STATE OF MICHIGAN

COURT OF APPEALS

STEVE GERESY, SHARMA SAITH, and MARGUERITE SAITH, Plaintiffs-Counter Defendants-Appellants,	UNPUBLISHED June 3, 2004
v	No. 243468 Kalamazoo Circuit Court LC No. 99-000571-CK
DOUGLAS H. DOMMERT, AZZAM S. KANAAN, JAMES L. CLARK, and EMBERLY ACRES COMPANY, LLC, Defendants-Counter Plaintiffs-Appellees.	

Before: Meter P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Plaintiffs Steve Geresy and Sharma and Marguerite Saith sold a piece of property to defendant Emberly Acres, L.L.C., which was comprised of Geresy, non-party Charles Hill, and defendants Douglas Dommert, James Clark, and Assam Kanaan, for the purpose of developing the land as a condominium complex. Plaintiffs sued for breach of contract when the individual defendants did not pay the entire purchase price of the land pursuant to the operating agreement. Defendants filed a counterclaim alleging, first, that the operating agreement was unenforceable and, second, that they would not have signed the agreement but for the fraudulent misrepresentations of Hill respecting the projected costs and profits of the project. Plaintiffs appeal as of right from the trial court's holding that defendants were not personally liable to plaintiffs for the purchase price of the property, as well as the trial court's finding that defendants were entitled to a setoff because of Hill's fraudulent misrepresentations. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Basic Facts And Procedural History

The project was conceived in April, 1997, when Geresy bought a parcel of land for $92,000 with the intent to sell it for $260,000 for commercial development. Geresy purchased this land jointly with Sharma Saith and Saith's wife, Marguerite. Before seeking a buyer for the land, Geresy asked Hill for advice about how best to develop the parcel. Hill recommended building condominiums, and he prepared a set of preliminary drawings as well as a summary of expected costs and profits. Geresy planned to do the excavating work for the project himself and charge the investors for his labor, while Hill would be responsible for the actual construction of the buildings.

In October, 1997, Geresy hired attorney Patrick Reid to represent him regarding the development project and to assist with financing. One of the banks Reid approached for financing hired an independent appraiser, John Brown, who estimated the fair market value of the undeveloped property at $96,000 and its "upon completion" value at $2,085,000. The bank adjusted the latter value to $1,980,000. Brown's appraisal indicated that the project would not make a profit, and would operate at a loss. By February of 1998, several banks had rejected Reid's attempts to secure financing for the project and no alternative funding source had been found. However, Hill nonetheless ordered the first building from the manufacturer by claiming to have a line of credit from First of America Bank.

In the spring of 1998, Geresy asked Dommert, who had bought land from Geresy previously, to consider investing in the project. Dommert and his partner Clark met with Reid, Hill, and Geresy, and were shown Hill's projection of expected net profit. According to Dommert and Clark, Geresy and Hill showed them a document – referred to in this opinion as "Exhibit V" – that stated it would cost $1,906,344 to construct the eight buildings and $371,500 for development costs such as building roads and installing utilities, for a total cost of $2,277,844. Subtracting this from the expected total sales of $2,667,344, left a net profit of $389,500.

Dommert and Clark asked how sure Hill was about the numbers supporting the projection, and Hill responded that he was very sure. However, Hill had prepared an updated projects cost analysis at Reid's request that included several costs that were omitted or not accurately reported in Hill's initial projection, and Dommert and Clark were not shown this memorandum. Dommert did see Brown's appraisal, which indicated that the project would not be profitable; however, Dommert disregarded Brown's estimates based on Hill's explanation that appraisers give very conservative estimates to avoid being sued.

Before committing to the project, Dommert and Clark met with Hill and Geresy again, and also brought a third potential investor, Kanaan, on the basis of Hill's projected net profit. Geresy, Hill, Clark, and Kanaan all received Brown's appraisal as well as Hill's. Ultimately, Dommert, Clark, and Kanaan agreed to be responsible for the financing, and also agreed take twenty-percent ownership of the project. Initially, defendants were to pay Geresy $150,000 at closing, then $8,000 for each condominium unit as it sold. After the bank refused to finance the property at its $260,000 selling price, however, the agreement was renegotiated so that defendants would only pay $50,000 at closing in May, 1998, with the additional $100,000 coming due on December 31, 1998 and $20,000 for each unit as it sold.

Reid prepared an operating agreement for Emberly Acres, a limited liability partnership, that incorporated the agreed-upon terms and included some changes recommended by defendants' attorney, Jeffrey O'Brien. The funding arrangements were set forth in Article XI, which reads:

> 11.1 Purchase of Land. The Company will enter into a contract for the purchase of real estate for the property described under paragraph 1.3. The purchase price shall be $260,000.00 with $50,000.00 paid at the time of closing and the balance paid at the rate of $20,000.00 on the sale of each condominium unit constructed on the property until the balance of the purchase price is paid in full. However, not less than $150,000.00 will be paid to the Sellers on or before December 31, 1998. All of the Members hereby acknowledge that one of the Members, Steve Geresy, is one of the Sellers of the Property to the Company and all of the Members consent and agree to the purchase as set forth in this Operating Agreement. Each of the Members agree to be personally liable for one-fifth of all of the obligations owed to the Sellers of the Property described under paragraph 1.3 and further agree to execute a Guarantee for the purchase of said Property.
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> 11.2 Financing. Douglas H. Dommert, Azzam S. Kanaan and James L. Clark agree to provide the financing necessary to purchase the property according to the terms set forth in 11.1 above and the financing necessary to construct the condominium improvements on the Property as fully outlined in the Appraisal Report dated February 25, 1998 and prepared by John B. Brown. Such financing will be non-recourse to Charles Hill and Steve Geresy.

The operating agreement was signed by Charles Hill on behalf of Emberly Acres and by each of the five members. In addition to the operating agreement, Reid prepared a sales agreement for the land, a promissory note, and five guarantees as referenced in section 11.1; however, none of the members ever signed these documents. On June 1, 1998, First of America Bank granted Emberly Acres a construction and land development loan in exchange for a mortgage on the property and the unsecured personal guarantees of Dommert, Clark, and Kanaan.

Between June and October, it became clear that the projection of costs on which defendants had relied was inaccurate. According to Dommert, although the estimate in Exhibit V was that each eight-unit building would cost $238,000, by the time the electrical services, furnaces, cabinets, carpeting, appliances, and landscaping were factored in, each building actually cost between $500,000 and $600,000. Furthermore, although Hill projected a total cost of $15,000 to build the road, it actually cost $17,325 to build half the road. Between 1998 and 2000, Dommert and Clark had to advance $345,000 toward the project to pay for cost overages, and Kanaan contributed $74,000.

Moreover, the project was taking longer to complete than had been estimated. According to Dommert, Hill said that the buildings would be ready to occupy within a hundred days of when the prefabricated units arrived at the site, but it actually took about nine months. In October, 1998, Emberly Acres decided to purchase six neighboring acres of land for $40,000 in hopes that expanding the project over cheaper land would help them recover their losses.

In November, 1998, despite other members' objections, Hill decided to have an open house. At this point, the units were only partially finished and the sidewalks had not been laid. As a result, Dommert says many buyers "walked in, took one look and turned around and walked back out," which meant that Emberly Acres "absolutely lost" their "one chance to make a good first impression."

On December 31, 1998, pursuant to the operating agreement, a $100,000 payment for the property came due; however, plaintiffs were not paid. Although the six units eventually sold, they all sold for less than the asking price, and one was sold at a loss. Dommert and Clark had to provide money at closing on at least four of the units because there was not enough equity in the sale to cover the bank loan. Dommert explained that plaintiffs were not paid for the six units because, according to Dommert, Emberly Acres had to give all the money to the bank for the mortgage. According to Dommert, construction stopped after six units had been built by mutual agreement that the project was a "disaster" and could not go forward.

Plaintiffs filed a complaint on September 23, 1999, demanding payment of $100,000 pursuant to the operating agreement, plus costs and attorney fees. On July 28, 2000, plaintiffs amended their complaint to specifically allege a breach of contract against both Emberly Acres and the individual defendants, and to request a judgment of $210,000, which reflects the $260,000 purchase price of the property minus the $50,000 down payment.[1] Defendants filed a two-count counterclaim alleging that Geresy either intentionally misrepresented the project's costs or, alternatively, that there was a mutual mistake regarding the development costs, and requested that the trial court rescind the operating agreement on either basis.

At trial, plaintiffs introduced a document, referred to as Exhibit 1A, that was similar to Exhibit V, the document Hill showed defendants regarding the projected costs and profits; however, Exhibit 1A reflected a projected *gross* profit of $389,500 rather than a *net* profit of $389,500, and stated that the cost to construct eight buildings would be $2,076,600 rather than $1,906,344. In addition to the difference in expected costs and profits, Exhibit 1A contained a construction timeline indicating that the land preparation was to begin in November, 1997, and the first building was to be finished in May, 1998. Exhibit V did not contain a timeline.

Hill testified that what he prepared and gave to defendants was Exhibit 1A, and he claimed that he had never seen Exhibit V until his deposition. Hill explained that the formatting of Exhibit V was different from what his printer would have produced because it was single-spaced rather than double-spaced and had different type, although he acknowledged on cross-examination that the computer software he used was capable of changing the font and spacing. Hill nonetheless maintained that he did not make any changes to Exhibit 1A and did not authorize anyone else to do so. Reid also denied preparing Exhibit V, and testified that the first time he saw it was at his deposition. Geresy, for his part, testified at his deposition that he had never seen Exhibit 1A before and did not know why it had been prepared or who prepared it,

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[1] A second amended complaint added an allegation that the individual defendants violated the Uniform Fraudulent Transfer Act, MCL 566.31 et seq., by executing a mortgage on the property, as well as a request for acceleration and declaratory relief (Second amended complaint, 12/15/00). The trial court decided this issue in defendants' favor (Appendix A, 8), and plaintiffs did not contest this ruling on appeal.

although he admitted at trial that he had seen so many documents that he did not always remember which ones he had seen.

Dommert, however, testified that Hill gave him "Exhibit V and Exhibit V only," and asserted that the parties always used Exhibit V, not Exhibit 1A, during negotiations. Likewise, Clark testified that he received Exhibit V, not Exhibit 1A. John Dalton, the First of America banker who extended credit to Emberly Acres, indicated that he was given Exhibit V as part of the loan application.

After a four-day trial, the trial court refused to impose personal liability on defendants, holding that individual guarantees would have to have been executed to satisfy the statute of frauds. The trial court explained that "nearly universal practice in the commercial world is that corporate officers sign twice, once as an officer and again as an individual," and defendants only signed the operating agreement once. Having noted the apparent discrepancy between sections 11.1 and 11.2 of the operating agreement, the court further held that the operating agreement "lacks sufficient clarity to enforce any personal obligations."

Regarding the counterclaim for fraud and misrepresentation, the trial court stated that the "chief credibility issue in this case" is whether Dommert, Clark, and Kanaan were given the project plan that listed net profits of $389,000 – that is, Exhibit V – or gross profits of $389,500 – that is, Exhibit 1A. The trial court concluded that defendants were given Exhibit V, which defendants then gave the bank to secure financing. The trial court expressly credited Dommert's and Clark's testimony that they received Exhibit V and discredited Hill's testimony that Dommert and Clark received Exhibit 1A. The trial court found that Hill "knew or recklessly set forth understated cost figures and omitted cost figures," and further found that Exhibit 1A was fraudulent.

Based on these findings, the trial court ruled that "there was a fraudulent misrepresentation and willful concealment of facts by means of which persons were induced to enter a contract to invest." Because the trial court found that Hill and Geresy were "partners in a joint venture to raise investment in Emberly Acres," the trial court held that Geresy was bound by Hill's misrepresentations.

Calculating the cost overruns for the road, permits and fees, water, engineering, and utilities at $57,379.65, and adding the omitted costs for legal services, landscaping, advertising, and insurance, which amounted to $64,177.18, the trial court concluded that defendants were entitled to a $121,556.83 setoff against their $210,100 obligation under the operating agreement. The trial court rejected the defense that defendants failed to exercise due diligence because there were no "circumstances tending to excite suspicion in the mind of reasonable persons" regarding whether Hill's representations were reliable. Accordingly, the trial court ordered defendant Emberly Acres to pay plaintiffs $88,443.17. This appeal followed.

II. Statute Of Frauds

Plaintiffs argue that the trial court erred in holding that defendants were not individually liable because the financing provisions of the operating agreement were void under the statute of frauds. However, we believe the trial court reached the correct result. We review de novo questions concerning the interpretation and application of the statute of frauds, *Zander v Ogihara*

Corp, 213 Mich App 438, 441; 540 NW2d 702 (1995), citing *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991), as well as questions concerning the proper interpretation of contracts. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

Michigan's statute of frauds provides that "an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise" in cases involving "[a] special promise to answer for the debt, default, or misdoings of another person." MCL 566.132(1)(b). In this case, paragraph 11.1 of the operating agreement provided that "[e]ach of the Members agree to be personally liable for one-fifth of all of the obligations owed to the Sellers of the Property described under paragraph 1.3 and further agree to execute a Guarantee for the purchase of said Property." Paragraph 11.2 stated that Dommert, Kanaan, and Clark "agree to provide the financing necessary to purchase the property according to the terms set forth in 11.1 above and the financing necessary to construct the condominium improvements on the Property . . . Such financing will be non-recourse to Charles Hill and Steve Geresy."

The operating agreement was signed by Charles Hill on behalf of Emberly Acres, then was signed by each member of Emberly Acres under the heading "members." The trial court held that the individual defendants could not be held liable because they had signed the operating agreement only once, rather than twice, which indicated that they had signed only as members and not as individuals. We find this rationale persuasive. As a general rule, "an individual stockholder or officer is not liable for his corporation's engagements unless he signs individually, and where individual responsibility is demanded the nearly universal practice is that the officer signs twice – once as an officer and again as an individual." *Salzman Sign Co v Beck*, 176 NE2d 74, 76 (NY 1961); see also 18B Am Jur 2d, Corporations, § 1838, p 690. In this case, each of the signatories signed the operating agreement only once, and the document makes clear that they did so in their capacities as members of Emberly Acres, not as individuals.

We are further convinced that imposing individual liability is not appropriate in this case because of the language in paragraph 11.1 specifying that the parties would sign separate guarantees. Although these guarantees were prepared, they were never signed. Because this evidence indicates that the parties did not intend to assume personal liability, the trial court did not err in imposing liability only on the corporate entity.

III. Geresy's Liability For Hill's Misrepresentations

Plaintiffs argue that the trial court erred in determining that Geresy was Hill's partner and was therefore liable for his misrepresentations. Whether a partnership exists is a question of fact that we review for clear error. *Miller v City Bank & Trust Co*, 82 Mich App 120, 123; 266 NW2d 687 (1978).

By statute, partners are jointly and severally liable for wrongful acts committed by a co-partner. MCL 449.15(a); MCL 449.13. The uniform partnership act defines a partnership as "an association of 2 or more persons . . . to carry on as co-owners a business for profit." MCL 449.6. As our Supreme Court noted in *Byker v Mannes*, 465 Mich 637; 641 NW2d 210 (2002), this definition "is devoid of any requirement that the individuals have the subjective intent to create a partnership." *Id*. at 646. Therefore, "if the parties associate themselves to 'carry on' as co-owners a business for profit, they will be deemed to have formed a partnership relationship regardless of their subjective intent to form such a legal relationship." *Id*. In other words, "the statute does not require partners to be aware of their status as 'partners' in order to have a legal partnership." *Id*.

Plaintiffs assert that there is no case law to support a court's imposition of a partnership or joint venture if both parties deny its existence. This assertion overlooks the *Byker* decision, in which the Court quoted approvingly from *Beecher v Bush*, 45 Mich 188; 7 NW 785 (1881), as follows: "It is . . . possible for parties to intend no partnership and yet to form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, *or that they even expressly declare that they are not to be partners*." *Byker, supra* at 649, quoting *Beecher, supra* at 193-194 (emphasis added).

Hill testified that while Geresy may never formally have asked him to be a partner, it was Hill's understanding that Geresy wanted Hill to "help him . . . do whatever it was that he decided to do with" the property in exchange for "payment [that] was going to come at the end of whatever we did." Before defendants joined the project, Hill was involved in hiring an architect to design the buildings, putting together the site plan, seeking township approval for the project, and ordering the first building. This evidence indicates that Hill and Geresy were jointly developing the project for profit.

There was also subjective evidence to support the finding that Geresy and Hill were partners. Dommert testified that Geresy asked him in early 1998 if he would be willing to meet with him and "his partner Charles Hill" to look over a possible investment in Emberly Acres. Brown's appraisal, which was dated March 19, 1998, refers to Hill as "[o]ne of the partners in the development of the subject property." Also, while Reid denied that Hill and Geresy were partners, the condominium disclosure statement that Reid prepared states that Emberly Acres "was formed by Steve Geresy and Charles Hill," although it is unclear when this document was prepared.

In light of this evidence, we are not left with a definite and firm conviction that the trial court erred in finding that Geresy and Hill intended to carry on the Emberly Acres project for their joint profit at the time Hill was seeking investors. *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999); *Miller*, *supra* at 123. Because the trial court did not clearly err in making this determination, we decline to reverse it.

IV. Determining The Setoff For Fraud

Plaintiffs argue that the trial court erred in granting defendants a setoff based on plaintiffs' fraud. Whether fraud was committed is a question of fact, *Traxler v Ford Motor Co*, 227 Mich App 276; 576 NW2d 398 (1998), and therefore we review the trial court's determination for clear error. MCR 2.613(C); *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 171; 530 NW2d 772 (1995).

To prevail on their fraud counterclaim, defendants had to show that (1) plaintiffs made a material representation that was false; (2) plaintiffs either knew that it was false when they made it or that they made it recklessly, without knowing whether it was true; (3) plaintiffs made the representation with the intention that defendants would act upon it; (4) defendants acted in reliance on it; and (5) defendants suffered damage. *M&D, Inc v W B McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998), citing *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). Defendants were required to prove these elements by clear and convincing evidence, *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 457; 559 NW2d 379 (1996), but circumstantial evidence may suffice to meet this burden. *Id*. at 458. Plaintiffs contest only the first two elements, denying that Hill's misrepresentations were material and that Hill knew the representations were false when he made them.

The trial court found that Hill gave defendants Exhibit V, which indicated an expected $389,000 net profit, not Exhibit 1A, which indicated an expected $389,500 gross profit. The trial court further found that "Hill knew or recklessly set forth understated cost figures and omitted cost figures," and that defendants relied on these figures. Of those cost items that Hill disclosed – road, permits and fees, water, engineering, and electric and gas – the trial court found, apparently in reliance on defendants' Exhibit W, that Hill had underestimated the actual costs by $57,379.65. Of those cost items that Hill did not disclose – legal, landscaping, advertising, and insurance – the trial court found that the omitted costs totaled $64,177.18. Accordingly, the trial court ruled that defendant Emberly Acres was entitled to a setoff of $121,556.83.

Plaintiffs first argue that Hill's representation, to the extent it was inaccurate, was not a material misrepresentation in relation to the project's overall costs, and therefore cannot constitute fraud. However, in maintaining that the variance between Hill's appraisal and the "actual" cost is only 4.04 percent of the total, plaintiffs do not appear to account for the fact that the project is only partially finished, and more costs – and potentially more unexpected costs and cost overruns – will be incurred.

It is true that some of the costs incurred during the initial phase of the project would not need to be duplicated if the project were completed, such as the roads, utilities, and permitting costs. However, plaintiffs' calculation of the percentage of overruns in relation to the total project cost fails to account for the fact that some of these items were incomplete. For example, Hill himself acknowledged that the cost to finish the road would be between $20,000 and $25,000 beyond the $17,325 that had already been spent. Also, Dommert testified that while the electric, gas, and water were installed, there would still be additional costs involved in hooking them up to the individual homes as they were being built.

Stated another way, Hill told defendants that the total costs for the nine items that the trial court considered in reaching its setoff amount would be $91,000, when those same items actually cost $212,556.83. Even Geresy testified that if he had known that Hill's projections were incorrect, he would not have entered into the agreement, and did not think that defendants would have either. "A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Triple E Produce Co, supra* at 171. Applying this standard, we are unconvinced that the trial court clearly erred in holding that Hill's misrepresentation regarding expected costs was material.

Plaintiffs next argue that Hill could not have made the representations with knowledge of their falsity because none of the cost overruns had been incurred when Hill prepared his projections. Plaintiffs acknowledge that they had information that the engineering costs would exceed Hill's original estimate, but maintain they had no knowledge of cost overruns regarding the road, permits and fees, and utilities. We defer to the trial court's ability to judge the credibility of witnesses. See *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003).

As a general rule, "fraud cannot be predicated on opinion statements," *Windham v Morris*, 370 Mich 188, 193; 121 NW2d 479 (1963), which Hill's projections arguably were. However, an exception to this rule exists for cases in which the opinion expressed is based on a concealment or misstatement of facts. See *Van Looyengoed v Allencrest Gardens Corp*, 265 Mich 182, 184; 251 NW 317 (1933). Under this exception, "fraud can be consummated by suppression of, concealment of or failure to disclose a material fact which a party to a contract has a good faith obligation to disclose." *Borman's, Inc v Lake State Development Co*, 60 Mich App 175, 185-186; 230 NW2d 363 (1975), citing *Sullivan v Ulrich*, 326 Mich 218, 228; 40 NW2d 126 (1949). Furthermore, even if Hill did not know his estimates were false when made, he may still be liable for fraud if he made the estimates with reckless disregard for their accuracy. See *M&D, Inc*, *supra* at 27.

With respect to the road, Hill projected a total cost of $15,000. However, according to Dommert, it cost Emberly Acres $17,325 to build half the road, and this did not include driveways or parking lots. As a result, Dommert estimated that the actual road cost would be closer to $40,000. Hill acknowledged at trial that the cost of finishing the road would likely be between $20,000 and $25,000. Hill testified that he got a written bid for road construction, but that bid was never admitted into evidence, and Hill did not testify what the bid amount was. The bank's June 1, 1998 appraisal estimated the road costs as $38,000, which indicates that the overage in road cost compared to Hill's initial estimate was not due to something unforeseeable. Accordingly, we conclude that the trial court did not clearly err in finding that Hill knew or recklessly disregarded the fact that the road would likely cost more than $15,000.

With respect to the cost of utilities, permits, and fees, Dommert testified that Hill had "purchased the permits" and paid for thousands of dollars in related costs "before this project even started." Hill then asked Dommert to reimburse him for $66,626 for these items, despite not having included them in his projection of costs. Because this testimony indicated that Hill had already incurred these cost overruns, the trial court did not clearly err in finding that Hill committed fraud by omitting them from his projections.

Plaintiffs also challenge two of the omitted costs on the basis that they were not incurred until well after Hill had prepared his projections. Plaintiffs assert that the decision to advertise was made after the first units were completed and the realtors were unable to sell them; however, the claim that no advertising costs were anticipated is contradicted by the construction timeline in Exhibit 1A, which indicates that plaintiffs planned to begin advertising even before the units were completed. Accordingly, plaintiffs' claim that they anticipated no advertising costs is unconvincing.

Likewise, plaintiffs' claim that certain landscaping costs were unanticipated has no merit. Hill claimed at trial that his landscaping plan only included covering the grounds with topsoil and grass seed, but the members decided at a meeting to landscape more extensively and install a sprinkler system, which ultimately cost $27,382.90. However, Hill's claim is directly contradicted by Brown's appraisal, which stated, "The developers indicate that . . . [a]ny portion of the unimproved site will be landscaped, including foundation shrubs and grass . . . The building perimeters will be serviced by underground sprinkling systems." The appraisal was conducted on March 19, 1998, well before the operating agreement was signed. Therefore, the trial court did not clearly err in finding that Hill's projected landscaping costs were fraudulent.

In sum, we conclude that the trial court did not clearly err in finding that Hill knowingly or recklessly made false, material representations regarding the expected project costs, and that the trial court properly granted defendants a setoff on that basis.

V. Applying The Setoff To The Saiths

Plaintiffs argue that the trial court erred in offsetting the Saiths' claim for damages because there was no allegation or evidence that the Saiths committed any wrongdoing or that the Saiths and Geresy had an agency relationship. We agree. The trial court's decision to grant a setoff is a matter of equity, and we therefore review it de novo. See *Walker v Farmers Ins Exchange*, 226 Mich App 75, 79; 572 NW2d 17 (1997).

The trial court imposed a setoff on the judgment against defendants as an equitable remedy for Hill's fraud; however, the court made no finding that any fraud was attributable to the Saiths. Plaintiffs argue that the Saiths are therefore entitled to half of the $210,000 that defendants owe under the operating agreement. Defendants respond that Hill's fraud is also attributable, through Geresy, to the Saiths, because they were Geresy's partners. However, defendants did not allege at trial that the Saiths either committed fraud or had a partnership or agency relationship with Geresy, although they attempt to do so on appeal.

The fact that the Saiths and Geresy co-owned the property does not itself establish a partnership, see MCL 449.7(2), and the trial court made no findings regarding the Saiths' relationship to Geresy. Even if a relationship had been proved between the Saiths and Geresy, there was no suggestion, either at trial or on appeal, that the Saiths had a partnership or agency relationship with Hill, who was found to have committed the underlying fraud. Accordingly, there appears to be no justification for applying the setoff to the Saiths.

When fashioning an equitable remedy, a court "'looks at the whole situation and grants or withholds relief as good conscience dictates.'" *McFerren v B & B Investment Group*, 253 Mich App 517, 522; 655 NW2d 779 (2002), quoting *Michigan National Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992) (internal citation omitted). In this case, when deciding to grant a setoff, the trial court failed to take into account the fact that the Saiths' portion of the judgment would be reduced despite the fact that it attributed no fraud to them. Accordingly, we conclude that the judgment should be modified to reflect the fact that the Saiths are entitled to their full fifty-percent share of the amount defendants owed plaintiffs, which is $105,000. Because the setoff amount exceeded Geresy's share, the judgment should reflect that defendants owe Geresy nothing.

VI. Conclusion

We affirm the trial court's ruling that imposing individual liability for defendants was unsupported because the operating agreement did not satisfy the statute of frauds. We also affirm the trial court's findings that Hill committed fraud, that Hill was Geresy's partner, and that a setoff was warranted. However, we conclude that the trial court erred in applying the setoff to the Saiths, to whom no fraud was attributable. On remand, the trial court should modify the judgment to indicate that defendant Emberly Acres owes the Saiths $105,000, and owes Geresy nothing.[2]

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

/s/ Patrick M. Meter
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello

[2] We decline to address plaintiffs' argument that the Saiths were third-party beneficiaries of the operating agreement. Defendants did not argue at trial that the Saiths could not sue to enforce the operating agreement, either in their pleadings or by motion, and the trial court did not decide the issue. Accordingly, this issue was not preserved for review. See MCR 2.111(F)(2); *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).