

STATE OF MICHIGAN
COURT OF APPEALS

DAWN CENTERS,

Plaintiff-Appellant,

v

ANGELA F. ARGUE,

Defendant-Appellee.

UNPUBLISHED

April 27, 2010

No. 290851

Grand Traverse Circuit Court

LC No. 08-026488-CZ

Before: OWENS, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

Plaintiff appeals from an order of the trial court denying her claim to damages. We affirm and remand.

Plaintiff sued defendant for conversion, breach of oral contract, and promissory estoppel. As a basis for her claims, plaintiff alleged that while incarcerated in Osceola County Jail, she contacted defendant, and defendant agreed to pack and store plaintiff's personal property. In return, plaintiff asserts, she gave defendant approximately \$2,050 worth of food and toiletries to help cover the cost of storage. However, after plaintiff's release, defendant demanded \$3,000 for storage and refused to return her belongings.

Plaintiff filed suit and sought judgment against the defendant for the amount of her belongings or alternatively their return. While defendant filed an answer and maintained that she had fewer of plaintiff's items than plaintiff claimed, she subsequently failed to respond to any of plaintiff's discovery requests, even after ordered to do so by the trial court. At the hearing on plaintiff's motion to enforce the court's order compelling discovery, the court instructed plaintiff to prepare a motion for entry of default judgment and provide defendant with notice. When defendant did not attend the hearing on plaintiff's motion, the trial court granted a default as to defendant's liability but scheduled a bench trial on the issue of damages. During the bench trial, plaintiff maintained that her missing items had a value of \$128,534. Plaintiff, who provided a list of the items, testified that she had calculated replacement values by either (1) contacting the store where she purchased the item to find the exact price she paid (i.e., purchase price), or (2) looking at Wal-Mart or on the internet to find what it would cost to replace the item (i.e., replacement cost). On January 28, 2009, by written decision, the trial court denied plaintiff's claim to an award of damages. The court found that plaintiff failed to prove the value of her personal property, when she only put forth evidence of "purchase or replacement cost new." The court subsequently denied reconsideration.

Plaintiff first argues that the trial court abused its discretion when, after entering a default as to defendant's liability, it concluded that further proceedings were necessary to determine the amount of damages. We disagree. This Court reviews a trial court's decision whether to enter a default judgment for an abuse of discretion. *Barclay v Crown Bldg & Dev Inc*, 241 Mich App 639, 642; 617 NW2d 373 (2000). An abuse of discretion occurs when a decision results in an outcome falling outside the principled range of outcomes. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 625; 750 NW2d 228 (2008).

Contrary to plaintiff's assertion on appeal, the trial court was not required to grant a default judgment as to damages. In *Wood v DAIIE*, 413 Mich 573, 585; 321 NW2d 653 (1982), our Supreme Court recognized that the decision whether to hold further proceedings on the question of damages following default "is within the discretion of the trial court." See also *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 79; 618 NW2d 66 (2000); MCR 2.313(B)(2)(c).

Here, the trial court entered a default against defendant as a sanction because defendant had failed to comply with numerous discovery requests and with court orders requiring her to answer plaintiff's discovery requests. Having resolved the issue of defendant's liability, the decision whether further proceedings were necessary to determine the amount of damages remained in the discretion of the trial court. The trial court recognized that in plaintiff's amended complaint her calculation of damages was based on "information and belief," and thus it did not assert a specific dollar amount. The trial court also recognized that plaintiff's request to admit did not request admission as to the value of plaintiff's property. Further, based on a review of the transcript of the default judgment hearing, it appears that plaintiff's counsel acquiesced to the decision to conduct further proceedings, or at least failed to argue that further proceedings were unnecessary. Under these circumstances, the trial court's decision that further proceedings were necessary to determine the amount of damages was not outside the permissible principled range of outcomes.

Next, plaintiff argues that she provided sufficient proof of damages when taking into account the uncertainty caused by defendant's failure to respond to discovery requests. We disagree. This Court reviews a trial court's determination of damages for clear error. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 513; 667 NW2d 379 (2003). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Id.* at 512.

Generally, the measure of damages for conversion is the value of the converted property at the time of the conversion. *Ehman v Libralter Plastics, Inc*, 207 Mich App 43, 45; 523 NW2d 639 (2003). A plaintiff bears the burden of establishing damages with reasonable certainty. *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 96; 706 NW2d 843 (2005). While speculative damages are not recoverable, the fact that damages cannot be ascertained with "mathematical precision" does not make them speculative. *Id.* "It is sufficient if a reasonable basis for computation exists, although the result be only approximate." *Hoffman v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995).

Here, it is clear that plaintiff was aware of what she needed to present at the damages hearing. Her "hearing brief" correctly states that "in a conversion action the proper value . . . is fair market value at the time of the conversion." However, at the damages hearing, plaintiff

failed to present evidence of the fair market value of the property at the time of conversion. Rather, plaintiff provided a list of the items and their corresponding values, which reflected either the purchase price or new replacement cost. Moreover, plaintiff left the trial court to speculate about which dollar amounts were based on replacement cost and which dollar amounts were based on purchase price. Plaintiff asserts that she provided sufficient proof of damages when taking into account the difficult position she was in because of defendant's failure to respond to discovery requests. However, defendant's conduct in no way denied plaintiff the opportunity to present evidence of the fair market value of the property at the time of the conversion. Under these circumstances, we are not left with a definite and firm conviction that the trial court erred. *Krol*, 256 Mich App at 512.

Plaintiff next argues that the trial court erred when it failed to consider her claims for equitable relief and whether she was entitled to damages under her alternate claims for breach of contract and promissory estoppel. We disagree. We note that plaintiff raised claims for breach of contract and for promissory estoppel in her initial complaint, and in her amended complaint, and also sought the return of her property as an alternate remedy to an award of damages. However, when plaintiff moved for a default judgment, she sought a judgment in the amount of \$391,241.78, representing three times her actual claimed damages of \$128,534, plus costs and attorney fees, allowable under MCL 600.2919a, the statute corresponding to her conversion claim. The trial court subsequently entered an order of default as to liability only, but scheduled trial on the matter of damages. The trial court's order did not specify which of plaintiff's legal claims applied, referencing plaintiff's first amended complaint generally. In plaintiff's hearing brief she requested and discussed damages and again referenced only a conversion theory. At the subsequent damages hearing, plaintiff pursued money damages and did not specifically request that the trial court order defendant to return her belongings. However, plaintiff's counsel also made the following statement, "And, ultimately she really would like her things back, but that doesn't seem like it's a possibility at this point in time. So she would be requesting at least some compensation for things she has lost."

When the trial court subsequently found that plaintiff had not proven damages with reasonable certainty, it did not discuss the possible return of plaintiff's property. In her motion for reconsideration, plaintiff claimed, among other issues, that her alternate request for equitable relief was still appropriate. However, in its denial of plaintiff's motion, the trial court stated, "This Court's Decision and Order of January 28, 2009, did not address any right of Plaintiff to return of her property. Any discussion of equitable relief in the Plaintiff's Motion for Reconsideration has no application to this Court's Decision and Order of January 28, 2009."

Given the record presented, we find that, despite the fact that plaintiff filed a claim of appeal, her assumption that the trial court's January 28, 2009, order was the final order in this case was erroneous. MCR 7.202(6)(a)(i). See also MCR 2.604(A). An aggrieved party has a right to appeal a final order of a circuit court, MCR 7.203(A)(1), and may seek leave to appeal a circuit court order that is not a final order, MCR 7.203(B)(1). Here, given the trial court's comments in its order denying reconsideration, we conclude that the trial court believed that it

was not resolving all of plaintiff's claims¹ in its January 28, 2009, order, perhaps due in part to the characterization of some of plaintiff's trial materials. The comments of plaintiff's counsel during the damages hearing supports a conclusion that plaintiff had not abandoned her equity claim for recovery of her belongings, but that she instead thought it unlikely that she would receive meaningful relief in equity or perhaps believed that she would recover a greater amount under a claim for treble damages pursuant to MCL 600.2919a.

Thus, because the trial court did not resolve plaintiff's request for equitable relief, and it appears that the trial court did not intend the January 28, 2009, order to be the final order in this case, plaintiff should not have filed a claim of appeal here. However, given the circumstances, and the apparent confusion below, we will treat plaintiff's claim of appeal as an application for leave to appeal, grant leave, and address the substantive issues presented. *In re Investigative Subpoena re Homicide of Lance C Morton*, 258 Mich App 507, 508 n 2; 671 NW2d 570 (2003).

Under the circumstances, plaintiff has not shown that the trial court erred in refusing to grant her claim for equitable relief. This issue is not yet ripe. Plaintiff sought a default judgment on the issues of damages, which the trial court has denied. Her equitable claims remain pending, and the trial court's January 28, 2009, order does not prevent her from continuing to pursue them.

With respect to plaintiff's claims of breach of contract and promissory estoppel, we find no error in the trial court's failure to consider a damage award pursuant to those theories of recovery. It is well settled that an "error requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence." *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). By failing to argue or pursue a claim for damages under a contract or promissory estoppel theory, plaintiff contributed to the approach taken by the court.

Moreover, as to damages, even were we to hold that the trial court erroneously decided not to consider damages under theories plaintiff never argued, plaintiff failed to present a "reasonable basis for computation" of damages under these alternative theories for the same reasons discussed in detail above. *Hoffman*, 211 Mich App at 108. Under a breach of contract theory, "[t]he remedy . . . is to place the nonbreaching party in as good a position as if the contract had been fully performed." *Corl v Huron Castings, Inc*, 450 Mich 620, 625; 544 NW2d 278 (1996). Under a promissory estoppel theory, "[t]he guiding principle in determining an appropriate measure of damages is to ensure that the promisee is compensated for the loss suffered to the extent of the promisee's reliance." *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 173-174; 568 NW2d 365 (1997). Under either of these theories of recovery, plaintiff's damages would be the same, albeit not trebled, as her damages for her conversion

¹ As a technical matter, plaintiff arguably should have filed a separate claim for replevin as a concurrent claim to her conversion claim. See MCL 600.2920. However, because, as noted below, plaintiff could seek return of her property as a specific performance remedy in her contract claim, see generally 2 Restatement Contracts, 2d, § 357, and her contract claim was also not decided by the trial court, the distinction does not materially change our analysis.

claim. Thus, as to recovery of damages, plaintiff has not shown error in the trial court's decision.

As noted above, however, plaintiff's motion for a default judgment concerned only her conversion cause of action. Plaintiff may still pursue a claim for equitable relief, whether under her apparently still unresolved breach of contract claim, see generally 2 Restatement Contracts, 2d, § 357, or through an amended complaint that includes a claim for replevin.

Affirmed. Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Peter D. O'Connell