STATE OF MICHIGAN

COURT OF APPEALS

ROBERT T. FREEBORN,

UNPUBLISHED
September 27, 2012

Plaintiff/Counter-Defendant-Appellee,

and

BARBARA FREEBORN,

Plaintiff,

and

FR MATRIX, L.L.C.,

Plaintiff-Appellee,

v

No. 298483
Wayne Circuit Court
LC No. 08-114730-CB

FACILITIES RESOURCING, L.L.C.,

Defendant/Counter-Plaintiff,

and

WSI INDUSTRIAL SERVICES, INC., THOMAS P. REDMOND, and JERRY TOLSTYKA,

Defendants,

and

PHILIP V. RYE,

Defendant-Appellant.

ROBERT T. FREEBORN,

Plaintiff/Counter-Defendant-Appellee,

and

BARBARA FREEBORN,

Plaintiff,

and

FR MATRIX, L.L.C.,

Plaintiff-Appellee,

v

FACILITIES RESOURCING, L.L.C.,

Defendant/Counter-Plaintiff,

and

WSI INDUSTRIAL SERVICES, INC., THOMAS P. REDMOND, and PHILIP V. RYE,

Defendants,

and

JERRY TOLSTYKA,

Defendant-Appellant.

No. 298484
Wayne Circuit Court
LC No. 08-114730-CB

Before: MURPHY, C.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

In these consolidated appeals, defendants Phillip Rye and Jerry Tolstyka each appeal as of right from the circuit court's order of judgment in favor of plaintiff Robert Freeborn on his claim for fraud and misrepresentation in connection with certain management fees that defendant WSI Industrial Services, Inc. (WSI) extracted from defendant Facilities Resourcing, LLC (Facilities). The trial court entered the order following a bench trial. The trial court also awarded judgments in favor plaintiff FR Matrix, LLC (FR Matrix) against Facilities, and in favor of Freeborn against Facilities, but Facilities has not appealed those judgments. We affirm.

I. FACTS AND PROCEEDINGS

A. BACKGROUND FACTS

WSI was a tier-one total waste service provider for Ford Motor Company (Ford). WSI's tier-one status meant that it was able to contract with Ford directly. WSI supplied Ford with industrial cleaning services. Jerry Tolstyka was WSI's accountant.

Freeborn testified that in 2003, he formed Facilities Resourcing, LLC (Facilities) with James Helvey. Facilities discussed forming a subcontracting relationship with WSI, in which Facilities would perform environmental services for Ford. Facilities was not a tier-one contractor and thus could not contract with Ford directly.

Rye, acting on the WSI's behalf, negotiated a subcontracting agreement with Facilities to perform hazardous and non-hazardous waste removal services for Ford. Ford requires its tier-one contractors to maintain at least a fifty-one percent ownership interest in any subcontractor. Facilities structured itself so that Rye, Freeborn, Helvey, Tolstyka, and Thomas Redmond, who is not a party to this appeal, were given roles and ownership interests in the company as follows:

Freeborn	President	26% ownership
Rye	Vice President	31% ownership
Redmond	Vice President	20% ownership
Helvey	Member	23% ownership
Tolstkya	Secretary, Treasurer, Accountant	0% ownership

Facilities's Operation Agreement provided that the "[n]et income or net loss of the LLC will be allocated to members in proportion to their ownership of the LLC."

Freeborn testified that the parties agreed that WSI would handle Facilities's financial accounts, including receivables, payables, and taxes, that Freeborn would manage the day-to-day business of Facilities, and that Facilities would provide WSI with Facilities's Ford vendor code—a code that WSI was previously unable to obtain. Freeborn testified that Facilities also agreed to pay WSI accounting fees. The "projection" or "calculation" documents that Freeborn received from Tolstyka indicated that WSI would charge Facilities a monthly management fee of about $7,000.

In early 2007, Freeborn initiated discussions with a separate tier-one contractor. Ford rejected Freeborn's proposal to allow the separate contractor to replace WSI as Facilities's tier-one contractor. Rye testified that Freeborn did not discuss these negotiations with him. Freeborn also negotiated a contract between Facilities and a government agency in November 2007, but was unsuccessful.

Beginning in 2007, WSI fell behind on Facilities's suppliers and subcontractors. Barbara Freeborn testified that in July 2007, Facilities's suppliers threatened to stop services if they were not paid. In late 2007, WSI defaulted on its line of credit, and WSI's bank cancelled the line of credit and garnished Ford's payments to WSI. WSI stopped paying Facilities's subcontractors consistently. Freeborn personally paid Facilities's major subcontractor in September and December 2007.

In 2008, the subcontractors refused to work without pay. In April 2008, Freeborn met with a Ford purchasing agent, Laura Flack, and warned Flack that Ford was in danger of becoming noncompliant with federal environmental regulations because Facilities's subcontractors refused to work until WSI paid them. Flack testified that she began looking for a replacement for WSI because Ford was concerned that WSI's financial difficulties could jeopardize its environmental regulations compliance. In November 2008, WSI stopped paying Facilities's suppliers entirely, and Barbara Freeborn testified that Rye told her that Facilities would have to file for bankruptcy.

B. PROCEDURAL HISTORY

In 2008, Freeborn, Barbara Freeborn, and FR Matrix sued WSI for an accounting. The plaintiffs later amended their complaint to include several claims, including claims of fraud and misrepresentation against Rye, Redmond, and Tolstyka. Facilities and WSI filed counterclaims against Freeborn for breach of fiduciary duty and tortious interference with a business relationship. By the parties' stipulation, the trial court dismissed Barbara Freeborn's claims before trial.

Ultimately, Ford terminated WSI's contract, and WSI declared bankruptcy. The trial court did not adjudicate any claims against WSI because of the bankruptcy stay.

C. MANAGEMENT FEES

WSI used a multi-tiered accounting system to manage its subcontractor's finances, including Facilities's finances. WSI received payments from Ford and then "swept" the funds into and out of WSI's master account to pay for each subcontractor's expenses, including a subcontractor's expenses to sub-subcontractors.

At the end of each year, Tolstyka reduced Facilities's bank account balance to zero, as was reflected by the entry "management fee adjustment, non cash tax savings transfer entity" in Facilities's financial statements. Rye and Tolstkya testified that this deduction was a management fee, a standard practice in the automotive services industry. Rye testified that he used this fee to pay debts related to WSI. Tolstyka testified that he was not familiar with the term "management fee adjustment, non cash tax savings transfer entity" and could not define it at trial. Rye testified that he also did not know what the term meant. Freeborn testified that he did not agree to pay management fees by "effectively zero[ing] out the profits of Facilities Resourcing at the end of the year."

Freeborn testified that this final entry "took the profit out of the company." Freeborn testified that Tolstyka provided him with profit and loss statements from WSI, but that he did not have access to Facilities's detailed financial records until April or May 2008. Freeborn testified that he understood the profit and loss statements, but that he did not see the term "management fee adjustment, non cash tax savings transfer entity" until Facilities produced detailed financial statements during discovery in his original action for accounting.

Freeborn testified that some contractors charged management fees, but not without a written contract. He testified that there was no Facilities member resolution to support the management fee. Freeborn testified that WSI charged management fees of about $7,000 a month, and Facilities's financial documents reflected this management fee charge on a monthly basis. Tolstyka testified that the year-end management fee was not the same fee that Facilities paid WSI for accounting expenses.

Tolstyka admitted that there was no written agreement between WSI and Facilities for management fees. Tolstyka testified that he collected the fee at Rye's direction, and testified that he "never knew the number was ten percent." When questioned further, Tolstyka admitted that Rye arbitrarily decided the amount of the management fees. Tolstyka testified that none of the other subcontractor's management fees were ten percent—or any specified percent—of their revenues. Tolstyka admitted that his accounting practices were not fully compliant with generally accepted accounting principles.

Redmond testified that he reviewed the income statements and balance sheets only "as a non-accounting person would" and that he was unaware of a ten percent management fee.

Freeborn testified that he had expected that Facilities's profits would be paid out. Freeborn testified that he first realized that Facilities did not show profits in December 2006. Freeborn testified that when he and Helvey asked Rye where the money was, Rye responded that "the money is still there, it's never been removed, this is for tax purposes." Freeborn testified that Rye told him that the transaction was a "paper only" transaction. Freeborn testified that "I was a little nervous about it, because . . . I don't know how you can wipe profit out of a company so you don't pay tax on the company," and that it looked bad.

Rye admitted that he emailed Freeborn not to "get confused by the financial statements, many of the entries are just that, book entries, no cash was transferred out of Facilities Resourcing." Rye testified that what he meant was that "[i]t was designed to save taxes and also to reflect that we were taking our management that we felt was due and agreed to[.]" Rye denied that he intentionally deceived Freeborn into believing that money was still in Facilities's accounts. Rye testified that no cash left Facilities because it never left WSI.

Rye testified that when he negotiated with Freeborn and Helvey, Rye had told them that he thought their salaries were "quite high . . . since we're funding your company to get you started. And I said, you guys will receive a salary, WSI can take a management fee. And they said, well, how much do you want to pay. So we tried to keep it below 10 percent, how's that. And so that's how we agreed on it." Rye testified that he used the ten percent figure as a guideline and that, based how well Facilities performed in the year, he would adjust it downward to determine management fees. Rye testified that in 2007, he began retaining funds to cover unpaid management fees from previous years.

Freeborn testified that he again asked Rye or Redmond where the profits were in 2008, and that Rye or Redmond gave a similar explanation. He testified that he did not understand the explanation, but "saw their explanation of how they could extract the funds."

Rye testified that WSI spent more than $500,000 in capital to start up Facilities. Tolstyka testified that Facilities owed $411,000 to WSI in inter-company debt in 2006 for Facilities's losses during its first year of operation. Tolstyka could not explain why the financial sheet for November 2004 showed that Facilities did not owe any further money to WSI, but that statements showed that Facilities incurred a $575,000 debt in December 2004.

The parties' financial exhibits showed that in 2005, Facilities had gross revenues of $10,128,276, and WSI collected a year-end fee of $967,833. In 2006, Facilities had $3,126,698 in revenues, and WSI collected a year-end fee of $205,420. Freeborn testified that WSI extracted a total of about $400,000 in management fees, in the exact amount of the profits that Facilities realized on a yearly basis. Freeborn asserted that he was entitled to 26 percent of the management fees.

D. TRIAL COURT'S RULING

The trial court found that the parties had never agreed to a ten percent management fee, and that WSI had improperly taken about $498,000 in management fees, because it had retained as management fees $98,000 of the money that Ford paid WSI for Facilities's work, and extracted $411,000 in year-end fees.

The trial court also concluded that Rye and Tolstyka had committed fraud. It found that Rye and Tolstyka made material misrepresentations to Freeborn when they told him that the management fee was a paper entry for tax purposes, and that the money was still there. It found that their representations were false because WSI took the money and used it to pay WSI's obligations, and thus "there was no money in Facilities Resourcing" and "the money was not there." It found that Rye and Tolstyka knew that the representations were false when they made them, because they knew that WSI would keep the money to pay obligations unrelated to Facilities's business. It also found that Rye and Tolstyka intended Freeborn to act on the representation, and that Freeborn did act on the representation by accepting that the money was still there and taking no further action to claim the profits as his income.

The trial court found that the misrepresentations damaged Freeborn because he had been entitled to 26 percent of the profits of Facilities, and the management fees represented Facilities's yearly profits. It found that WSI had wrongfully retained $498,000, and awarded Freeborn 26 percent, or $129,480. Defense counsel challenged the trial court's award of damages, arguing that if WSI had not withdrawn the management fees on the grounds that Freeborn would not have received distributions if WSI had not extracted the funds because Facilities's debts to its creditors would have taken precedence over the distribution. The trial court rejected this argument.

The trial court also concluded that Rye breached Facilities's operating agreement by unilaterally imposing the management fee. It concluded that Rye's actions were oppressive conduct, interfered with Freeborn's interest in Facilities, and deprived him of his right to his share in Facilities's profits.

The trial court rejected Facilities's counterclaim that Freeborn had breached his fiduciary duties. The trial court concluded that Facilities did not establish the damage element of its claim, because it found that Freeborn's unsuccessful negotiations did not damage Facilities. It found that WSI's default was the sole cause of any damage that Facilities incurred.

The trial court awarded judgments in favor of FR Matrix against Facilities, in favor of Freeborn against Facilities, and in favor of Freeborn against Rye and Tolstyka for misrepresentation and fraud. The trial court found no cause of action against Redmond, and found no cause of action on Facilities's counterclaim against Freeborn.

Defendants Rye and Tolstkya now appeal. Thus, only Freeborn's claims of fraud and misrepresentation against these defendants are at issue in this appeal.

II. MISREPRESENTATION AND FRAUD

A. STANDARD OF REVIEW

This Court reviews for clear error the trial court's findings of fact following a bench trial.[1] The trial court's findings of fact will be clearly erroneous if, after reviewing the entire record, we are definitely and firmly convinced that the trial court made a mistake.[2] We give regard to the special opportunity of the trial court to judge the credibility of the witnesses that appeared before it.[3] We review de novo the trial court's conclusions of law.[4]

B. ELEMENTS OF FRAUD

The elements of fraud are:

> "(1) that the charged party made a material misrepresentation; (2) that it was false; (3) that when he or she made it he or she knew it was false, or made it recklessly, without any knowledge of its truth as a positive assertion; (4) that he or she made it with the intention that is should be acted upon by the other party; (5) that the other party acted in reliance upon it; and (6) that the other party thereby suffered injury."[5]

C. ANALYSIS

First, Rye and Tolstyka argue that the trial court clearly erred when it determined that WSI was not entitled to the management fees. They argue that the trial court mistakenly based its finding on a wrong reading of the operating agreement. They further argue that the trial court

[1] MCR 2.613(C); *Trader v Comerica Bank*, 293 Mich App 210, 215; 809 NW2d 429 (2011).

[2] *Peters v Gunnell, Inc*, 253 Mich App 211, 221; 655 NW2d 582 (2002).

[3] MCR 2.613(C); *In re Clark Estate*, 237 Mich App 387, 395-396; 603 NW2d 290 (1999).

[4] *Bertrand v City of Mackinac Island*, 256 Mich App 13, 28; 662 NW2d 77 (2003).

[5] *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254 n 8; 701 NW2d 144 (2005); *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).

erred in concluding that Rye arbitrarily charged a fee because a management fee is a standard practice in the industry. After a careful review of the record, we conclude that the trial court did not find that the fee was improper because it was arbitrary or was not permitted by the operating agreement, as Rye and Tolstyka suggest. A careful reading of the record indicates that these facts were pieces of evidence that the trial court used to conclude that the parties had not actually agreed to the management fee.

The trial court referred to other evidence supporting its finding that the parties had not agreed to the management fee. These facts included that there was no written fee agreement, that Facilities's members did not agree to the fee, that Freeborn testified that he had not agreed to a management fee based on ten percent of sales, and that Redmond testified that he did not know about a ten percent management fee. The trial court noted that only Rye claimed that there was an agreement that Facilities would pay WSI a ten percent management fee, but indicated that "[t]his court does not believe Rye's testimony[.]" We defer to the trial court's determination of credibility on this issue. We are not convinced that the trial court made a mistake when it concluded that Facilities had never agreed to pay WSI a ten percent or similar management fee.

Second, Rye and Tolstyka argue that their statements were not fraudulent because the money belonged to WSI. Because we have concluded that the trial court did not clearly err when it determined that the money did not belong to WSI, we reject this argument.

Third, Rye and Tolstyka argue that the trial court erred when it determined that Freeborn relied on their misrepresentations because Freeborn's reliance was unreasonable. A defendant did not defraud a plaintiff if the plaintiff had access to information that he or she chose to ignore.[6]

Here, Freeborn testified that he did not understand the balance sheets, but believed the explanations of Rye and Tolstyka. There was no evidence that Freeborn had any specialized training in accounting or taxes. To the contrary, there was evidence that Freeborn needed Tolstyka's assistance to fill out a K-1 form to report his income from Facilities. Freeborn testified that he did not receive access to Facilities's detailed financial records until April or May 2008, including the statements that indicated that the accounts were zeroed out because of a "management fee adjustment, non cash tax savings transfer"—a term that Tolstyka, the accountant for both WSI and Facilities, could not explain the meaning of at trial.

Further, there was evidence that Freeborn investigated what he saw to be the discrepancy. Freeborn testified that the only knowledge he had was that the bank account statements were at zero at the end of the year. He testified that he asked Rye about where the profit had gone, and that Rye told him that the profit was still available, but that the account balance was zeroed for tax purposes. Freeborn testified that he later asked Tolstyka, Facilities's accountant, about the discrepancy. He testified that he believed the explanation about how Tolstyka zeroed the account out for tax purposes. Rye and Tolstyka do not indicate what further actions Freeborn should have taken to discover the falsity of their representations on the basis of his knowledge

[6] *Nieves v Bell Industries, Inc*, 204 Mich App 459, 465; 517 NW2d 235 (1994).

and the information he had at the time. Thus, we conclude that the trial court did not err when it determined that Freeborn had relied on the misrepresentations of Rye and Tolstyka.

Fourth, Rye and Tolstyka argue that the trial court's conclusion that Freeborn relied on the misrepresentations was clearly erroneous because there was no evidence that Freeborn would have acted differently if he knew about the management fees. Rye and Tolstyka premise their argument on WSI's entitlement to the management fees, and we have concluded that the trial court did not clearly err when it found that WSI was not entitled to them. Thus, we reject this argument.

We therefore conclude that the trial court's findings of fact concerning the elements of fraud and misrepresentation were not clearly erroneous.

III. DAMAGES

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

This Court reviews for clear error the trial court's damages award.[7] The trial court's award is not clearly erroneous if it is within the range of the evidence.[8]

An issue is not preserved unless it has been raised before, addressed, or decided by the trial court.[9] Here, Rye and Tolstyka did not argue below that it was necessary for the trial court to find an implied contract for management fees to avoid unjustly enriching Facilities and Freeborn. Thus, this issue is unpreserved. We review unpreserved claims of error for plain error affecting the party's substantial rights.[10]

B. LEGAL STANDARDS

A party who has committed fraud or misrepresentation is liable for injuries resulting from the wrongful actions if the damages are legal and natural consequences that the party might reasonably have anticipated.[11] A limited liability company may not distribute its profits if the company would be unable to pay its debts as they come due in the usual course of business.[12]

[7] *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002).

[8] *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 177; 530 NW2d 772 (1995).

[9] *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

[10] *Duray Development, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010).

[11] *Sutter v Biggs*, 377 Mich 80, 86; 139 NW2d 684 (1966); *O'Neal v St John Hosp & Medical Ctr*, 487 Mich 485, 496; 791 NW2d 853 (2010).

[12] MCL 450.4307(1).

Unjust enrichment is an equitable theory that allows the trial court to imply a contract in order to prevent the unjust enrichment of a party.[13] To show that an award would unjustly enrich the plaintiff, the defendant must establish that the plaintiff received a benefit from the defendant, and that it would be inequitable for the plaintiff to keep the benefit.[14] The trial court may not imply a contract under an unjust enrichment theory if there is an express agreement covering the same subject matter.[15]

C. APPLYING THE STANDARDS

As an initial matter, Rye and Tolstyka argue in part that the trial court erroneously concluded that Rye committed willful and oppressive acts.[16] However, the trial court awarded Freeborn damages against Rye and Tolstyka, the only parties to this appeal, on grounds of misrepresentation and fraud—not on the grounds of member oppression. We will not set aside the trial court's judgment unless our failure to do so would be inconsistent with substantial justice.[17] Thus, we decline to review this issue because even if the trial court erred on this ground, it would not warrant reversal.

Rye and Tolstyka also argue that the trial court clearly erred in its determination of damages. The trial court based its damages award on $498,000 of unauthorized management fees that it found WSI collected at the end of each year. Freeborn owned a 26 percent interest in Facilities, and the trial court found that Freeborn was entitled to 26 percent of Facilities's profits under its operating agreement. The total amount was within the range of the documentary evidence that Freeborn presented concerning WSI's wrongful withholding of management fees.

Rye and Tolstyka correctly argue that Freeborn would not have been entitled to a distribution of profits until Facilities's debts were paid, and that Facilities owed several debts at the time of trial. A company may not distribute its profits before it has paid for the debts it incurred in the ordinary course of business.[18] However, Rye and Tolstyka did not provide any evidence of debts not yet paid by Facilities at the time that the distributions would have been made, did not prove that the debts were incurred in usual course of business, and did not prove the amounts of these debts. Thus, damages of $498,000 were within the range of the evidence, and Rye and Tolstyka have not demonstrated that the trial court clearly erred in awarding Freeborn 26 percent of this amount.

Finally, Rye and Tolstyka argue that the trial court's judgment unjustly enriches Freeborn because WSI was entitled to compensation for its services. However, Freeborn established that

[13] *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003).

[14] *Id*.

[15] *Id*.

[16] MCL 450.4515.

[17] 2.613(A); *Zdrojewski v Murphy*, 254 Mich App 50, 64-65; 657 NW2d 721 (2002).

[18] MCL 450.4307(1).

Facilities did compensate WSI for its services. Freeborn testified that Facilities also agreed to pay WSI accounting fees, and the "projection" or "calculation" documents that he received from Tolstyka indicated a monthly management fee of about $7,000 for each month. Freeborn provided evidence that WSI charged this amount to Facilities. Tolstyka testified that this amount was different from the year-end management fees. Thus, because the parties' express agreements included compensation for WSI's services, we conclude that there is no clear error concerning unjust enrichment that affected WSI's substantial rights on this unpreserved issue.

We affirm.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ William C. Whitbeck