[Cite as *Tesca v. Hoffman*, 2010-Ohio-1114.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
PARTENA TESCA	:	Hon. Julie A. Edwards, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellant	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-0058
PAUL HOFFMAN, ET AL	:	
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from the Richland County Court of Common Pleas, Case No. 2008CV681D
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 18, 2010

APPEARANCES:

For Plaintiff-Appellant	For Defendants-Appellees
ERIC J. ALLEN 713 South Front Street Columbus, OH 43206	JOSEPH T. OLECKI WELDON, HUSTON &KEYSER 76 North Mulberry Mansfield, OH 44902

Gwin, J.

{¶1} Plaintiff-appellant Partena Tesca appeals a judgment of the Court of Common Pleas of Richland County, Ohio, entered after a bench trial, in favor of defendants-appellees Paul and Betty Hoffman, John Hoffman, the Hoffman Family Revocable Living Trust, and GNA, Inc. Appellant assigns six errors to the trial court:

{¶2} "I. THE TRIAL COURT ERRED IN FINDING APPELLEE PAUL HOFFMAN TO BE INCOMPETENT TO ENTER INTO A BINDING CONTRACT.

{¶3} "II. THE TRIAL COURT ERRED IN CONSIDERING APPELLANT'S PRIOR EVICTIONS AND BANKRUPTCY PROCEEDINGS.

{¶4} "III THE TRIAL COURT ERRED IN FINDING THAT APPELLANT COMMITTED FRAUD IN HIS DEALINGS WITH THE APPELLEES.

{¶5} "IV. THE TRIAL COURT ERRED IN FINDING $305,793.00 IN COMPENSATORY DAMAGES.

{¶6} "V. THE TRIAL COURT ERRED IN AWARDING ONE HUNDRED THOUSAND DOLLARS IN PUNITIVE DAMAGES.

{¶7} "VI. THE TRIAL COURT ERRED IN DECLINING TO ENFORCE APPELLANT'S CONTRACTS AND TO FIND THAT APPELLEE JOHN HOFFMAN INTERFERED WITH THE CONTRACT BETWEEN APPELLANT AND APPELLEE PAUL HOFFMAN."

{¶8} Appellant brought this action for specific performance of alleged agreements related to the operation of a junk yard at 435 Piper Road in Mansfield, Richland County, Ohio. Appellant also brought a claim for tortious interference with the above agreement against defendant-appellee John Hoffman. Appellees counterclaimed,

alleging appellant committed fraud in three land contracts, breached the three contracts, and requested a declaration that a deed to one of the properties involved was not valid, or in the alternative, to rescind the deed. Appellees also alleged breach of contract claims in agreements to purchase various vehicles and for recovery of money for improvements to various properties.

{¶9} After a two-day trial to the court, the trial court made extensive findings of fact and conclusions of law. The court found the evidence in the case gave a "convincing picture of fraud and overreaching" by appellant against appellees. The court found appellee Paul Hoffman was 85 years old in 2007, when the dealings between the parties began. He was a retired businessman who had accumulated substantial savings, including $300,000 in annuities as well as several parcels of real property. In 2006 he had suffered a stroke which left him with memory problems, making him emotional, trusting, and easily led. Appellee GNA, Inc. is a business entity owned by Paul Hoffman. Appellee John Hoffman is the son of appellees Paul and Betty Hoffman.

{¶10} In 2007, appellant had an extensive history of debt problems and failed business deals. He had filed two separate Chapter 13 Bankruptcy cases in 2005, although both were dismissed when he failed to make payments required by the Chapter 13 payment plan. The second dismissal took place only six months before the parties' first business deal.

{¶11} In October 2006, appellant's assets totaled $32,435.00 while creditor claims allowed in the bankruptcy action totaled $335,455.00. The court found among

the debts was one for $175,000 owed to the IRS for failure to file income tax returns from 1997 through 2004.

{¶12} The court found that appellant claims to be physically disabled as the result of an automobile accident in 2006, for which at the time of the trial he had a pending personal injury lawsuit. About the time the parties began their dealings, appellant was being evicted from his home as a result of a land contract forfeiture. In the same period, appellant had five other land contract forfeitures in various business deals he had made.

{¶13} The court found appellant met Paul Hoffman at a small used car lot and learned that Hoffman owned properties, one of which was an unoccupied residence on Ferndale Road. Appellant then began a series of handwritten deals with Paul Hoffman, his family trust, and his corporation. The court listed ten business deals: On 4/13/07, the parties recorded a land contract on the Ferndale Road house for $160,000 with a month payment of $1200. On 6/07/07, Paul Hoffman agreed to pay remodeling expenses on the Ferndale Home in the amount of $25,000. On the same date Paul Hoffman sold appellant seven automobiles for a total of $53,600. On 6/18/07 another two automobiles were sold for $44,000. On 6/25/07, Hoffman sold appellant an Olds Aurora for $5,000. On 6/27/07 the parties recorded the deed for the Ferndale Road house, and 8/06/07 they recorded a mortgage for $160,000 on the home. On 8/15/07, the parties entered into a lease/purchase agreement on the Piper Road junk yard in the amount of $175,000, with a monthly payment of $1,000. On 12/20/07, the parties entered into a land contract for ten vacant lots on Hillside Circle. The price was not specified and although the agreement required a monthly payment, no amount was

specified. On 1/12/08, the parties recorded a land contract for eight apartment units at Hillside Circle in the amount of $230,000, with a monthly payment of $1500. Also on 1/12/08, the parties voided the 8/15/07 agreement on the Piper Road junk yard, and entered into a handwritten agreement that gave appellant 48% of the business without cost to him.

{¶14} The court found in each agreement except the 8/15/07 agreement, appellant dictated the terms and either had Paul Hoffman write the agreement in his hand writing or had Paul's wife appellee Betty Hoffman type it. The court found one proof of appellant's authorship was a provision in each of the real property documents to the effect that appellees agreed not to evict appellant if he did not make the agreed payments. The court found appellant made no payments on any of the obligations.

{¶15} The 8/15/07 lease/purchase agreement was drafted by Hoffman's son, appellee John Hoffman. It imposed fixed payment obligations, and limited the time appellant would hold the property if he did not pay. Subsequently, on 1/12/07, appellant drafted the document that voided the 8/15/07 agreement, including language providing that John Hoffman was no longer vice president of the family corporation and that only Paul or Betty Hoffman represented the family trust. This agreement gave appellant 48% of the corporate Piper Road business, after the business itself had paid off all of appellant's contractual obligations to the Hoffman's.

{¶16} The mortgage on the Ferndale Road property which was recorded on 8/06/07 provided if appellant did not get a bank loan for the purchase, then the parties would revert to the land contract agreement of 4/13/07. Appellant could not get a bank loan because of his poor credit.

{¶17} The court found in each case where appellant obtained land contracts to purchase properties, he falsely represented his intention and ability to pay as agreed. The court found part of the false inducements appellant used to convince Paul Hoffman to enter into contracts with him was a scheme whereby appellant would operate a towing and impounding car reconditioning and salvage business at the Piper Road site. Appellee Paul Hoffman was trusting, and was induced to expend large sums of money for the purchase of automobiles from a salvage yard in Southern Ohio and at auction, and for fixing up the Piper Road property, as well as for the construction of a repair garage on other property appellant owned. Appellant represented he had contacts with the Ohio State Highway Patrol, and could get towing and impounding business from those contacts.

{¶18} The court found the tow trucks and most of the salvaged autos Paul Hoffman ostensibly purchased for the business were titled in appellant's name. Appellant took the corporate dozer, which he sold, and took the backhoe, which he still had at the time of the trial. Paul Hoffman gave appellant money to be used as payment on Hoffman business debts, but appellant diverted the funds to his other personal businesses. The court found not a single dollar of revenue was generated by the alleged business ventures appellant undertook with Hoffman.

{¶19} During the period of their dealings, Paul Hoffman wrote over $250,000 in checks to appellant or to cash, to give to appellant, even though the payments were allegedly to be made to third parties who are legitimate business or remodeling creditors. Ultimately, Paul Hoffman cashed out all his $300,000 annuities to meet appellant's demands for money.

{¶20} Appellant told Paul Hoffman at the beginning of their dealings that appellant was experienced in handling financial paperwork and computerized accounting functions because of his business experience, and he would keep all the receipts. Appellant did not produce a single receipt, invoice or evidence of payment to demonstrate how he used the funds he received from Hoffman. At trial, appellant testified Paul Hoffman carried away all his receipts, but the trial court found this testimony was not credible. The Hoffmans were only able to reconstruct part of the paper trail of appellant's diversion of funds by reviewing the records of Hoffman's bank, credit card companies, and a few large suppliers, as well as a handwritten check register in which Hoffman sometimes recorded the purpose for which appellant asked him to write a check.

{¶21} The court enumerated three examples of the egregious extent of appellant's fraudulent conversion of Hoffman's assets: (1) In a 16 day period in July 2007, appellant had Hoffman write checks for six bills to repair a backhoe which was never actually repaired. The checks were all made out to cash, and totaled over $12,000. Another instance occurred in 2008, when appellant took large checks written to other creditors, had them converted at the bank to cashier's checks, held them a few days, and then brought them back to the bank to be converted to a single cashier's check payable to appellant, all without Paul Hoffman's knowledge. Between January 7 and 11, 2008, appellant cashed $78,103.97 in cashier's checks payable to him. He paid $39,200.00 to 239 Auto Group for cars which were supposed to belong to GNA, Inc., but were titled in appellant's name. The court found appellant could not account for the remaining $38,903.97.

{¶22} Other examples of appellant's fraudulent conversion of appellee's funds involved appellant's use of Paul Hoffman's credit card to pay appellant's cable TV bill; to pay for repairs, fuel and tires for appellant's semi-truck; to buy a $1500 organ at Metronome Music; and to purchase meat and groceries for appellant's restaurant.

{¶23} In mid-January 2008, appellee John Hoffman, Paul Hoffman's son, became suspicious of appellant's dealings with Paul Hoffman, when Hoffman could not produce any copies of any business records. Around the same time, appellant drafted the agreement purporting to remove John Hoffman as vice president of the corporation and the family trust. John Hoffman took his father to the courthouse to copy recorded land contracts and to the bank to request copies of checks. As a result of what they found, John Hoffman called a family meeting on January 24, 2008, in which he, his five sisters and their spouses met with their parents, appellees Paul and Betty Hoffman. John Hoffman and Paul Hoffman's son-in-law Gary Vanderbilt agreed to become trustees of the family revocable trust and officers of GNA, Inc. and the elder Hoffmans removed themselves from those positions.

{¶24} Thereafter, John and Gary undertook efforts to discover the nature of appellant's business dealings with Paul and Betty Hoffman. On March 19, 2008, appellant responded by suing all the defendants demanding his business agreements with them be specifically enforced.

{¶25} The trial court itemized the damages stemming from appellant's fraud and misapplication of funds, and found the total losses were $305,793.00. In addition, the court found appellant had in his possession vehicles which belonged to and should be

returned to appellees, including the previously mentioned backhoe, a Pontiac Aztec, a Chrysler PT Cruiser, a Ford shuttle bus, a Ford Focus, and a Toyota Forerunner.

{¶26} The trial court made conclusions of law from the above facts. Addressing appellant's claim for specific performance, the court found the agreements are illusory and lacking any obligations imposed on appellant, and as such are not binding on the appellees. Appellant had paid none of his contractual obligations and the court found him in breach. The court also found appellant procured these agreements by fraudulent representations about his business and financial abilities, his physical abilities, and his honesty and intention to perform. The court concluded appellant was not entitled to specific performance.

{¶27} Our standard of reviewing a trial court's determination in a bench trial is to determine whether the trial court's judgment is supported by competent and credible evidence going to all the essential elements of the case. *C.E. Morris Company v. Foley Construction Company* (1978), 54 Ohio St. 2d 279.

I.

{¶28} In his first assignment of error, appellant argues the trial court erred in finding appellee Paul Hoffman to be incompetent to enter into a binding contract. He cites the trial court's finding that in 2006, Paul Hoffman suffered a stroke which left him with memory problems, and emotional, trusting and easily led. In fact, the trial court did not make a finding that Paul Hoffman was incompetent, but only found that because of his physical disability, Hoffman was susceptible to appellant's fraudulent manipulations.

{¶29} The first assignment of error is overruled.

II.

{¶30} In his second assignment of error, appellant argues the trial court erred in considering his prior evictions and bankruptcy proceedings.

{¶31} The trial court found appellant procured the various illusory agreements by fraudulently representing his business and financial abilities, and his honesty and intention to perform the contract obligations. Evidence of appellant's prior evictions and bankruptcy proceedings were relevant to demonstrate whether appellant's representations about his business acumen and trustworthiness were fraudulent.

{¶32} The second assignment of error is overruled.

III.

{¶33} In his third assignment of error, appellant argues the trial court erred in finding appellant committed fraud in his dealings with the appellees. The trial court correctly set out the elements of fraud: (1) appellant made representations of material matters of fact; (2) the representations were false; (3) appellant knew they were false; (4) he made them with the specific intent to mislead the appellees to rely on them; and (5) appellees legitimately relied on the representations. Judgment Entry of March 16, 2008, at page 9, citing *Cross v. Ledford* (1954), 61 Ohio St. 469, syllabus, paragraph 2.

{¶34} "A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration." *Minster Farmers Coop. Exchange Co., Inc. v. Meyer*, 117 Ohio St.3d 459, 884 N.E.2d 1056, 2008-Ohio-1259, at paragraph 28, quoting *Perlmuter Printing Co. v. Strom*e, Inc.

(N.D.Ohio 1976), 436 F.Supp. 409, 414; *Kostelnik v. Helper,* 96 Ohio St.3d 1, 770 N.E.2d 58, 2002-Ohio-2985, at paragraph 16.

{¶35} In order to establish that a contract was procured by fraudulent inducement, "a plaintiff must prove that the defendant made a knowing, material misrepresentation, with the intent of inducing the plaintiff's reliance, and that the plaintiff relied upon that misrepresentation to her detriment." *ABM Farms, Inc. v. Woods,* 81 Ohio St.3d 498, 502, 692 N.E.2d 574, 1998-Ohio-612.

{¶36} The court found appellant's fraudulent acts included obtaining possession of vehicles and real property through contracts when he did not intend to make payments; representing he would handle business records, credit cards, and pay appellee's legitimate creditors, and then destroying the records and diverting payments to himself and his other business interests; taking title and possession of vehicles he had represented he was purchasing for GNA, Inc., and obtaining a gift of nearly half of the Piper Road business and using appellees' business profits to pay appellant's debts to appellees. The court found appellant committed fraud by manipulating appellee's trust and confusion and misrepresenting his intentions, resources and ability to perform.

{¶37} We find there is sufficient, competent and credible evidence contained in the record to permit the court to determine by clear and convincing evidence that appellant had committed fraud in his business dealings with appellees.

{¶38} The third assignment of error is overruled.

IV.

{¶39} In his fourth assignment of error, appellant argues the trial court's determination of the compensatory damages is in error. Appellant argues appellees have recovered all the property, both real and personal, that was the subject of this lawsuit. Appellant argues the award of compensatory damages must be set aside or the matter remanded for a hearing to determine the appropriate measure of damages.

{¶40} Appellees respond that the trial court did not award any compensation for property that was ordered returned, and the record bears this out. Appellees assert that if anything, the extent of appellant's fraud was much greater than the amount determined by the trial court.

{¶41} Based upon the record before us, this court must find there is competent and credible evidence supporting the trial court's determination of damages.

{¶42} The fourth assignment of error is overruled.

V.

{¶43} In his fifth assignment of error, appellant asserts the award of punitive damages in the amount of $100,000.00 was error. Appellant argues the court relied on the fact that he had not been a good business man as a reason to impose punitive damages. He asserts nowhere in the pleadings or in the court's decision is it argued his behavior was reprehensible.

{¶44} Appellant is technically correct in that the court did not use the word "reprehensible" in characterizing his behavior. However, the trial court found appellant committed fraud in extensive business dealings with an elderly, susceptible person, eventually bilking him of his life savings, valuable properties, and a large portion of his

business operations. We find there is sufficient, competent and credible evidence for the trial court to find an award of punitive damages was appropriate.

{¶45} The fifth assignment of error is overruled.

VI.

{¶46} In his sixth assignment of error, appellant urges the court should have granted specific performance on the contracts and should have found in his favor on his tortious interference with contract claim against appellee John Hoffman.

{¶47} "Specific performance of a contract is a distinctly equitable remedy." *Quarto Mining Co. v. Litman* (1975), 42 Ohio St. 2d 73, 87, 326 N.E.2d 676. The remedy of specific performance is available when the promisor's failure to perform constitutes a breach of contract and a legal remedy for that breach, such as money damages, will not afford the promisee adequate relief. See *Gehret v. Rismiller*, Darke App. No. 06CA1705, 2007-Ohio-1893, at paragraph 14.

{¶48} The trial court found two separate reasons why appellant should not prevail on his specific performance claim. First, in order to prevail, appellant was required to prove the agreements were enforcible. The trial court found, and we agree, the contracts were illusory. Because of the language providing no penalty for failure to make payments, there was no consideration for the agreements. Secondly, because the agreements were fraudulently induced, appellant is not entitled to equitable relief in the form of specific performance.

{¶49} The trial court correctly found John Hoffman was privileged, by virtue of their relationship, to assist his parents in protection of their wealth and to prevent their victimization. In addition, appellee John Hoffman was a trustee of the family trust and

vice-president of the family corporation, and as such, was privileged to intervene in the contracts. We find the trial court did not err in determining appellant could not prevail on his claims for specific performance and tortuous interference with contracts.

{¶50} The sixth assignment of error is overruled.

{¶51} For the foregoing reasons, the judgment of the Court of Common Pleas of Richland County, Ohio, is affirmed.

By Gwin, J.,

Edwards, P.J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. PATRICIA A. DELANEY

WSG:clw 0209

[Cite as *Tesca v. Hoffman*, 2010-Ohio-1114.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

PARTENA TESCA	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
PAUL HOFFMAN, ET AL	:	
Defendants-Appellees	:	CASE NO. 2009-CA-0058

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Richland County, Ohio, is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. PATRICIA A. DELANEY