STATE OF MICHIGAN

COURT OF APPEALS

JACOB TEWEL,

Plaintiff-Appellant,

v

DOROTHY STOLL, JOSEPH R. STOLL, ALEXIS B. STOLL, AUSTIN H. STOLL, SPENCER N. STOLL, CHERYL N. STOLL, and LINDSAY S. STOLL,

Defendants-Appellees.

UNPUBLISHED
December 10, 2020

No. 352730
Oakland Circuit Court
LC No. 2019-173135-CZ

Before: MURRAY, C.J., and K. F. KELLY and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the final order of the trial court finding the parties' settlement agreement valid, based on a previous order denying plaintiff's motion to set aside the settlement agreement or for an evidentiary hearing, in this estate-related dispute. Plaintiff argues that the trial court abused its discretion when it refused to set aside the settlement agreement because it was entered into based on fraudulent or innocent misrepresentation, and the trial court should have conducted an evidentiary hearing on these issues. We affirm.

I. FACTUAL BACKGROUND

This case arises from disputes among siblings as to the estates of their late mother and brother. Plaintiff and defendant Dorothy Stoll are siblings. They have another sister, Fay Vincent, and a deceased brother, Philip Tewel. Defendants Joseph R. Stoll, Alexis B. Stoll, Austin H. Stoll, Spencer N. Stoll, Cheryl N. Stoll, and Lindsay S. Stoll ("the Stoll grandchildren") are Dorothy's children. Defendants live in Los Angeles, California.

Zlata Tewel was the mother of plaintiff, Dorothy, Fay, and Philip, and owned property at 24221 Pierce Street, in Southfield. On August 15, 1990, Zlata quitclaimed the Southfield property to herself, plaintiff, and Dorothy as "joint tenants with right of survivorship and not as tenants in common." Zlata became ill, and moved to Los Angeles in 2009, to live with Dorothy for the last few years of her life. Meanwhile, plaintiff lived at the Southfield property. On December 4, 2011,

Zlata quitclaimed the Southfield property to the Stoll grandchildren. Zlata died on September 11, 2012. When plaintiff tried to sell the Southfield property, he learned of the 2011 quitclaim deed to the Stoll grandchildren, which led to the filing of the complaint. Philip died shortly after Zlata in 2012, and left one-third of his estate to each of his three siblings.

II. PROCEDURAL HISTORY

Plaintiff originally filed a two-count complaint against defendants seeking to quiet title to and partition Zlata's Southfield property. Defendants filed an answer to the complaint and counterclaims, alleging that plaintiff committed fraud, embezzlement, conversion, and breach of fiduciary duties in relation to both Zlata's and Philip's estates, as well as a motion for summary disposition under MCR 2.116(C)(8) and (10) of plaintiff's quiet title and partition claims.

The court then entered a stipulated order to allow plaintiff to file an amended complaint, which plaintiff did. Plaintiff asserted in the amended complaint that Philip owned a company called Worldwide Kosher Caterers (WKC), and when plaintiff filed the inventory for Philip's estate as the personal representative, Dorothy refused to allow WKC to be probated because she claimed an ownership interest in the company. But plaintiff alleged that after Philip died in 2012, Dorothy changed all of WKC's officers without authority, and continues to operate it as if it belongs to her, taking all of WKC's assets. Thus, plaintiff alleged the following counts in relation to WKC: silent fraud, intentional misrepresentation, statutory conversion, common law conversion, and unjust enrichment, and he sought an accounting of WKC, a declaration of interests, and exemplary damages. Plaintiff repeated his claims of quiet title and partition in relation to the Southfield property as well.

In lieu of ruling on defendants' motion for summary disposition, the trial court ordered the parties to mediation with mediator Martin Weisman; however, the court later granted defendants' motion, dismissing plaintiff's claims for quiet title and partition.

The parties attended mediation on September 26, 2019, and stayed in separate conference rooms the entire time. By way of the mediator, Dorothy provided plaintiff with a signed, notarized statement by the WKC accountant, David Lazarus, which stated:

> I have prepared all of the tax returns for the corporation. The corporation has never been a profitable corporation. [WKC] has never had net revenues of anywhere near 2.5 million dollars per year. [WKC] made no profit for the year[s] 2008-2012.

The statement is dated September 20, 2019, at the top, and the notary block is dated September 23, 2019.[1]

At the end of mediation, the parties entered a handwritten settlement agreement. It provided that plaintiff would transfer to Dorothy three properties free and clear of any and all liens

[1] We note that Lazarus's signature is not between the "Respectfully yours," and his printed name at the bottom of the statement, but rather, written on an angle and partially on top of the block of text.

by December 31, 2019: (1) the Southfield property, (2) a property on 13 Mile, and (3) a property in Sanilac. Plaintiff was also to pay Dorothy $200,000, and upon payment, the parties would release all claims, and the cases would be dismissed. Dorothy agreed that she and her attorney would destroy any of plaintiff's personal financial documents in their possession, and the pending lawsuits between plaintiff and Fay would be dismissed as well.

On October 9, 2019, plaintiff filed a motion to set aside the settlement agreement and request for an evidentiary hearing, arguing that Dorothy made fraudulent misrepresentations upon which plaintiff relied to enter the settlement agreement, so it should be declared void and set aside. Plaintiff asserted that Dorothy misrepresented Lazarus's competency because before he signed the statement, he was appointed a guardian, and therefore could not comprehend the statement. Additionally, Lazarus stated that he prepared WKC tax returns, but WKC did not file federal tax returns for the years stated.[2] Dorothy would know this as the owner of the company. Thus, the elements for fraudulent misrepresentation, or at the very least, innocent misrepresentation, were met. Should Dorothy or Fay dispute these factual allegations, plaintiff requested an evidentiary hearing.

The trial court held a hearing on plaintiff's motion to set aside the settlement agreement on October 16, 2019. The court asked plaintiff's attorney what documents were given to the mediator, and he responded that a profit and loss statement attached as Exhibit B to defendants' answer to plaintiff's motion to set aside was also attached to defendants' mediation statement, which was provided to the mediator. The court noted that defendants' attorney stated in defendants' response to the motion that bank records were provided to the mediator, but were too voluminous to be submitted to the court, and defendants' attorney confirmed. Defendants' attorney brought the documents to the hearing, and the court asked plaintiff's attorney if he recalled seeing a stack "like that" at mediation. Plaintiff's attorney clarified that they were in separate rooms during mediation, but defendants' attorney stated that he left the documents with the mediator, and gave the mediator permission to show the documents to plaintiff's attorney.

Defendants' attorney stated that he was not aware that Lazarus was under guardianship when he signed the document, and did not think it mattered because plaintiff's claim of fraud related to the content of Lazarus's letter, and there was no evidence that the company was profitable. Plaintiff's attorney argued that the misrepresentation was made regarding the competency of the statement, and plaintiff refuted the statement with the Internal Revenue Service (IRS) account transcripts indicating no tax returns were filed for WKC. Plaintiff's attorney stated that he had a video of plaintiff visiting Lazarus the day after mediation, demonstrating that Lazarus was not competent, and that the probate court handling his guardianship matter did not think that

[2] Plaintiff relies on Internal Revenue Service (IRS) account transcripts that he obtained from the IRS office in West Palm Beach, Florida, to make this assertion, which indicate for tax periods 2008 through 2013, "Requested Date Not Found."

Lazarus should be signing documents. The court noted that this information was not in the motion, and took the matter under advisement.[3]

On October 18, 2019, the trial court entered an opinion and order denying plaintiff's motion to set aside the settlement agreement. The court reviewed the video of Lazarus, but determined that his competency was irrelevant because even if he were incompetent, the court could not see how plaintiff could reasonably rely on only Lazarus's statement to conclude that WKC was not profitable when plaintiff had access at mediation to bank records and the profit and loss statement. The court found that plaintiff could have determined whether the business was profitable at mediation, and cannot claim to have been defrauded when he had information available that he chose to ignore. Moreover, plaintiff presented no evidence that the content of the letter was false or fraudulent; he only argued that Lazarus was not competent when he signed it. Even if Lazarus were incompetent, plaintiff presented no evidence to suggest that WKC was profitable, or that the letter was a false statement. Therefore, the motion was denied.

Plaintiff filed a motion for reconsideration of the trial court's October 18, 2019 order, which the trial court denied. Plaintiff filed a claim of appeal of the October 18, 2019 order on November 27, 2019, which this Court dismissed for lack of jurisdiction because the October 18, 2019 order was not a final order because it did not dispose of all pending claims. *Tewel v Stoll*, unpublished order of the Court of Appeals, entered January 21, 2020 (Docket No. 351673). On January 27, 2017, the trial court entered the final order, based on the October 18, 2019 opinion and order, finding the settlement agreement valid, and ordering the parties to perform their respective obligations. Plaintiff timely filed a claim of appeal of the final order on February 18, 2020.

III. FRAUDULENT AND INNOCENT MISREPRESENTATION

Plaintiff first argues that the trial court abused its discretion when it denied plaintiff's motion to set aside the settlement agreement because it was entered into based on fraudulent, or at the very least, innocent misrepresentations.

This Court reviews a trial court's decision whether to set aside a settlement agreement for an abuse of discretion. *Groulx v Carlson*, 176 Mich App 484, 493; 440 NW2d 644 (1989). "An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes." *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). Additionally, settlement agreements are subject to the laws of contract formation and interpretation. *Mich Mut Ins Co v Indiana Ins Co*, 247 Mich App 480, 484-485; 637 NW2d 232 (2001). "The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

"An agreement to settle a pending lawsuit is a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts." *Id*. (quotation marks and citation omitted). A valid contract requires an offer, acceptance, consideration, and mutual agreement to all of the contract's essential terms. *Id*. at 452-453. "As a general rule, settlement

[3] A proof of service filed in the trial court indicates that the videos of Lazarus were submitted to the trial court the day after this hearing, October 17, 2019. We have reviewed these videos.

agreements are final and cannot be modified." *Clark v Al-Amin*, 309 Mich App 387, 395; 872 NW2d 730 (2015) (citation and quotation marks omitted). "This is because settlements are favored by the law, and therefore will not be set aside, except for fraud, mutual mistake, or duress." *Id*.

To establish a claim of fraudulent misrepresentation, the plaintiff must establish the following elements:

> (1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) the defendant made it with the intention that the plaintiff should act upon it; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff thereby suffered injury. [*Roberts v Saffell*, 280 Mich App 397, 403; 760 NW2d 715 (2008), aff'd 483 Mich 1089 (2009).]

"Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery." *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012) (quotation marks and citations omitted). As a general rule, "an action for fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact. Future promises are contractual and do not constitute fraud." *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).

In *Hord v Environmental Research Institute of Mich*, 463 Mich 399, 400; 617 NW2d 543 (2000), the plaintiff filed suit against the defendant company after the plaintiff accepted a job offer, and was laid off one year later, "alleging that the company had misrepresented its financial health and that [the plaintiff] would not have accepted the position if he had known the actual situation." At his job interview in September or October 1992, a representative of the defendant provided the plaintiff with informational material, including an operating summary with financial data for fiscal year 1991. *Id*. at 401. The Michigan Supreme Court determined that the plaintiff failed to establish a claim of fraudulent misrepresentation:

> There is no claim whatsoever that the financial statement covering the fiscal year ending in 1991 was in any way false or misleading. The plaintiff says he inferred from it that [the defendant company's] current financial condition was consistent with that statement. However, the statement itself is not a representation to that effect. Thus, the claim of fraudulent misrepresentation must fail because [the defendant company] did not make any false statement. [*Id*. at 410.]

This holds true because "[f]raudulent misrepresentation, of course, requires a *false representation* by the defendant. A plaintiff's subjective misunderstanding of information that is not objectively false or misleading cannot mean that a defendant has committed the tort of fraudulent misrepresentation." *Id*. at 411.

"A claim of innocent misrepresentation is shown if a party to a contract detrimentally relies on a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation." *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 688; 599 NW2d 546 (1999).

> The innocent misrepresentation rule represents a species of fraudulent misrepresentation but has, as its distinguished characteristics, the elimination of the need to prove a *fraudulent purpose* or an intent on the part of the defendant that the misrepresentation be acted upon by the plaintiff, and has, as added elements, the necessity that it be shown that an unintendedly false representation was made in connection with the making of a contract and that the injury suffered as a consequence of the misrepresentation inure to the benefit of the party making the misrepresentation. Thus, the party alleging innocent misrepresentation is not required to prove that the party making the misrepresentation intended to deceive or that the other party knew the representation was false. [*M&D, Inc v WB McConkey*, 231 Mich App 22, 27-28; 585 NW2d 33 (1998) (citations omitted).]

Plaintiff asserts that Dorothy fraudulently or innocently misrepresented two material facts when she tendered Lazarus's statement to plaintiff: (1) that Lazarus based his personal knowledge about WKC's profitability on the company's tax returns for 2008 to 2012, and (2) that Lazarus was mentally competent when he signed the statement.

Lazarus's statement provided: "I have prepared all of the tax returns for the corporation. The corporation has never been a profitable corporation. [WKC] has never had net revenues of anywhere near 2.5 million dollars per year. [WKC] made no profit for the year[s] 2008-2012." Plaintiff asserts that Lazarus's statement is false because the IRS account transcripts indicate that no tax returns were filed for the years 2008 to 2012, but this evidence does not establish that Lazarus's statement was false. Lazarus stated that he "prepared" the tax returns, not that he "filed" the tax returns. Moreover, the IRS account transcripts indicating that no tax returns were filed does not render the content of Lazarus's statement false. The lack of tax returns does not establish that Lazarus's statement that WKC was not profitable was false. Thus, plaintiff cannot establish the second element of his fraudulent misrepresentation claim, *Roberts*, 280 Mich App at 403, rendering the claim invalid, *Titan Ins Co*, 491 Mich at 555. See also *Hord*, 463 Mich at 410-411 (no fraudulent misrepresentation where the financial statement that the plaintiff relied on was not false or misleading). For the same reason, plaintiff cannot establish that Dorothy made an innocent misrepresentation because plaintiff has failed to prove any false statement. *Novak*, 235 Mich App at 688. Therefore, the trial court did not abuse its discretion when it denied plaintiff's motion to set aside the settlement agreement based on plaintiff's fraudulent and innocent misrepresentation claims related to the tax returns. *Hayford*, 279 Mich App at 325.

Relatedly, the trial court did not abuse its discretion in denying plaintiff's motion to set aside the settlement agreement based on its determination that plaintiff provided no evidence to prove that WKC was, in fact, profitable. *Id*. Plaintiff produced no evidence as exhibits to his motion to set aside the settlement agreement or his motion for reconsideration establishing that WKC was a profitable company. Rather, defendants produced a profit and loss statement indicating a loss of $183,963.65. This document was provided to the mediator. Thus, plaintiff produced no evidence to establish that Lazarus's statement that WKC was not profitable was a false statement. *Roberts*, 280 Mich App at 403.

As to Lazarus's competency, in tendering Lazarus's statement to the mediator, who provided it to plaintiff, it does not appear that Dorothy made any representation as to Lazarus's competency. See *id*. (the first element of a fraudulent misrepresentation claim is that the defendant

actually made a material representation). A notary public specifically attests that a particular individual personally appeared before them and signed a document or acknowledged a signature on a document. See MCL 55.285(1) (a notary public may take acknowledgments, administer oaths and affirmations, and witness or attest to a signature). The notarization of Lazarus's statement is irrelevant to his competency.

We note that the evidence indicates that Lazarus was in failing health. A petition for appointment of a guardian for Lazarus was filed on September 11, 2019, indicating that "[t]he adult lacks sufficient understanding or capacity to make or communicate informed decisions because of" and "mental deficiency" and "physical illness or disability" are checked off. His ailments included septic shock, deep vein thrombosis (DVT), oropharyngeal dysphagia, and diabetes, among others. However, the petition also indicates a request for a "temporary guardian [to] be appointed pending a hearing on this petition because of the following emergency: Mr. Lazarus needs a PEG Tube placed that he cannot consent to." Lazarus was appointed a *temporary* guardian the next day, seemingly, for the purpose of consenting to this emergency medical procedure. Lazarus signed the statement at issue on September 23, 2019.

Lazarus was appointed a guardian ad litem (GAL), who visited Lazarus on September 27, 2019 (the same day that plaintiff visited Lazarus, the day after mediation[4]). The GAL indicated that Lazarus was awake, could engage in two-way conversation, and correctly identified the year and president. The GAL reported that Lazarus did not object to the appointment of a guardian, but rather, wanted his brother appointed instead of the agency appointed as his temporary guardian, and the GAL requested a contested hearing. The hearing took place in the Oakland Probate Court on October 2, 2019. The representative from the guardianship agency indicated that "someone" visited Lazarus to get him to sign documents, and when the court asked whether it was Lazarus's brother, the representative stated that it was related to a corporation for which Lazarus was listed as the treasurer. The court agreed with the representative's assertion that Lazarus should not be signing documents. Because Lazarus wanted his brother to be appointed guardian, the hearing was adjourned to October 23, 2019; however, Lazarus passed away the day before.

This evidence does not establish that Dorothy made a representation regarding Lazarus's competency in producing Lazarus's statement to the mediator. Therefore, plaintiff cannot establish the first element of his fraudulent misrepresentation claim, *Roberts*, 280 Mich App at 403, rendering his entire claim invalid, *Titan Ins Co*, 491 Mich at 555. Nor can he establish that Dorothy made an innocent misrepresentation in this regard because there is no false statement. *Novak*, 235 Mich App at 688. There is, in fact, no statement by Dorothy regarding Lazarus's competency. Therefore, the trial court did not abuse its discretion when it denied plaintiff's motion to set aside the settlement agreement on the basis of plaintiff's fraudulent and innocent misrepresentation claims related to Lazarus's competency. *Hayford*, 279 Mich App at 325.

[4] The videos requested by this Court portray the recorder of the video who is not shown, supposedly plaintiff, trying to have a conversation with Lazarus, who is in a hospital bed. Although struggling to speak, Lazarus indicates that he gave documents to plaintiff's "sister" regarding WKC, "did the books" for WKC, and "did the taxes."

IV. REQUEST FOR EVIDENTIARY HEARING

Plaintiff next argues that the trial court should have held an evidentiary hearing regarding Lazarus's competency and the veracity of his statement.

"Generally, an issue must be raised, addressed, and decided in the trial court to be preserved for review." *Dell v Citizens Ins Co of America*, 312 Mich App 734, 751 n 40; 880 NW2d 280 (2015). Plaintiff requested an evidentiary hearing as an alternative in his motion to set aside the settlement agreement. The trial court did not address plaintiff's request for an evidentiary hearing when it originally denied plaintiff's motion to set aside the settlement agreement, or in the final order. The trial court noted in its opinion and order denying plaintiff's motion for reconsideration that it was not inclined to hold an evidentiary hearing on the veracity of Lazarus's statement when plaintiff failed to offer any evidence suggesting that WKC was profitable; however, plaintiff has not appealed this order. Nonetheless, a party "should not be punished for the omission of the trial court." *Id*. (quotation marks and citation omitted). Rather, "[t]his Court may address the issue because it concerns a legal question and all of the facts necessary for its resolution are present." *Id*. A trial court's decision regarding whether to conduct an evidentiary hearing is also reviewed for an abuse of discretion. *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). "An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes." *Hayford*, 279 Mich App at 325.

Plaintiff relies on MCR 2.119(E)(2) to argue that the trial court should have held an evidentiary hearing because fraud on the court was committed. MCR 2.119(E)(2) provides, "When a motion is based on facts not appearing of record, the court may hear the motion on affidavits presented by the parties, or may direct that the motion be heard wholly or partly on oral testimony or deposition." As stated by this Court in *Kiefer v Kiefer*, 212 Mich App 176, 179; 536 NW2d 873 (1995),

> Where a party has alleged that a fraud has been committed on the court, it is generally an abuse of discretion for the court to decide the motion without first conducting an evidentiary hearing regarding the allegations. An evidentiary hearing is necessary where fraud has been alleged because the proof required to sustain a motion to set aside a judgment because of fraud is "of the highest order." [Citations omitted.]

The trial court is "best equipped" to determine whether the parties' positions require a judicial assessment of the demeanor of witnesses to make a credibility determination as part of the fact-finding process. *Williams v Williams*, 214 Mich App 391, 399; 542 NW2d 892 (1995).

"However, courts understandably look with skepticism upon a dissatisfied party's claim of fraud and insist on strict factual proof." *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 405; 651 NW2d 756 (2002). "Thus, where the party requesting relief fails to provide specific allegations of fraud relating to a material fact, the trial court need not proceed to an evidentiary hearing." *Id*. As explained above, plaintiff offered no factual allegations of fraud as he could not prove that any false misrepresentation was made, nor could he provide evidence that WKC was, in fact, profitable. Moreover, Lazarus's competency was irrelevant to the content of his statement, the content of which plaintiff cannot prove is false. Therefore, the trial court did not abuse its

discretion in denying plaintiff's motion to set aside the settlement agreement without holding an evidentiary hearing. *Brown*, 260 Mich App at 599.

Affirmed. Defendants, having prevailed in full, may tax costs under MCR 7.219(F).

/s/ Christopher M. Murray
/s/ Kirsten Frank Kelly
/s/ Cynthia Diane Stephens