# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| MICHIGAN FIRST CREDIT UNION,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>December 16, 2010 |
| v | No. 291146<br>Macomb Circuit Court |
| AL LONG FORD, INC.,<br><br>Defendant-Appellant. | LC No. 2006-002548-CK |

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

PER CURIAM.

Defendant Al Long Ford, Inc., appeals as of right from a judgment for plaintiff Michigan First Credit Union, following a jury trial. We affirm.

Plaintiff brought this action for fraud and breach of contract to recover damages for losses it sustained when defendant's customers defaulted on car loans that plaintiff financed. Plaintiff alleged that it approved the loans in reliance on misrepresentations allegedly made by defendant in the borrowers' loan financing applications. The jury determined that defendant committed fraud and breach of contract and awarded damages to plaintiff. The trial court entered a judgment awarding plaintiff damages of $360,776.13, consistent with the jury's verdict, and also statutory interest of $54,673.92, for a total judgment for $415,450.05.[1]

On appeal, defendant first argues that the trial court erred in allowing both the fraud and breach of contract claims to be submitted to the jury. We disagree. We review this issue de novo as a question of law. *Cardinal Mooney High Sch v Mich High Sch Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

[1] The court also directed that plaintiff be permitted to recover reasonable attorney fees and costs as an additional component of contract damages in an amount to be determined. After a later hearing, the trial court awarded plaintiff $11,060.39 in costs, and $230,000 in attorney fees. The award of costs and attorney fees is not at issue in this appeal.

Defendant relies on the rule set forth in *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004). In *Fultz*, our Supreme Court held that a person injured in a parking lot had no cause of action for negligence against the parking lot maintenance contractor because the contractor had no duty to the injured person. *Id*. at 461-462. The Court explained, "a tort action will not lie when based solely on the nonperformance of a contractual duty." *Id*. at 466.

Here, in contrast, plaintiff asserted a fraud claim that required proof distinct from plaintiff's breach of contract claim. A plaintiff may proceed on these alternative theories when the complaint alleges fraud extraneous to the contract. *Huron Tool & Engineering Co v Precision Consulting Serv, Inc*, 209 Mich App 365, 373; 532 NW2d 541 (1995), citing *Pub Serv Enterprise Group, Inc*, 722 F Supp 184, 201 (D NJ, 1989); see also *Gen Motors Corp v Alumi-Bunk, Inc*, 482 Mich 1080; 757 NW2d 859 (2008) (adopting dissenting opinion's reasoning from unpublished opinion per curiam of the Court of Appeals, issued July 24, 2007 [Docket No. 270430]). To establish the breach of contract claim, plaintiff was required to prove the existence of a contract and a breach of one or more of the contractual terms. See *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990). To establish the fraud claim, plaintiff was required to prove that defendant knowingly made a false material representation with the intent that plaintiff rely on it, that plaintiff did in fact rely on the misrepresentation, and that plaintiff incurred damages as a result. *M&D, Inc v McConkey (On Rehearing)*, 231 Mich App 22, 27; 585 NW2d 33 (1998). The requirement of proving that defendant intentionally mislead plaintiff regarding the borrowers' qualifications was separate from the requirement of proving that defendant failed to fulfill its contractual obligations. Accordingly, the trial court properly allowed plaintiff to proceed on both theories.

Defendant next argues that the trial court abused its discretion by refusing to reopen the proofs to allow defendant to introduce evidence that plaintiff lacked the license required by the Motor Vehicle Sales Finance Act, MCL 492.101 *et seq*. Defendant contends the lack of license rendered the contract at issue void. We review the decision on the motion to reopen proofs for abuse of discretion. *Bonner v Ames*, 356 Mich 537, 541; 97 NW2d 87 (1959).

The trial court ruled that proofs should remain closed, reasoning that defendant could readily have learned plaintiff's licensing status before trial. We find no abuse of discretion in this ruling. Although there had been discovery disputes concerning the release of certain information, the record indicates that the licensing information is a public record. Defendant apparently could have accessed the information prior to entering into the contract, or at any time during the litigation. The trial court was within its discretion in refusing to reopen the proofs to present information that had been readily available to defendant.

Defendant next argues that the testimony of Orlando Clements should have been excluded because it was not based on his personal knowledge and because it was procured with improper monetary inducements. We disagree.

MRE 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are

> (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

In this case, Clements testified that he had years of experience in the business, although he denied being an expert. He worked for defendant from February 2003 until January 2004, and was familiar with defendant's policies, practices, and procedures. He estimated that he had reviewed more than 70 loan files for plaintiff's counsel. Clements explained what the documents showed and explained defendant's instructions and practices concerning loan applications.

Clements's opinions were rationally based on his perceptions of the files in conjunction with his work experience and familiarity with defendant's policies and procedures. His opinions were helpful to a clear understanding of the determination of a fact at issue, i.e., whether defendant violated the contractual guarantee of accuracy or committed fraud or misrepresentation in the loan applications. Under MRE 701, Clements was qualified to provide a lay opinion concerning sales other than his own. The trial court properly permitted his testimony.

As defendant argues, an attorney may not offer "an inducement to a witness that is prohibited by law." MRPC 3.4(b). The comment to rule 3.4 states:

> With regard to paragraph (b), it is not improper to pay a witness' expenses or to compensate an expert witness on terms permitted by law. It is, however, improper to pay an occurrence witness any fee for testifying beyond that authorized by law, and it is improper to pay an expert witness a contingent fee.

In this case, Clements was a fact or occurrence witness to some transactions and a lay opinion witness to others. Clements admitted that he was paid $100 an hour (or $1,500 total) to review files and prepare two affidavits, in addition to being provided expenses such as plane fare, lodging, and meals. He was also paid to discuss the files with plaintiff's counsel on the telephone. However, Clements denied being paid for his testimony or for his time to appear at the three-day deposition, or being led to believe that he would be paid to testify.

In accordance with MRPC 3.4(b), Clements was compensated for his expenses, but was not paid to testify. Defendant has failed to provide any binding Michigan authority holding that the payments made for reviewing files were unethical or unlawful. Thus, defendant has not shown that plaintiff's counsel committed an ethics violation that justified excluding Clements's deposition testimony.

Furthermore, "[a]n error in the admission . . . of evidence is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A); see also MRE 103(a). Regardless of the substance of Clements's testimony, defendant's general manager and chief operating officer, Gary Marcicano, admitted to the misinformation alleged by plaintiff, as did nine loan applicants. Considering that testimony, which alone was sufficient to support the jury's verdict, there is no basis for disturbing the judgment. Thus, any error was harmless.

Defendant also argues that the trial court abused its discretion in limiting its presentation of Clements's videotaped cross-examination and in unduly limiting its cross-examination of plaintiff's collections manager at the time of trial, Robert LaPalme. Once again, we disagree.

The scope and duration of cross-examination is within the trial court's sound discretion, and this Court will not reverse the trial court's decision absent a clear showing that the court abused its discretion. *Wischmeyer v Schanz*, 449 Mich 469, 474-475; 536 NW2d 760 (1995).

MRE 611(a) provides, in pertinent part:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

However, questions seeking to elicit evidence of bias, prejudice, or interest, or inconsistent testimony or statements, should not be unduly limited. *Wischmeyer*, 449 Mich at 475. Defendant also relies on MRE 106, which provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Clements's deposition was approximately 14 hours long. However, it involved questioning concerning 72 loans, only 48 of which were at issue at trial. The trial court ordered each party to limit their presentation to three hours. The jury was informed that the deposition had been edited due to its length and to not draw any adverse conclusions from the potentially choppy presentation.

The record does not support defendant's argument that the deposition was presented out of order, or that cross-examination was interspersed with direct examination. Rather, after plaintiff became aware of defendant's selection of cross-examination, plaintiff used some of its time to require that additional portions of the cross-examination and parts of the re-direct examination be included and played for the jury. All the selections were played in their original order, and nothing was interspersed.

Based upon the length of the unedited deposition and the fact that it covered 24 loans that were not at issue at trial, it was not unreasonable for the trial court to direct the parties to pare down their presentation of Clements's deposition. Cf. *Barksdale v Bert's Marketplace*, ___ Mich App ___; ___ NW2d ___ (August 31, 2010) (trial court abused its discretion by imposing an arbitrary time limit unrelated to the issues in the testimony). Moreover, defendant has not provided any basis for concluding that the three-hour limitation imposed by the trial court was unreasonable. In particular, defendant does not identify any portions of the original deposition that it was unable to present, or explain how it was prejudiced by not being able to present certain portions. Thus, defendant has not demonstrated that the three-hour limitation was outside

the range of reasonable and principled outcomes. Accord, *Alpha Capital Mgt, Inc v Rentenbach*, ___ Mich App ___; ___ NW2d ___ (March 23, 2010, slip op p 17).

With respect to damages, defendant questioned LaPalme concerning the particulars of four repossessions, e.g., whether there were negotiations with the debtor, why the car was held for so long before it was sold, why so much was still owed, and similar questions. The court then asked defendant how many other transactions it intended to address, and defendant responded, "Every one. Every single one." Noting that LaPalme was answering counsel's questions from plaintiff's records, the trial court precluded further cross-examination on the self-help issue. The trial court reasoned that, now that defendant had explained some of the loans, the jury could read the rest from the exhibits introduced by the parties (just as well as LaPalme could read them). The court specifically stated that defense counsel could address each loan individually during closing argument, including preparing a demonstrative exhibit summary, as was done by plaintiff. Defendant chose not to do so and chose not to call its damages expert to testify.

Under the circumstances, the trial court made a reasonable and principled decision to limit the cross-examination of LaPalme. The desired information was already in the exhibits that had been introduced at trial and would be available to the jury. Further, defendant was given options to summarize and explain the information to the jury, but chose to forego those options. The trial court did not err in curtailing defendant's cross-examination.

Defendant lastly argues that the trial court erred in denying its motion for judgment notwithstanding the verdict ("JNOV") on the ground that plaintiff's lawsuit was barred by a hold harmless notice provision in plaintiff's contract with the third-party loan processor, Aimbridge Lending Solutions ("Aimbridge"). We disagree.

This Court reviews a trial court's decision on a motion for JNOV de novo. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). We review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Id.* We uphold the trial court's decision unless the evidence and inferences fail to establish plaintiff's claims as a matter of law. *Id*.

Paragraph 4 of plaintiff's contract with Aimbridge contains the following hold harmless clause:

> A. Aimbridge shall act solely as the agent of the Credit Union in processing loans pursuant to the terms of the Operations Manual. . . . If the loan documents are *incomplete or otherwise overtly inconsistent with the documents approved* by Credit Union, Credit Union *must* notify Aimbridge of such irregularity within fifteen (15) business days after funding of the loan represented by such loan documents. If Credit Union shall fail to so notify Aimbridge of any such overt defects, Credit Union shall forever be deemed to have waived all such overt defects. . . . [Emphasis added.]

Plaintiff's agreement with Aimbridge also contains a clause requiring that disputes be submitted to non-binding mediation, and if that proves unsuccessful, to binding arbitration. *Id*. at ¶ 15.

However, in ¶ 5(f) of defendant's contract with Aimbridge, defendant warrants to Aimbridge, as well as participating credit unions, that

> [a]ll documents delivered by Dealer are true and correct, the cash down payment and/or trade-in allowance and the total purchase price and the portion thereof financed is as stated in such documents and, to the knowledge of Dealer, no portion of the cash down-payment was borrowed by the customer.

The contract further provides that, "notwithstanding any other provisions of this Agreement," a breach of that warranty specifically makes defendant liable for damages and attorney fees to Aimbridge "and participating credit unions." *Id*. In addition, the contract provides that, upon written demand by Aimbridge, defendant would re-purchase the loan from the credit union and acquire the credit union's interest in the collateral. *Id*.

We decline defendant's invitation to decide as a matter of law that the alleged "inaccuracies" in the loan applications involved in this case were overt inconsistencies (and therefore barred by the notice provision). Rather, the character of the so-called inaccuracies was one of the central factual issues in this case. Whether to characterize them as fraud, misrepresentation, overt inconsistencies, or violations of the warranty provision was for the jury to decide.

The trial court did not err in denying defendant's motion for JNOV with respect to the hold harmless clause.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Peter D. O'Connell