264 Mich App 376, 382; 691 NW2d 770 (2004) (internal quotations and citations omitted).]

Thus, to establish fraud, a plaintiff must prove that a defendant caused his damages. See *Phinney v Perimutter*, 222 Mich App 513, 528, 532; 564 NW2d 532 (1997) (trial court properly denied the defendant's motions for a directed verdict and JNOV, holding that "reasonable jurors could find that plaintiff suffered damages *as a result of* relying on [the defendant's] misrepresentations.") (Emphasis added.)

This Court has already determined, in *Oncevski, supra*, that based on the trial court's factual findings, defendant committed fraud. Therefore, this Court has already found the necessary causation and, in fact remanded for entry of a judgment in favor of plaintiff.¹ On remand, the trial court needed only to determine the amount of damages based on the wording of the promissory note. The causation issue already having been resolved, and defendant not challenging the actual amount of damages awarded, the trial court did not err in awarding plaintiff damages based on defendant's fraudulent misrepresentation.

¹ If defendant wanted to challenge this Court's holding that he caused plaintiff's damages, he needed to seek a rehearing in this Court or appeal to the Supreme Court pursuant to the law of the case doctrine. *Bruce Twp v Gout*, 207 Mich App 554, 557-558; 526 NW2d 40 (1994). Thus, defendant should have filed a motion for reconsideration within 21 days after the holding was issued. MCR 7.215(I). Otherwise, this Court does not have jurisdiction to hear appeals from its own decisions. See MCR 7.203. Given that more than 21 days have elapsed, if defendant still wants to challenge this Court's holding, he needs to apply for leave to appeal to the Supreme Court and must show that this Court's decision "is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals." MCR 7.302(B)(5).

Defendant next argues on appeal that the court should have allowed testimony regarding plaintiff's mitigation of damages. We disagree.

This Court reviews preserved evidentiary claims for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Mitigation of damages is a legal doctrine that seeks to minimize the economic harm arising from wrongdoing. *Morris v Clawson Tank Co*, 459 Mich 256, 263; 587 NW2d 253 (1998). In both contract and tort actions, a party injured by wrongdoing must make every reasonable effort to minimize damages. *Bak v Citizens Ins Co of America*, 199 Mich App 730, 736; 503 NW2d 94 (1993). The injured party cannot recover for any item of damage which could have been avoided through reasonable means. *Morris, supra*, at 263-264.

In the instant case, plaintiff's economic injury occurred when he was induced to loan \$100,000 to Stealth and Stealth breached the promissory note by failing to pay plaintiff the owed amount. Given that the only basis for the award was found in the promissory note and no additional damages accumulated after the promissory note was breached, any subsequent actions by plaintiff would have had no impact on his damages. Therefore, the trial court did not err by excluding defendant's proposed testimony regarding plaintiff's mitigation of damages.

Affirmed.

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Christopher M. Murray