

STATE OF MICHIGAN
COURT OF APPEALS

CITIZENS BANK,

Plaintiff-Appellee

v

WITHERS STEEL SERVICE CENTER, LLC, and
SCOTT WITHERS,

Defendants-Appellants.

UNPUBLISHED
March 22, 2012

No. 302150
Genesee Circuit Court
LC No. 10-093702-CK

Before: BORRELLO, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

This case involves the trial court's valuation of plaintiff Citizens Bank's damages after the court entered a default judgment against defendants Withers Steel Service Center, LLC and Scott Withers on the issue of liability. Citizens Bank presented evidence regarding the appraised value of lost tangible property and an estimated value for certain intangible property based on defendants' accounts receivable records. As the trial court calculated Citizens Bank's damages as precisely and reasonably as possible, we find no error warranting relief. We affirm the trial court's default judgment against Withers Steel Service Center, LLC and Scott Withers in the amount of \$35,000.

I. BACKGROUND

Between 2002 and 2008, Citizens Bank (Citizens) made various loans to Withers Steel Supply, Inc. (WSSI), which was owned by Douglas Withers. WSSI and Douglas Withers filed for protection under the United States Bankruptcy Code in February 2010. The bankruptcy court lifted the stay and permitted Citizens to seize and sell WSSI's assets to pay down its \$1.9 million debt owed to Citizens. Citizens hired J.R. Heineman and Associates to appraise WSSI's assets. Citizens then arranged to sell WSSI's assets to Heineman for \$100,000. When Heineman employees went to WSSI's facility to retrieve those assets, \$8,050 worth of materials were missing. It appeared that WSSI and Douglas Withers had transferred the missing assets to Douglas's son, Scott Withers, and Scott's newly established company, Withers Steel Service Center, LLC (WSSC). Matthew Scott McMichael, Vice President and Special Loans Officer for Citizens, investigated and discovered that Scott and WSSC had basically taken over WSSI's business and moved it down the street in a likely attempt to avoid repaying the bank under WSSI's bankruptcy plan.

On May 20, 2010, Citizens filed suit against WSSC and Scott seeking recovery of the lost assets or their replacement value under the Uniform Fraudulent Transfer Act (UFTA), MCL 566.31 *et seq.* Citizens accused Scott of colluding with his father by transferring WSSI's property to WSSC without payment for the purpose of defrauding WSSI's sole creditor, Citizens. See MCL 566.34; MCL 566.35 (defining fraudulent transfers for purposes of the UFTA). Citizens specifically alleged that WSSI had transferred numerous pieces of equipment, fixtures, vehicles, machinery, and raw materials to Scott and WSSC and that no funds had been paid to WSSI or Citizens as a result of the transfer. Citizens requested a judgment against Scott and WSSC for the replacement value of the assets transferred, MCL 566.38, or a judgment setting aside the transfers and returning the assets to Citizens, MCL 566.37(1)(a). The trial court granted a temporary restraining order to protect the value of the assets. Scott and WSSC did not file an appearance through their attorney or an answer in response to Citizens' complaint. The court clerk entered a default against Scott and WSSC on June 16, 2010, following Citizens' request.

When Scott and WSSC finally appeared before the court, they filed a motion to set aside the default, which the trial court denied. At that point, Scott and WSSC were deemed to have admitted their violations of the UFTA by accepting WSSI's assets without making a payment in exchange for the purpose of defrauding Citizens. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 79; 618 NW2d 66 (2000) (“[I]t is an established principle that ‘a default settles the question of liability as to well-pleaded allegations’” and “‘is equivalent to an admission by the defaulting party.’”). Citizens then filed a motion for entry of a default judgment for \$35,000 in damages.¹ Citizens' monetary claim against Scott and WSSC was based upon the value of the items that WSSI had fraudulently transferred to Scott and WSSC, including the profit earned from WSSI's client list and goodwill. After a hearing on the motion, the trial court awarded Citizens' the requested amount of damages.

II. ANALYSIS

Scott and WSSC do not challenge the entry of a default judgment against them on the liability issue. They challenge only the damages portion of the judgment, arguing that Citizens presented insufficient evidence to prove its loss of \$35,000. At the hearing on the damages issue, Citizens presented the testimony of its vice president and special loans officer, McMichael, regarding the earlier appraisal of WSSI's assets. McMichael also identified the particular assets that were missing from the WSSI facility and their appraised value. Scott and WSSC challenge Citizens' reliance solely on McMichael's testimony as McMichael neither personally appraised the property, nor conducted the auction. As such, Scott and WSSC contend that McMichael lacked the necessary personal knowledge to testify regarding those facts. Scott and WSSC

¹ Citizens claimed that Scott and WSSC took \$8,050 in assets and amassed \$30,000 in profit through usurpation of WSSI's client list and goodwill. It is unclear from the record why Citizens sought only \$35,000 in damages rather than \$38,050.

further challenge McMichael's credentials to testify regarding the value of WSSI's goodwill and client lists.

We review 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, we are left with a definite and firm conviction that a mistake has been made. *Id.*

“A party asserting a claim has the burden of proving its damages with reasonable certainty. Although damages based on speculation or conjecture are not recoverable, damages are not speculative merely because they cannot be ascertained with mathematical precision.” *Unibar Maintenance Svcs, Inc v Saigh*, 283 Mich App 609, 634; 769 NW2d 911 (2009), quoting *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 525; 687 NW2d 143 (2004). Where, as here, the fact of damages (liability) has been established, the quantum of certainty regarding the amount of damages is relaxed. *Unibar*, 283 Mich App at 634; *Ensink*, 262 Mich App at 525. As noted by our Supreme Court in *Purcell v Keegan*, 359 Mich 571, 576; 103 NW2d 494 (1960), “[W]here injury to some degree is found, we do not preclude recovery for lack of precise proof. We do the best we can with what we have. We do not, in the assessment of damages, require a mathematical precision in situations of injury where, from the very nature of the circumstances, precision is unattainable.” (Quotation marks and citation omitted.) There must be some “reasonable basis for computation.” *Ensink*, 262 Mich App at 525 (quotation marks and citation omitted). However, the factfinder is permitted “to act upon probable and inferential, as well as direct proof.” *Allison v Chandler*, 11 Mich 542, 555 (1863). And so, when calculating an uncertain damages award, the most a plaintiff can do is place before the factfinder “all the facts and circumstances of the case, having any tendency to show damages, or their probable amount,” and leave the factfinder “to make the most intelligible and probable estimate which the nature of the case will permit.” *Id.* at 555-556.

First, we decline to consider Scott and WSSC's claim that the items allegedly removed from WSSI's facility were actually sold by Citizens at a separate auction and therefore could not be calculated as part of Citizens' damages. The cause of the loss was decided when the trial court entered a default as to liability. Scott and WSSC do not challenge that portion of the default judgment and are barred from seeking the exclusion of those items in the damages award.

In regard to the valuation of the missing items from the WSSI facility, McMichael testified that Heineman conducted the property appraisal and then made a “full asset purchase” from Citizens. When Heineman returned to the WSSI facility to take possession of the assets, a drilling machine valued at \$600, a tractor valued at \$3,250, a power roll forming machine valued at \$1,500, a brake valued at \$1,800, a magnetic base drill valued at \$500, and a hydraulic ram system valued at \$400 were missing. Citizens proved these values through the testimony and affidavit of McMichael. Obviously, the appraisal report itself would have been the best method to prove the value of the missing items. However, Scott and WSSC did not challenge the values placed on the missing items in the appraisal report or the accuracy of McMichael's recitation of those values. In fact, Scott and WSSC presented no rebuttal evidence. Citizens proved the value of the missing items as precisely as possible and we find no clear error in the trial court's valuation judgment.

With regard to the goodwill and customer lists, McMichael valued those assets at \$30,000. McMichael arrived at this number by comparing WSSC's sales reports with WSSI's customer lists. McMichael discovered that the first 23 transactions in WSSC's accounts receivable records were debts originally owed to WSSI. WSSC's customer list was also comprised mainly of WSSI's former customers. On the third day of the damages hearing, Citizens' attorney offered to place WSSC's accounts receivable on the record, but neither the court nor Scott and WSSC indicated a desire to inspect the documents. Again, Citizens proved the value of WSSI's goodwill and customer lists as precisely as possible and Scott and WSSC presented no rebuttal evidence. The trial court reviewed the evidence and deemed it sufficient to value Citizens' claim of loss. We see no ground for finding clear error on the record before us.

Affirmed.

/s/ Stephen L. Borrello
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher