STATE OF MICHIGAN

COURT OF APPEALS

BERT ELGERSMA,

Plaintiff-Appellant,

v

RE/MAX OF GRAND RAPIDS, INC, and JOHN POSTMA,

Defendants-Appellees.

UNPUBLISHED
February 11, 2010

No. 287115
Kent Circuit Court
LC No. 05-010539-CK

Before: Talbot, P.J., and Whitbeck and Owens, JJ.

PER CURIAM.

Following trial, a jury found that defendant John Postma, a real estate broker for defendant Re/Max of Grand Rapids, breached his fiduciary duty as a real estate broker during the sale of plaintiff Bert Elgersma's home in Byron Center, Michigan. The jury awarded Elgersma $25,000 in damages, which included $5,000 in interest. Elgersma moved for a new trial and/or additur, which the trial court denied. Elgersma appeals as of right. We affirm.

I. Basic Facts And Procedural History

In March 2002, Postma listed Elgersma's home on the real estate market. It had already been on the market, off and on, for approximately four years. Postma introduced Elgersma to Tom Smith, part owner of Trade Partners, Inc., a life settlement company. A life settlement company is a company that purchases life insurance polices from persons with shorter life expectances (e.g., the elderly or terminally ill). Such a company buys the policy before the insured dies for a price below the expected death benefits of the policy and subsequently pays the rest of the premiums on the policy for the life of the insured. The company, which then owns the future death benefits, can divide up those benefits into parts for sale to investors. Once the insured dies, as long as the premiums have been paid, the life settlement company receives the benefits from the life insurance company, which are then distributed to the investors.[1]

Smith eventually offered to purchase the home in exchange for a viatical. A viatical is a subset of a life settlement, but it typically refers to a policy purchased on a terminally ill person,

[1] 29 Appleman on Insurance (2d ed), § 178.02, pp 101-111.

whereas a life settlement would refer to an elderly person. Because viaticals are essentially life insurance policies, they do not pay out until the insured dies. Therefore, a person who invests in a viatical cannot know precisely when he or she will receive under the policy.

Elgersma rejected Smith's first offer, but later accepted a second offer by Smith for $709,000. The parties signed a purchase agreement and closed following a meeting between Elgersma, Postma, and Smith in April 2002. According to the terms of the contract, Elgersma received $70,900 at closing and would receive the remaining $638,100 to be paid as a viatical when the insured on whose policy it was based passed away. Additionally, Elgersma was to receive ten percent each year for three years (the projected life expectancy of the insured), bringing the total sale to $829,530.

Testimony conflicts greatly regarding why Elgersma considered selling his home in exchange for the viatical payout, and regarding what transpired between the first and second offer. Elgersma testified that he rejected the first offer, at least in part, because he did not have the time to complete the due diligence he felt was necessary to assure him that the investment was safe. He therefore told Postma that he would wait and consider the offer again when he had more time. According to Elgersma, Postma told him that he had already done the due diligence: he had completed prior transactions with Smith, and, according to Postma's attorneys, and past investors' attorneys and CPAs, viaticals were a reliable investment. Elgersma further testified that Postma told him there were accounts set up that automatically paid the premiums to Trade Partners' life insurance polices, and therefore there was no risk in the policy lapsing due to non-payment. Elgersma also testified that Postma assured him that viaticals were so safe that he was in the process of investing $500,000 of his own money into Trade Partners. Postma further allegedly told Elgersma that Trade Partners predicted the payout dates of its policies with 80 percent accuracy. Elgersma testified that based on Postma's multiple assurances, he did not personally investigate or research viaticals or Trade Partners' mechanism to pay premiums in order to assess risk.

In contrast, Postma testified that Elgersma never said he did not have time to complete his own due diligence. According to Postma, he told Elgersma that he had considered investing $500,000 of his own money in Trade Partners, but that ultimately he did not. Postma admitted introducing Elgersma to Smith, but he denied explaining how viaticals actually work. He also denied completing any due diligence into the viability and reliability of viaticals above or beyond what was required of him by law as a real estate broker. Postma denied that Elgersma asked him to perform the due diligence, and he denied that Elgersma asked him about the risk of investing in viaticals. Further, Postma testified that he did not tell Elgersma that he had retained an attorney or CPA to investigate or research viaticals. Postma denied that he inquired into any payment mechanism to guarantee the policy premiums. He also testified that in his two previous sales involving Trade Partners and viaticals, the sellers each hired their own accountant or attorney who completed the due diligence. And, according to Postma, Elgersma said that he did not need an attorney or accountant.

Smith stated in his deposition that the purpose of the April 2002 meeting with Elgersma and Postma was so that Elgersma could ask technical questions about viaticals that Postma could not answer, and to select a policy. Smith stated that Elgersma asked a lot of questions at the meeting, including asking about the number of policies Trade Partners had previously purchased and inquiring as to the number of transactions Trade Partners had completed. Smith did not

recall Postma making any representations to Elgersma regarding the status of Trade Partners. Smith stated the purpose of the meeting was to inform Elgersma of the mechanics of the viaticals and explain how the premiums were going to be paid. Smith believed that Elgersma's questions amounted to him conducting his own due diligence into the investment. Smith further stated that he had no knowledge of Postma performing any investigation or audits of Trade Partners investments.

The contract went as planned for approximately one year, until February 2003, when Elgersma received a letter from the Office of Financial and Insurance Services of Michigan[2] informing him that Trade Partners was under investigation for its securities activities. In April 2003, Trade Partners went into receivership for, in part, fraudulent activities and failure to fund the escrow accounts that were meant to pay the premiums on its approximately 1,000 life insurance policies. The company's assets were liquidated. As a result, the policies, including Elgersma's, were no longer valid, and for each person with an interest in a life insurance policy at Trade Partners, the receiver paid, on average, roughly 35 percent of the face value of their policy. The receiver informed Elgersma that his viatical was valued at $638,100, but issued him a check for $172,046. Before trial, the receiver testified that Elgersma might still receive an additional five percent, or $31,905.

Due to his significant loss, Elgersma sued defendants on several causes of action. The thrust of the case was that Postma represented that he had performed the necessary due diligence to assure Elgersma that viaticals were a safe investment and that a mechanism was in place to ensure that the premiums would be paid, and Elgersma allegedly relied on those representations. The jury rejected all of Elgersma's claims except for breach of fiduciary duty and awarded him $25,000, as previously indicated. Elgersma moved for a new trial and/or additur, arguing, in part, that because the jury found in his favor on at least one cause of action, and because defendants did not challenge the amount of his damages, the jury necessarily should have given him the remaining funds owed from the value of the viatical. Elgersma now appeals.

II. Motion For New Trial

A. Standard Of Review

Elgersma argues that the trial court abused its discretion in denying his new trial motion because the jury verdict was clearly and grossly inadequate, under MCL 2.611(A)(1)(d), and went against the great weight of the evidence, under MCL 2.611(A)(1)(e), both of which are grounds for a new trial on damages. We review a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion.[3] An abuse of discretion occurs when a court chooses an outcome that is not within the range of principled outcomes.[4]

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[2] Now the Office of Financial and Insurance Registration.

[3] *McManamon v Redford Charter Twp*, 273 Mich App 131, 138; 730 NW2d 757 (2006).

[4] *Id.*

B. Applicable Legal Principles

"A party asserting a claim has the burden of proving its damages with reasonable certainty."[5] "[T]he adequacy of the amount of damages awarded is ordinarily within the province of the jury,"[6] and a jury is free to either accept or reject a plaintiff's testimony regarding damages.[7] A jury verdict is inadequate on its face and must be reversed if the jury ignores uncontroverted damages.[8] But "[t]here is no legal requirement that a jury award damages simply because liability was found. Indeed, before damages can be awarded, they must be proved."[9] "When a party challenges a jury's verdict as against the great weight of the evidence, this Court must give substantial deference to the judgment of the trier of fact."[10] Even if inconsistent, this Court will not set aside the jury verdict "if there is competent evidence to support it[,]"[11] and the facts on the record can provide a logical explanation.[12]

C. Applying The Principles

Here, the record indicates that Elgersma had worked for General Electric for several years in its financial services sales division, where he sold mutual funds, variable annuities, and conducted some financial planning. Elgersma left General Electric in April 2002 and became the majority shareholder of ESI Financial, a financial services and financial planning company. He ran the company and personally held five licenses to sell a variety of investment products, including mutual funds, variable annuities, and some insurance products.

Further, some of the trial testimony indicated that Elgersma, and not Postma, conducted the due diligence before Elgersma purchased his policy. Postma was not an expert in investment products like viaticals, and some of the trial testimony indicated that he did not perform any due diligence into the viability of Elgersma's investment or make any of the alleged representations to Elgersma. Additional testimony indicated that Elgersma asked Smith technical questions about how the premiums of his policy would be paid, and other aspects of Trade Partners during the April 2002 meeting. The jury dismissed all but one of Elgersma's causes of action; thus, it is clear they were not convinced that Postma was to blame for Elgersma's entire loss.

In light of the verdict, and considering the facts in the record, we conclude that the evidence in this case logically supports the conclusion that while Postma breached his fiduciary

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[5] *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995).

[6] *Taylor v Mobley*, 279 Mich App 309, 311; 760 NW2d 234 (2008).

[7] *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 172; 568 NW2d 365 (1997).

[8] *Moore v Spangler*, 401 Mich 360, 372; 258 NW2d 34 (1977).

[9] *Joerger*, 224 Mich App at 173.

[10] *Allard v State Farm Ins Co*, 271 Mich App 394, 406; 722 NW2d 268 (2006).

[11] *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999).

[12] *Allard*, 271 Mich App at 407.

duty as a real estate broker, that breach was not causally related to the entirety of Elgersma's losses. The facts logically suggest that Elgersma's own conduct and the demise of Trade Partners contributed to a substantial portion of the loss. Evidence supported that Elgersma did not solely rely on Postma's representations, and instead made his own educated decision, and, in turn, is in some measure responsible for his own unfortunate loss. The trial court drew a similar conclusion when it denied Elgersma's motion, and we find it did not abuse its discretion. The verdict was not clearly and grossly inadequate on the facts of this case, and we cannot conclude that it was against the great weight of the evidence.

Affirmed.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Donald S. Owens