STATE OF MICHIGAN

COURT OF APPEALS

BRADLEY INVESTMENTS V, L.L.C,

Plaintiff-Appellee,

v

TOMMY L. SUTHERBY,

Defendant-Appellant,

and

JUDY L. A. SUTHERBY,

Defendant.

UNPUBLISHED
November 20, 2008

No. 278390
Lapeer Circuit Court
LC No. 04-034257-CK

Before: Gleicher, P.J., and Kelly and Murray, JJ.

PER CURIAM.

Defendant[1] appeals as of right the trial court's order denying his motion for involuntary dismissal and the judgment for plaintiff in the amount of $77,000, plus statutory interest and costs. We affirm.

I. Facts

This case arises out of the 2003 sale of the Otisville Coin Laundry from defendant to plaintiff. Plaintiff corporation is owned by Thomas Bradley. Bradley became interested in acquiring a laundromat for investment purposes in the spring of 2003 and asked John Johnson, who had acted as his real estate broker in the past, to inform him if such an investment came to his attention.

[1] Both Tommy L. Sutherby and Judy L. A. Sutherby were named as defendants. However, this opinion will only refer to Tommy as a defendant as Judy did not take part in any of the negotiations for the sale of the laundromat at issue and did not give testimony at trial. Further, Judy is not listed as a party to this appeal.

Johnson first became aware of the laundromat through an advertisement in a commercial real estate magazine. After getting approval from Bradley, Johnson contacted Creative Investment Solutions (CIS), the company that had placed the ad, for more information on the laundromat and was supplied with a two-page information sheet. Because the information sheet indicated a large difference between the gross income for 2000 and 2001, Johnson contacted CIS. CIS, however, was unable to explain the reason for the significant change, since the figures were initially provided by defendant. Johnson contacted defendant directly, who explained the difference resulted from his earlier attempt to sell the laundromat by land contract but the buyer had let the business go down, resulting in defendant getting the business back.

A meeting was held in early April 2003 at CIS's office between Johnson, defendant, and Scott Tindall to discuss the possible sale of the laundromat. Jack Tindall testified that he was also present for this meeting, but Johnson maintained that Jack appeared only briefly at the beginning of the meeting. Johnson testified at trial that the only data on the information sheet identified as being incorrect was the asking price, which was mistakenly listed at $325,000 instead of $350,000. Defendant's testimony contradicted Johnson's, as defendant testified that when he saw the information sheet for the first time at the meeting, he indicated that both the asking price and the 2001 income figure were wrong. Defendant further testified that Scott Tindall then drew a line through the sheet and marked it with the letters "NG," indicating that the numbers were no good.

Both Scott Tinsdall and Jack Tinsdall concurred with defendant that Johnson was informed at the meeting that the purchase price and the income figure for 2001 were incorrect. Even after this meeting, however, CIS continued to distribute information sheets to prospective buyers that listed the income figure for 2001 at $90,000, despite having adjusted the asking price from $325,000 to $350,000.

Bradley testified that on more than one occasion after the early April meeting at CIS, he met with defendant personally and was told that the 2001 income figure of $90,000 was correct and was further led to believe, without explicitly being told so, that the income for 2002 was at least as high. Bradley asked for reassurance on this figure because he was concerned about the difference between the income from 2000 to 2001, and defendant indicated the lower figure was due to the previous land contract buyer's poor business management. According to Bradley, the income figure was important because he planned on having employees handle the day-to-day operations, and the business would have to gross at least $85,000 per year in order to cover employee expenses and still clear a profit. Bradley stated at trial that the reason he went through with the sale was because he believed defendant's representations regarding the gross income of the laundromat.

Bradley indicated that because the income figure was important to his decision to purchase the laundromat, he attempted to verify that the income for 2001 was $90,000. In addition to requesting verbal confirmation from defendant, Bradley asked for numerous documents to support the figures, including utility bills and tax documents. The only documentation defendant provided was a utility bill for a single month. He obtained copies of the water bills himself after defendant failed to provide them. When Bradley expressed concern about the water usage indicated by the water bills, defendant told him that the meter was broken and would not reflect accurate numbers. Defendant refused to provide tax return information, saying it would not be helpful because he did not report all of his income. Defendant denied that

he failed to provide documentation, testfying that he told Bradley the meter might be inaccurate but never told him it was broken. Defendant further denied that Bradley asked him about the income figures on more than one occasion and asserted that the one time it was brought up, he informed both Bradley and Johnson that the correct figure was between $60,000 and $70,000.

Two and a half months after the initial inquiry, the sale of the laundromat closed. Bradley testified that he asked defendant about the laundromat's income at the closing for a final time and defendant again assured him it was $90,000. Shortly after the sale closed, Bradley realized that income figure could not have been correct, based on the amount of money he collected at the end of the first week multiplied by 52. The laundromat's gross sales for the year plaintiff owned it were less than $56,000. Plaintiff subsequently sold the laundromat to another buyer for $140,000.

The trial court bifurcated the trial, first addressing liability and leaving damages to be considered afterward. After the close of proofs in the liability portion of the bench trial, defendant moved for an involuntary dismissal, arguing that plaintiff's claims were barred by the merger clause in the Buy/Sell Agreement. The trial court denied this motion, finding that the placement and wording of the merger clause indicated that it did not apply to the entire agreement (only to the condition of the premises) and that parol testimony on other fraud that might have induced Bradley to purchase the laundromat was properly admitted.

At the conclusion of proofs, the trial court entered a judgment in favor of plaintiff in the amount of $77,000, plus statutory fees and costs. This amount reflects the difference between the purchase price of $267,000 and $190,000, which the trial court determined was the actual value of the laundromat, based on an appraisal performed by the Hodge Appraisal Group.

II. Analysis[2]

Defendant first argues that the trial court erred in holding that the integration clause only applied to the condition of the premises, and that parol evidence on plaintiff's fraud claims was admissible. We disagree.

Following a bench trial, a trial court's findings of fact are reviewed for clear error and its conclusions of law are reviewed de novo. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004). "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court is left with the definite and firm conviction that a mistake has been made." *Id.* (quotation and citation omitted).

"The goal of contract interpretation is to first determine, and then enforce, the intent of the parties based on the plain language of the agreement." *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130; 743 NW2d 585 (2007). A contact is clear and unambiguous if, despite

[2] Both parties cite to unpublished opinions from this Court, but those nonbinding opinions are not attached to the briefs in violation of MCR 7.212(C)(1).

clumsy writing, it fairly admits of only one interpretation. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 567; 596 NW2d 915 (1999) (quotation and citation omitted).

The Buy/Sell Agreement entered into by the parties included a paragraph entitled "Condition of the Premises" which provided:

> Buyer has personally inspected the property and accepts it in its AS IS present condition and agrees that there are no additional written or oral understandings expect as otherwise provided in this Agreement.
>
> Buyer acknowledges that the Salesperson has recommended that Buyer obtain an inspection of the property by a licensed contractor and/or an inspector. Buyer does not desire to obtain an inspection of this property.

Defendant contends that this language constitutes a valid merger clause that applied to the entire agreement between the parties and, as such, precluded introduction of parol evidence of any other representations, including the alleged misrepresentation of the income produced by the business in 2001. The trial court disagreed, holding that the merger clause applied only to those agreements made in regard to the laundromat's premises, and therefore allowed parol evidence on the issue of defendant's alleged misrepresentations.

A merger clause (also called an integration clause) determines the applicability of the parol evidence rule to a contract.

> Recitations to the effect that a written contract is integrated, that all conditions, promises, or representations are contained in the writing and that the parties are not to be bound except by the writing, are commonly known as merger or integration clauses. By stipulating the fact of integration, such clauses purport to contractually require application of the parol evidence rule to the parties' agreement. [11 Williston on Contracts §33:21 (4th ed. 2006).]

In *UAW-GM*, this Court analyzed a merger clause stating that the "agreement constituted 'a merger of all proposals, negotiations, and representations with reference to the subject matter and provisions.'" *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 488, 504-505; 503 NW2d 411 (1998). After examining the plaintiff's fraud allegation, this Court held that "when the parties include an integration clause in their written contract, it is conclusive and parol evidence is not admissible to show that the agreement is not integrated except in cases of fraud that invalidate the integration clause or where an agreement is obviously incomplete 'on its face' and, therefore, parol evidence is necessary for the 'filling of gaps.' *Id*. at 502, quoting 3 Corbin, Contracts, § 578, p 411. The Court elaborated: "the merger clause made it unreasonable for [the plaintiff] to rely on any representations not included in the letter of agreement." *Id*. at 504.

The language in the agreement in the case at bar contains less detail than the agreement in *UAW-GM*, and its context and placement support the trial court's ruling. See *Bloomfield Estates*

Improvement Ass'n, Inc v City of Birmingham, 479 Mich 206, 215; 737 NW2d 670 (2007) ("a word or phrase [in a contract] is given meaning by its context or setting.") As noted above, the clause appears in a paragraph headed "Condition of the Premises." When the location of the paragraph in the context of the agreement is taken into consideration, and the paragraph is read in its entirety, the language does not evidence an intention of the parties that the merger clause apply to the entire agreement. Instead, it appears, as the trial court concluded, that the parties agreed that this was the final understanding of their agreement in terms of the premises of the laundromat, and was included because plaintiff had declined to have an inspection performed. Hence, the clause's placement and its language leads us to conclude that the trial court's reading of the clause was correct.

Defendant next argues that the trial court erred in determining that a misrepresentation had been made and that defendant knew about it. We disagree.

In order to show fraud or misrepresentation, a plaintiff must prove the following elements: (1) defendant made a material representation; (2) the representation was false; (3) when the representation was made, defendant knew it was false or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) defendant made it with the intention that plaintiff should act upon it; (5) plaintiff acted in reliance on the representation; and (6) the plaintiff thereafter suffered injury. *Hord v Environment Institute of Michigan*, 463 Mich 399, 404; 617 NW2d 543 (2000). A claim for innocent misrepresentation exists where a plaintiff detrimentally relies on a misrepresentation in such a way that results in injury to the plaintiff that benefits the defendant. *Forge v Smith*, 458 Mich 198, 211-212; 580 NW2d 876 (1998). The party claiming fraud or innocent misrepresentation must reasonably rely on the misrepresentation, *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005); *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 690-691; 599 NW2d 546 (1999), and cannot reasonably rely on a representation known to be false. *Phinney v Perlmutter*, 222 Mich App 513, 535; 564 NW2d 532 (1997).

Defendant argues that plaintiff could not have reasonably relied on the alleged misrepresentation when its agent was told at the April 2003 meeting that the $90,000 income figure for 2001 listed on the information sheet was incorrect. Defendant correctly asserts that knowledge of an agent is generally imputed to the principal. *US Fidelity & Guaranty v Black*, 412 Mich 99, 126; 313 NW2d 77 (1981). However, contrary to defendant's argument, it is not undisputed that Johnson was informed that the income figure on the information sheet was incorrect. Instead, Johnson testified that he was never told there was an error with the income figure, only the asking price. The fact that three people (defendant, Jack Tindall, and Scott Tindall) all assert that the disclosure occurred does not constitute an undisputed fact when there is still a witness that contests their version of the meeting. In addition, Bradley testified that on at least two occasions *after* the meeting in early April, defendant told him directly the $90,000 income figure for 2001 was accurate and further indicated that the laundromat did at least as well

in 2002. Those facts, as found by the trial court,[3] are not clearly erroneous and defeat defendant's argument.

Defendant also argues that plaintiff's claims must fail because it was unreasonable to rely on an income figure of $90,000 when the income for the previous year was $56,000. Michigan law recognizes that "'there can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant.'" *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 501; 686 NW2d 770 (2004), quoting *Webb v First of Michigan Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992). This principle is generally applied in cases where the plaintiff has been presented with information and chose to ignore it or had some other indication that further inquiry was needed. *Cleary Trust*, *supra* at 501.

The large difference between the income figures for 2000 and 2001 on the information sheet can reasonably be said to have provided plaintiff with an indication that further inquiry was needed. In fact, Bradley did take steps to verify the income information, including requesting defendant to supply copies of the laundromat's water bills, utility bills, and tax statements. defendant only provided a utility bill for a single month, and refused to provide tax statements because he told Bradley they were inaccurate. Bradley then obtained copies of the water bills himself, but when he further questioned defendant about the laundromat's water usage, he was informed that they too were inaccurate because of problems with the meter. In light of these facts, plaintiff made reasonable efforts to verify the truthfulness of defendant's representations. Further, defendant's failure to provide requested documentation constituted an interference with those efforts. Therefore, plaintiff's fraud claim could be pursued.

Finally, reviewing the trial court's award of damages following a bench trial for clear error, *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002), we disagree with defendant's argument that the damage award was excessive.

In a claim for fraud, the measure of damages is "the difference between the actual value of the property when the contract was made and the value that it would have possessed if the representations had been true." *Mayhall v A H Pond Co, Inc*, 129 Mich App 178, 185; 341 NW2d 268 (1983).

Here, the trial court made a finding that the sale price was $267,000 and the actual value of the laundromat was $190,000, based on the appraisal performed by the Hodge Appraisal Group. The trial court set damages in the amount of $77,000, reflecting the difference between the two figures.

Defendant alleges that this determination of damages was in error for two reasons. First, defendant argues that because the trial court determined the merger clause only applied to the

---

[3] Indeed, the trial court specifically found that defendant and his agents made a misrepresentation about the 2001 income level, and that defendant knew that the figure was a misrepresentation.

condition of the premises, it effectively divided the sale into distinct assets and it should have determined the damages in terms of those different assets, rather than using the purchase price as a whole. Stated differently, defendant alleges that the correct measure of damages was the difference between an income stream of $90,000 and plaintiff's actual income in 2003. However, defendant has supplied no authority to support his position that the damages should be determined by using something other than the total value of the property. An appellant may not merely announce his position and then leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Nor are we persuaded by defendant's second argument that the trial court erred in failing to reduce the damage award because plaintiff failed to take available tax benefits. In both tort and contract actions, a plaintiff has a duty to mitigate his damages. *Bak v Citizens Ins Co*, 199 Mich App 730, 736; 503 NW2d 94 (1993). However, we have found no authority to support a conclusion that this duty extends to an obligation to take advantage of optional tax benefits. Thus, we affirm the trial court's damage award.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray