J-A32015-12

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

MARK FERRY AUCTIONEERS, INC., a Pennsylvania Corporation, and HARTLAND MACHINERY COMPANY, INC., a Pennsylvania Corporation,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellees	:	
v.	:	
LAWRENCE NEWMAN, Individually, and CAROLINE NEWMAN, Individually, t/d/b/a BRIAR CLIFF FINANCIAL SERVICES, a Fictitious Name,	:	
Appellants	:	No. 397 WDA 2012

Appeal from the Judgment entered on March 6, 2012
in the Court of Common Pleas of Westmoreland County,
Civil Division, No. 786 of 2010

BEFORE: MUSMANNO, WECHT and COLVILLE*, JJ.

MEMORANDUM BY MUSMANNO, J.: Filed: March 18, 2013

Lawrence Newman ("Newman"), individually, and Caroline Newman, individually, t/d/b/a Briar Cliff Financial Services (collectively "the Defendants"), appeal from the Judgment entered in favor of Mark Ferry Auctioneers, Inc. and Hartland Machinery Company, Inc. ("Hartland")

*Retired Senior Judge assigned to the Superior Court.

(collectively "the Plaintiffs").[1] We affirm.

The factual history underlying this appeal is convoluted and well known to the parties. In the interest of judicial economy, we adopt by reference herein the facts as found by the trial court in its "Decision and Order" issued in support of the court's verdict. ***See*** Decision and Order, 10/18/11, at 2-16.[2]

In February 2010, the Plaintiffs filed a Complaint against the Defendants alleging various theories of liability, including fraudulent misrepresentation.[3] Following a non-jury trial, the trial court found the Defendants liable to the Plaintiffs on the fraudulent misrepresentation count,

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[1] The Defendants purport to appeal from the trial court's February 6, 2012 Order denying their Motion for post-trial relief. An appeal properly lies from the entry of judgment, not from an order denying post-trial motions. ***See, e.g., Johnston the Florist, Inc. v. Tedco Constr. Corp.***, 657 A.2d 511, 514 (Pa. Super. 1995). Since the trial court's docket reveals that the Prothonotary entered Judgment on March 6, 2012, and the Defendants timely filed a Notice of appeal from the Judgment, there is no jurisdictional impediment to our review.

[2] We note that the trial court did not issue a separate Pa.R.A.P. 1925(a) opinion in this case; rather, the court relied upon its October 18, 2011 Decision and Order in lieu of a Rule 1925(a) opinion. To the extent that the trial court's factual recitation includes credibility determinations and legal conclusions by the trial court, we will review those determinations in our analysis of the Defendants' claims of error on appeal.

[3] To succeed on a cause of action for fraudulent misrepresentation, a plaintiff must demonstrate the following elements by clear and convincing evidence: "(1) [a] representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance." ***Bortz v. Noon***, 729 A.2d 555, 560 (Pa. 1999) (citation omitted).

and entered a verdict in favor of the Plaintiffs in the amount of $23,089.80 in compensatory damages and $5,000.00 in punitive damages.[4] The Defendants timely filed a post-trial Motion seeking judgment notwithstanding the verdict, which the trial court denied. On March 6, 2012, the trial court entered Judgment in favor of the Plaintiffs, after which the Defendants filed a timely Notice of appeal.

On appeal, the Defendants raise the following questions for our review:

> 1. Did the Trial Court err in finding that the Defendants made a representation to [] Hartland regarding the ownership of the [e]quipment in question when the evidence was clearly to the contrary[?]
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> 2. Did the Trial Court err in finding that a third party entity, PNC, had a perfected security interest in the [e]quipment in question, superior to that of the Defendants, despite [the] lack of any credible evidence submitted at trial to support such finding[?]
>
> 3. Did the Trial Court err in finding that a third party entity, PNC, had a superior perfected security interest in the [e]quipment sold by [the] Defendants to [] Hartland, when no evidence was properly admitted at trial to suggest that monies paid by [the] Plaintiffs to PNC amounted to anything more than a voluntary payment[?]
>
> 4. Did the Trial Court erroneously admit into evidence documents submitted by [the] Plaintiffs days after trial, over the objection of [the] Defendants, which were: (i) different than [the documents] offered at trial[,] which the Trial Court permitted [the] Plaintiffs to have authenticated after trial; (ii) offered through a witness who was neither a party to the

[4] The trial court noted that its award applied only to plaintiff Hartland and its president, Dean Gearhart ("Gearhart"), as "Gearhart was the only party in a contractual relationship with the [D]efendant[s]." Decision and Order, 10/18/11, at 19.

transaction nor had any knowledge of the documents; and (iii) despite sustaining [the] Defendants' timely objection precluding such witness from authenticating such documents[?]

5. Did the Trial Court err in [awarding the Plaintiffs] $23,089.80 in compensatory [damages] and $5,000.00 in punitive damages when the evidence submitted at trial dictated that: (i) compensatory damages, if warranted at all, would have been an amount less than half that found[;] and (ii) that none of the conduct [*sic*] of the Defendants amounted to fraud[?]

6. Did the Trial Court err in finding that [the] Defendants warranted title to the [e]quipment in question despite language in their Quiet [*sic*] Claim Bill of Sale [that was] clearly to the contrary and consistent with provisions of 13 Pa.C.S.A. § 2312(b)[?]

7. Did the Trial Court err in failing to find that, as a matter of law, [] Hartland had the ability and duty, but failed to review the public record to ascertain what, if any, security interests may have existed in the [e]quipment in question, despite testimony of [Gearhart,] Hartland's principal officer[,] that he had concern[s] over its ownership, before agreeing to purchase it from [the] Defendants[?]

Brief for the Defendants at 7-8 (issues renumbered).[5]

> [O]ur appellate role in cases arising from non-jury trial verdicts is to determine whether the findings of the trial court are supported by competent evidence and whether the trial court committed error in any application of the law. The findings of fact of the trial judge must be given the same weight and effect on appeal as the verdict of a jury. We consider the evidence in a light most favorable to the verdict winner. We will reverse the trial court only if its findings of fact are not supported by competent evidence in the record or if its findings are premised on an error of law. However, where the issue concerns a question of law, our scope of review is plenary.

[5] The Defendants' Statement of Questions Involved spans two and one-half pages, in violation of Pa.R.A.P. 2116(a) (providing, in relevant part, that "[t]he statement shall be no more than two pages ….") . Nevertheless, we will ignore this minor defect and address all of the Defendants' issues on appeal.

Health Care & Ret. Corp. of Am. v. Pittas, 46 A.3d 719, 721 (Pa. Super. 2012) (citation, brackets and ellipses omitted). Additionally, this Court has stated that, in considering a challenge to a non-jury verdict,

> [i]t is not the role of an appellate court to pass on the credibility of witnesses; hence[,] we will not substitute our judgment for that of the fact[-]finder. Thus, the test we apply is not whether we would have reached the same result on the evidence presented, but rather, after due consideration of the evidence which the trial court found credible, whether the trial court could have reasonably reached its conclusion.

Fletcher-Harlee Corp. v. Szymanski, 936 A.2d 87, 92-93 (Pa. Super. 2007) (citation omitted).

Initially, we note that, regarding the Defendants' first issue, the Defendants have failed to comply with the Pennsylvania Rules of Appellate Procedure, in that they improperly (1) set forth their cursory "argument" in narrative form, which consists merely of conclusory statements that the trial court had erred; and (2) failed to provide citation to relevant legal authority or to cite to the record in support of their bald allegations of error. ***See*** Brief for the Defendants at 18-19. Based upon these defects, we could deem this issue waived on appeal. ***See*** Pa.R.A.P. 2119(a) (mandating that an appellant develop an argument with citation to and analysis of relevant legal authority); ***see also*** Pa.R.A.P. 2119(c) (providing that "[i]f reference is made to the [] evidence … or any other matter appearing in the record, the argument must set forth, in immediate connection therewith, or in a footnote thereto, a reference to the place in the record where the matter

referred to appears ….”); ***see also Papadoplos v. Schmidt, Ronca & Kramer, PC.***, 21 A.3d 1216, 1229 (Pa. Super. 2011) (finding waiver where the appellants advanced only a cursory argument in support of their issue and failed to cite to any pertinent legal authority).

However, we will not find waiver and will briefly address the merits of the Defendants' claim. In sum, the Defendants baldly allege that (1) "[t]he [t]rial [c]ourt's finding in favor of the [Plaintiffs] was against the evidence and against the weight of the evidence[;]" and (2) "[t]he evidence established that [defendant Newman] legitimately believed [that he] had a first lien perfected security interest in the [e]quipment [in question.]" Brief for the Defendants at 18, 19.

Here, the trial court, as the fact-finder, considered the evidence presented at trial and found that defendant Newman had intentionally made several fraudulent, material misrepresentations to Gearhart, the president of Hartland, regarding the Defendants' purported ownership interest in the equipment, and thus induced Gearhart to purchase the equipment. ***See*** Decision and Order, 10/18/11, at 8-12, 16. In making this factual finding, the trial court assessed the credibility of the witnesses and determined the weight to be accorded their testimony, and found that Newman had misrepresented his ownership interest in bad faith, and that Gearhart had justifiably relied upon Newman's false statements to Gearhart's detriment. ***See id.*** at 16, 19; ***see also Bortz***, 729 A.2d at 560 (setting forth the

necessary elements to prevail on a cause of action for fraudulent misrepresentation).

It is well-settled that an appellate court may not disturb the findings of a trial judge sitting as the finder of fact unless there is a determination that those findings are not based upon competent evidence. ***See Mastroni-Mucker v. Allstate Ins. Co.***, 976 A.2d 510, 519 (Pa. Super. 2009). Likewise, this Court is precluded from disturbing a fact-finder's credibility determinations. ***See Fletcher-Harlee Corp.***, 936 A.2d at 92-93; ***see also A.M. Skier Agency, Inc. v. Gold***, 747 A.2d 936, 939 (Pa. Super. 2000). In the instant case, since the trial court's findings are supported by competent evidence of record, we may not disturb them.

In their next three issues, which are closely related, the Defendants argue that "the [Plaintiffs] failed to establish, by properly admitted evidence, that PNC Bank had any security interest in the [e]quipment[,]" and the trial court erred in admitting evidence of PNC's alleged prior security interest in the equipment in the form of official financing statements (hereinafter "the UCC-1 Filing Statements") filed with the Pennsylvania Department of State pursuant to the Uniform Commercial Code ("UCC"). Brief for the Defendants at 19, 21-22. According to the Defendants, the trial court improperly ruled that the Plaintiffs were permitted to establish the authenticity of this evidence *after* the close of trial. ***Id.*** at 21-22.

It is well established that "the admission or exclusion of evidence is within the sound discretion of the trial court. In reviewing a challenge to the

admissibility of evidence, we will only reverse a ruling by the trial court upon a showing that it abused its discretion or committed an error of law." ***Schuenemann v. Dreemz, LLC***, 34 A.3d 94, 99 (Pa. Super. 2011) (citation omitted).

At the trial in this matter, the trial court ruled that, since the UCC-1 Financing Statements were official documents filed with the Department of State, the Plaintiffs were permitted to authenticate these documents after the close of trial, pursuant to the dictates of 42 Pa.C.S.A. § 6103. ***See*** N.T., 8/31/11, at 136-42, 292-93.[6] Section 6103 provides, in relevant part, that

> [a]n official record kept within this Commonwealth by any … government unit, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, … *or if there is no such officer, by[] [t]he Department of State*, in the case of any Commonwealth agency.

42 Pa.C.S.A. § 6103(a)(1) (emphasis added); ***see also id.*** § 6104(a) (providing that "[a] copy of a record of governmental action or inaction authenticated as provided in section 6103 … shall be admissible as evidence that the governmental action or inaction disclosed therein was in fact taken or omitted."). In the instant case, shortly following the conclusion of trial, the Plaintiffs submitted documentation signed by an agent of the

[6] At trial, the Plaintiffs presented deposition testimony and exhibits that pertained to the UCC-1 Filing Statements, which the trial court considered in ruling that the Plaintiffs were permitted to establish the authenticity of these official documents following the trial. ***See*** N.T. (trial), 8/31/11, at 127-32, 140-42; ***see also*** N.T. (deposition), 8/9/11, Exhibits 1-6.

Department of State that certified the authenticity of the UCC-1 Filing Statements.

Since it is undisputed that the UCC-1 Filing Statements were official documents filed with the Department of State, these documents were clearly admissible evidence under section 6103. ***See*** 42 Pa.C.S.A. § 6103(a)(1). Moreover, the Defendants cite to no relevant law, nor do they advance any persuasive arguments, that the trial court lacked the authority to permit the Plaintiffs to submit proof of the authenticity of these official documents after trial. Accordingly, the Defendants' challenge to the trial court's admission of the UCC-1 Filing Statements to establish PNC's perfected security interest in the equipment lacks merit.

In their fifth issue, the Defendants contend that the trial court erred in its award of compensatory and punitive damages in favor of the Plaintiffs. Brief for the Defendants at 20-21. Regarding the Defendants' challenge to the compensatory damages award, the Defendants set forth only three sentences of "argument" and do not cite to any legal authority or the record. Based upon these defects, we are compelled to find that the Defendants have waived their challenge in this regard. ***See Papadoplos***, 21 A.3d at 1229 (finding waiver where the appellants advanced only four sentences of argument in support of their claim and failed to cite to any legal authority); ***see also*** Pa.R.A.P. 2119(a). However, even if we did not find waiver, we would affirm based on the trial court's explanation of how it calculated the

amount of compensatory damages due to the Plaintiffs. ***See*** Decision and Order, 10/18/11, at 17-18.

Further, to the extent that the Defendants argue that the trial court erred in awarding the Plaintiffs $5,000 in punitive damages, this claim is predicated upon the Defendants' allegation that there was no evidence presented that their conduct was fraudulent. ***See*** Brief for the Defendants at 20. We have already concluded that the trial court properly found that the conduct of the Defendants was, in fact, fraudulent, and we will not disturb this finding on appeal. Additionally, we note that the trial court explained its rationale for awarding the Plaintiffs punitive damages in its Decision and Order, which we incorporate herein by reference. ***See*** Decision and Order, 10/18/11, at 18-19. Accordingly, the Defendants are not entitled to relief on this issue.

The Defendants next contend that "[t]he Trial Court ruled contrary to applicable law with respect to the finding that [the Plaintiffs] warranted title to the [e]quipment[,]" since, "in this case[,] warranty of title was specifically disclaimed in both the language and title of the 'Quit Claim Bill of Sale.'" Brief for the Defendants at 21.

In its Decision and Order, the trial court addressed this claim and determined that it lacked merit. ***See*** Decision and Order, 10/18/11, at 12-14. Specifically, the trial court found that, under the circumstances of this transaction, even though the document was titled "Quit Claim Bill of Sale," it was insufficient to disclaim the warranty of title under section 2312 of the

UCC.[7] ***See*** Decision and Order, 10/18/11, at 13-14; ***see also Sunseri v. RKO-Stanley Warner Theatres, Inc.***, 374 A.2d 1342, 1344-45 (Pa. Super. 1977) (in a contract dispute alleging that the appellant had breached the warranty of title in its sale of equipment to the appellee, holding that the language in the "Bill of Sale" prepared by the appellant was insufficient to disclaim the warranty of title under section 2312 of the UCC because the document did not include specific language to that effect or set forth "a positive warning or exclusion in regard to the status of title[.]"). After review of the parties' briefs and the certified record, we affirm on the basis of the trial court's sound rationale as to this issue. ***See*** Decision and Order, 10/18/11, at 12-14.

Finally, the Defendants argue that the trial court erred in failing to find that Gearhart, on behalf of plaintiff Hartland, had "a duty to review the

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[7] Section 2312 provides, in relevant part, as follows:

> **(a) General rule.** --Subject to subsection (b)[,] there is in a contract for sale a warranty by the seller that:
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> (1) the title conveyed shall be good, and its transfer rightful; and
>
> (2) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.
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> **(b) Exclusion or modification of warranty.** --A warranty under subsection (a) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

13 Pa.C.S.A. § 2312.

public record to ascertain [whether] any security interests may have existed in the [e]quipment." Brief for the Defendants at 23. The Defendants emphasize the fact that, prior to the scheduled auction in this case, Gearhart had expressed his concerns regarding the Defendants' ownership interest in the equipment. ***Id.*** In light of these concerns, the Defendants assert, Gearhart had a duty to conduct an investigation into whether any other party had a paramount claim of ownership to the equipment. ***Id.***

We are wholly unpersuaded by the Defendants' claim. The trial court found that, in response to Gearhart's expressed concerns regarding ownership of the equipment, both Newman and his attorney had intentionally made several fraudulent assurances to Gearhart that no one had a superior claim to the equipment than that of Newman and the Defendants. ***See*** Decision and Order, 10/18/11, at 8-12. Further, the Defendants cite to no relevant legal authority to support their bald claim that, despite the Defendants' fraudulent misrepresentations, Gearhart nevertheless had a legal duty to conduct an investigation into the title history of the equipment. Accordingly, we conclude that the Defendants' final claim of error lacks merit.

Since we determine that the trial court's factual findings are supported by competent evidence in the record, and we discern no error of law by the court in entering judgment against the Defendants, we affirm.

Judgment affirmed.

J. A32015/12

IN THE COURT OF COMMON PLEAS OF WESTMORELAND
COUNTY
PENNSYLVANIA
CIVIL DIVISION

MARK FERRY AUCTIONEERS, INC., A PENNSYLVANIA CORPORATION, AND HARTLAND MACHINERY COMPANY, INC., A PENNSYLVANIA CORPORATION,
PLAINTIFFS,

V.

NO. 786 OF 2010

LAWRENCE NEWMAN, INDIVIDUALLY, AND CAROLINE NEWMAN, INDIVIDUALLY, AND T/D/B/A BRIAR CLIFF FINANCIAL SERVICES, A FICTICIOUS NAME,
DEFENDANTS,

DECISION AND ORDER/VERDICT

This matter is before the Court for disposition as the result of a non-jury trial. Having heard such oral testimony as the parties chose to introduce and examined the pertinent exhibits and reviewed both transcribed trial testimony and deposition testimony and heard oral arguments and considered written submissions, I make the following findings based upon

(28)

(21)

the credible evidence and the reasonable inferences to be drawn there from. I make these findings by a preponderance of the evidence.

The plaintiffs are two Pennsylvania corporations in the business of conducting auctions. The defendants do business as Briar Cliff Financial Services (hereinafter "Briarcliff"). Briarcliff is in the business of making commercial loans and acting as a loan broker for commercial loans. The plaintiffs and defendants have been conducting their respective businesses for many years.

In December of 2004, PNC Bank National Association (hereinafter "PNC") made a loan to persons known as John and Margaret Pahlman. The purpose of the loan was to fund the purchase of a business known as High Tech Tools, Inc. As security for this loan and to perfect a security interest in said property, PNC filed a UCC-1 Financing Statement on January 24, 2005. In this Financing Statement, the following was set forth as the collateral: "...all of the debtor's equipment...and all additions and accessions thereto, substitutions therefore and replacements thereof, in each case whether now existing or hereafter acquired or arising and wherever located." On August 24, 2009, PNC filed a continuation of this original Financing Statement and

indicated thereon that the collateral had not changed. On January 24, 2005, PNC filed another UCC-1 Financing Statement wherein the collateral was listed as follows: "...all assets of the Debtor, of every kind and nature now existing and hereafter acquired and arising and wherever located, including without limitation...goods, inventory. ...and all additions and accessions thereto, substitutions therefore and replacements thereof." On August 24, 2009, PNC filed a continuation of this original Financing Statement and indicated thereon that the collateral had not changed. In addition, on January 24, 2005, PNC filed another UCC-1 Financing Statement listing as collateral the same items as set forth immediately above in the previously mentioned Financing Statement. On August 24, 2009, PNC filed a continuation of this original Financing Statement and indicated thereon that the collateral had not changed. On January 24, 2005, PNC filed yet another UCC-1 Financing Statement wherein it listed as collateral "all of the Debtor's equipment ...and all additions and accessions thereto, substitutions therefore and replacements thereof, in each case whether now existing or hereafter acquired or arising and wherever located." On August 24, 2009, PNC filed a continuation of this original Financing Statement and indicated thereon that the collateral had not changed.[1]

[1] This items are admitted into evidence as Ex. M in accordance with my order from the bench during the

On or about August 10, 2006, the defendants, Lawrence and Caroline Newman t/d/b/a Briar Cliff Financial Services (hereinafter "Newman or Briar Cliff") made a loan to John W. Pahlman and Margaret R. Pahlman, husband and wife, and High Tech Tools, Inc., in the amount of $185,000.00 to finance the purchase of real estate at 3162 Leechburg Road, Lower Burrell, Pennsylvania. This loan was secured by a Mortgage and Security Agreement. The machine shop equipment was also collateral for this loan and a security interest was perfected in this equipment by the filing of a UCC-1 Financing Statement. The UCC-1 Financing Statement filed by Newman also covered after acquired property, therefore, Newman knew that this was a common element of financing statements and did know or should have known that the financing statements of PNC also covered after acquired property. Given the description of the collateral in the PNC Financing Statements, the security interest of Newman would obviously be subordinate to the security interests held by PNC.

The Pahlman's became delinquent on their loans from PNC and the defendants.

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trial that the plaintiff would be given an opportunity to have these matters properly certified by the Department of State in accordance with 42 Pa. C.S.A. §6103.

On September 1, 2009, Newman sent a very telling e-mail to PNC wherein he states: "I would be happy to meet with your representative at that time to discuss removal of your equipment." The representative was one Andrew Comly, an auctioneer from the Philadelphia area that was hired by PNC to do appraisals and conduct auctions. Now, Newman says he did this because he did not know what equipment was subject to the lien of PNC. It does, however, show that Newman knew that PNC had at least some interest to some of the property in question. Newman should have given this information to Dean Gearhart of Hartland Machinery Company, Inc., (hereinafter "Gearhart") at the time he was negotiating the sale of the equipment, that will later be discussed, rather than leading Gearhart to believe, by his words and actions, that he owned all of the property on the list set forth on Exhibit BB and that it was not subject to the lien of PNC.

Newman's argument that he believed he was selling equipment that he owned free of the lien of PNC is specious, given that he admits, at the very least, that he did not know which equipment PNC had a lien upon. Thus, he knew or should have known that he very well may have been selling

equipment subject to the lien of PNC. He had all of this knowledge but did not share it with Gearhart.

On September 11, 2009, Mr. Newman telephoned Mark Ferry, of the Plaintiff Mark Ferry Auctioneers, Inc., (hereinafter "Ferry") and told him that he (Mr. Newman) owned a building at 3162 Leechburg Road in Lower Burrell. He also represented that he was a secured party with regard to all of the personal property in the building and that he had taken it back by default. Mr. Newman wanted the equipment removed from the building as soon as possible so that he could do something with the building. In addition, Mr. Newman asked Mr. Ferry if he was interested in auctioning off the equipment for Briar Cliff Financial. This would lead a reasonable person to believe that Newman was the sole entity with the power to sell the property and have it removed from the building. However, Mr. Pahlman has testified, and I do find that, Lawrence Newman, at that time, had knowledge "that PNC was the sole owner of all the equipment that was in that building and he had no right to it whatsoever." (See Pahlman Depo. P. 20 lns. 6-12.) In addition, Mr. Pahlman had provided all of his financial information to Newman at the time Newman was considering the loan request of Pahlman in 2006, and this information would have included information concerning

the loan with PNC. At the time Newman made the loan to Pahlman, Pahlman gave him a list of the equipment in the building. This was the same list that Newman gave to Gearhart at the time he negotiated the sale of the equipment to Gearhart. Newman knew of the PNC loan and the fact that PNC had a security interest in all the property on the premises and any after acquired property. Therefore, he knew that any lien that he had the property on the list provided to him by Pahlman and then later provided by him to Gearhart was not a first lien, but subordinate to that of PNC. Thus, he knew that the equipment on that list could not be sold to Gearhart without satisfying the PNC security interest.

In connection with the proposed sale of the equipment in the building, Mr. Ferry advised Mr. Newman that he would first have to inspect the property. On September 11, 2009, Mr. Ferry inspected the equipment, tools and inventory that were to be auctioned. Mr. Ferry was going out of town and, since this was a specialized industry, he would contact someone he knew who would better be able to conduct an auction of this type of equipment. On Monday September 14, 2009, Ferry telephoned Newman and advised him that Dean Gearhart of the plaintiff Hartland Machinery Company, Inc., (hereinafter "Gearhart") would be the best person suited to conduct this

auction. Then, on Wednesday September 16, 2009, Newman telephoned Ferry three times. During those calls, Newman asked Ferry if he or Dean Gearhart were interested in purchasing the equipment. Newman emphasized during these calls that he was interested in getting the equipment out of his building as soon as possible. On the third call to Ferry that day he asked that Gearhart contact him. Then, either on the 17th or 18th of September, Newman telephoned Gearhart. He wanted Gearhart to look over the equipment. Newman gave Gearhart the phone number of the realtor handling the sale of the property, a Mr. Kristoff. Gearhart made an appointment with Kristoff to look at the equipment.

When Mr. Gearhart had spoken to Newman they discussed the possible purchase of the equipment by Gearhart. On September 21, 2009, Newman sent to Gearhart, at the request of Gearhart, a list of the equipment that was to be purchased by Gearhart. (See Exhibit BB) This is the same list that Pahlman had originally given to Newman and Newman knew that this equipment was subject to the lien of PNC.

On September 25, 2009, Gearhart and Newman reached an agreement that Gearhart would purchase the equipment for $25,000.00. During this

conversation, Newman made the comment that by next Tuesday (September 29, 2009), things would be cleared up and Newman would be able to sell the property. This is another representation by Newman that could reasonably have led Gearhart to believe that the equipment was not subject to any other liens, just as Newman had previously led him to believe. Gearhart, however, did express some concern over the ownership of the property in question and Newman told Gearhart to contact his attorney, John Straka. Gearhart then sent an e-mail that has been entered into the record as Ex. B. In that e-mail, Gearhart very succinctly asked that Attorney Straka provide proof that Newman is the "sole" and "rightful" owner of the assets of High Tech Tool, Inc., "and that there are no additional liens or encumbrances against these assets."

In his response, Attorney Straka informed Gearhart that "The owner is an individual named Pahlman, who has filed bankruptcy." He then went on to state that "Larry has a first mortgage against his building and is secured against the equipment via a properly filed UCC-1 Financing Statement." Now, as far as the statement goes, it is a true statement, but did not answer the question asked by Gearhart concerning the equipment. Gearhart wanted an assurance that there were no other additional liens or encumbrances

against these assets. This inquiry was not answered directly but was answered in an ambiguous and misleading way. Given the direct inquiry of Gearhart and the nature of the response of Straka, it would have been reasonable for Gearhart to conclude that the UCC-1 Financing Statement held by Newman was the only one on the equipment. This we know was not accurate and, furthermore, Newman knew that this was not accurate. It is interesting to note that Newman was copied on this e-mail but took no action to clear up the ambiguity created by the response of Attorney Straka. Furthermore, the interpretation of Straka's response by Gearhart was reasonable given the fact that Newman had previously stated that he had taken back the equipment on default and wanted the equipment removed from the building as soon as possible. In addition, the remaining portion of the response of Attorney Straka in the e-mail of September 25th further reinforced the interpretation of Gearhart that no one had a superior claim to the equipment than that of Newman. Attorney Straka went on to state that "Through his counsel, Ronald Roteman, Mr. Pahlman has consented to Larry retaining as auctioneer to dispose of these assets. I have notified the bankruptcy trustee, Jim Walsh, of our intention to proceed with the auction of the equipment, and he has raised no objection....". Attorney Straka, on September 25, 2009, also forwarded to Gearhart an e-mail, Ex. A, he had

sent September 22, 2009 to jwalsh, rroteman, bkgroup, marques williams@pnc and LRNewman. It is important to note that at this time Gearhart had no knowledge of who Marques Williams was or what, if any, relationship he had to any transaction concerning this equipment. A reading of this e-mail, in my opinion, would not have informed Gearhart that PNC had a superior lien on the equipment. This is particularly true when considering the statement of Attorney Straka in that e-mail that "Accordingly, he [Newman] intends to contract with an auctioneer as soon as possible to sell that equipment ***free of any liens claims or encumbrances***." (emphasis by the court) When you consider that statement along with the response of Straka in the September 25th e-mail and the previous statement of Newman that the equipment has been taken back on default and he wanted it removed as soon as possible, it is no wonder that Gearhart was mislead. In that same e-mail of September 22nd, Attorney Straka informed the recipients that the property at 3162 Leechburg Road and Newman's mortgage on that "property was the subject of a consent motion for relief from automatic stay to be heard next Tuesday." This would have been further misleading to Gearhart and would have reinforced his belief and reliance on Newman's previous statement that, in essence, things would be cleared up by "next Tuesday" and he could sell the equipment. In reality,

however, the proceeding scheduled before the bankruptcy court for that "Tuesday" was only for the purpose of obtaining a relief from stay for the real estate. (See Ex. H – the Order granting relief from stay dated Tuesday September 29, 2009.)

Although Newman and Gearhart reached an agreement on the purchase price on September 25, 2009, Newman advised Gearhart they could not close on the sale of the equipment until after September 29, 2009 because there had to be some action by the bankruptcy court. Such a statement would reasonably lead Gearhart to believe that, after the hearing on the 29th, Newman could then sell the equipment free and clear. However, this was not true because the hearing on the 29th only dealt with releasing real estate from the stay in bankruptcy. What is so disappointing is that at every opportunity there was for clarification the defendant and his counsel chose obfuscation.

The sale of the equipment actually took place on October 5, 2009. Gearhart was in Florida at the time and was too ill to return home to attend a closing of the transaction. However, because Newman was anxious to close, Gearhart agreed that his secretary could handle the closing and would use a

signature stamp on all documents that were to be signed by Gearhart. Newman went to the office of Gearhart and dealt with Dori Stone, Gearhart's secretary. Newman produced what was entitled a "Quit Claim Bill of Sale". Dori did read the document to Gearhart, but Gearhart was unaware of the significance of the language contained therein. The language contained in the body of the Quit Claim Bill of Sale would not have informed Gearhart that Newman owned any less of an interest in the equipment than he had led Gearhart to believe he owned. This is because the language is as follows: "...all the right, title and interest of the seller, if any, in and to any and all machinery, equipment, parts, or other items of tangible personal property enumerated on Ex. A...which is owned by the Seller and...is now located in...3162 Leechburg Road, Lower Burrell, Pa. 15068." This type of language, even though the title to the document was "Quit Claim Bill of Sale", is insufficient to exclude the warranty of title in 13 Pa. C.S.A. §2312 (a) (2) that the goods were being delivered "free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge." This is because §2312 (b) requires that such a warranty can only be excluded by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right

or title as he or a third person may have. Sunseri v. RKO-Stanley Warner Theatres, Inc., 374 A2d. 1372 (Pa. Super. 1977). The language of the Quit Claim Bill of Sale did not specifically exclude any warranty of title and further, the surrounding factual circumstances created by the conduct of the defendant and the ambiguous language of the Quit Claim Bill of Sale were such as would lead a reasonable person to believe that the interest being sold was that which had previously been represented to be as good and marketable title free of any prior security interests.

The fact that Newman chose to give Gearhart a "Quit Claim Bill of Sale" is further evidence that Newman was aware that he did not own the property in question free and clear, but rather he knew it was subject to the lien of PNC.

Thereafter, Gearhart went about to prepare for the auction expending various sums to advertise the auction. Gearhart printed flyers to advertise the sale. Jeanine Ferry took pictures of all the equipment that was to be sold. They advertised the sale in the Tribune Review Newspaper.

Then, on or about Saturday, November 7, 2009, Pahlman stopped by the building where the equipment was located because he had heard that there was to be an auction of equipment there. When Pahlman went into the building he saw Gearhart and spoke to him about what he was going to do. Gearhart told him that Newman had agreed that they could conduct an auction of the equipment located in the building. At that point Pahlman looked at Gearhart like he was crazy and said to Gearhart "how can Larry Newman auction it off when he doesn't own it. It all belonged to PNC and PNC has first liens on it..." Gearhart contacted Ferry and told him that he felt they had been duped. Ferry then contacted Attorney Costello to determine what to do. It was decided that they should cancel the sale. They sent out notices to the effect that the sale had been cancelled.

Thereafter, on or about November 11, 2009, Andrew Comly, the representative of PNC Bank, arrived at the building because he heard there were plans for an auction. While at the building he met with Gearhart. Andrew Comly advised Gearhart that PNC had a first security interest in the equipment that was to be auctioned by Gearhart. This conclusion was reached based upon the description of collateral that appeared in the Financing Statements that were filed in 2004. It was then decided by Comly

and those in authority at PNC Bank that it would be in the best interest of PNC to have Gearhart proceed with the sale, but do so on behalf of PNC.

Once this had been decided Gearhart sent out notices that the sale was no longer cancelled and that it would take place as scheduled on November 19, 2009.

From all of the evidence presented, I find that the damages suffered by Gearhart were the proximate result of a misrepresentation by the defendant and Gearhart's justifiable reliance upon a factual situation intentionally created by the defendant through his words and actions and those of his attorney. The evidence in this case supports my finding that the defendant, in conjunction with statements made by his attorney, caused damages to the plaintiff Gearhart as the proximate result of Gearhart's justifiable and detrimental reliance upon a factual situation that the defendant misrepresented to him. It must be remembered that "fraud" consists of anything calculated to deceive, whether by a single act or combination, or by a suppression of the truth, whether it be by direct falsehood or innuendo, by speech or silence, or word of mouth. Delahanty v. First Pennsylvania Bank, N.A. 464 A.2d 1243 (Pa. Super. 1983). A "fraud" can occur through a

material misrepresentation that need not be in the form of a positive assertion but can be in the nature of any artifice by which a person is deceived to his disadvantage and may be by false or misleading statements or by concealment of that which should have been disclosed, which deceives another and causes them to act upon that deceit to his detriment. Id. A misrepresentation is material when it is of such a character that if not made then the transaction would not have been entered into. Id. In this matter, if Gearhart would have known that Newman did not have a first lien priority he would not have agreed to purchase the equipment.

The sale was held November 19, 2009. As a result of the auction there was realized the sum of $57,157.50 from the total bids. In accordance with the agreement that Gearhart had with PNC, he was paid $5,715.75, that being 10% of the total bids.

In preparation for the auction Gearhart incurred expenses of $9,067.70. Of this amount, he was reimbursed the sum of $6,000.00 by PNC. Therefore, he was out of pocket $3,067.71 for his expenses. In addition, he was out of pocket the $25,000.00 he paid Newman for the purchase of the

equipment. The total out of pocket loss by Gearhart was $28,067.71, less the $5,715.75 he was paid by PNC, or $22,351.96.

If the damages are calculated on the profit lost by Gearhart in this transaction, that amount would be $23,089.80. This amount is calculated by taking the total proceeds from the sale of $57,157.50 and subtracting the total expenses of the sale of $9,067.70 and also subtracting the $25,000.00 paid for the equipment in the first instance.

Under Pennsylvania law, in an action based upon fraud, the measure of damages is "actual loss". Kaufman v. Mellon National Bank & Trust Co., 366 F.2d 326 (3rd Cir. 1966). Because the sale was actually conducted, it is possible to determine that the actual profit that the plaintiff lost as a result of the fraudulent misrepresentation was $23,089.80.

The next issue to determine with regard to the matter of damages is whether or not punitive damages should be awarded. This is within the discretion of the court. The question is whether I find that there has been sufficiently aggravated conduct contrary to the plaintiffs' interests, involving bad motive or reckless indifference, to justify the special sanction of

punitive damages. Such damages are appropriate and proper when the act which creates the actual damages also imports insult or out rage and is committed with a view to oppress or is done in contempt of the plaintiff's rights. Delahanty supra. Fraudulent misrepresentation by itself is sufficient to uphold an award of punitive damages because of the state of mind rendering it fraudulent. Id. Mr. Newman is obviously oblivious to the concept of fair dealing in contractual matters. The conduct, in addition to the fraudulent misrepresentation, which is most reprehensible and worthy of punitive damages, and which best illuminates the bad motive of the defendant, is the defendant's inability, or even refusal, to recognize his responsibility to return the money that was paid by Gearhart when Newman knew he could not fulfill his portion of his agreement. This was so because even when it became clear to him that he did not have a first lien on the property sold to Gearhart, he insists on keeping the purchase price.

Therefore, I will award the amount of $5,000.00 in punitive damages to the plaintiff.

The award in this case will be made only to the plaintiff Gearhart, as Gearhart was the only party in a contractual relationship with the defendant.

It is true that Gearhart and Ferry had a separate contract on how they would split the profits; however, that is a matter for them to resolve apart from this court's decision.

I find that the matter of damages requested pursuant to the Unfair Trade Practices and Consumer Protection Law can be dealt with summarily because the act is not designed to apply to the nature of this transaction, which was a commercial transaction between a corporation and a Financial Services Company. Therefore, the request for damages pursuant to this Act is denied.

IN THE COURT OF COMMON PLEAS OF WESTMORELAND
COUNTY
PENNSYLVANIA
CIVIL DIVISION

MARK FERRY AUCTIONEERS, INC.,
A PENNSYLVANIA CORPORATION,
AND HARTLAND MACHINERY
COMPANY, INC., A PENNSYLVANIA
CORPORATION,
PLAINTIFFS,

VI. NO. 786 OF 2010

LAWRENCE NEWMAN, INDIVIDUALLY,
AND CAROLINE NEWMAN, INDIVIDUALLY,
AND T/D/B/A BRIAR CLIFF FINANCIAL
SERVICES, A FICTICIOUS NAME,
DEFENDANTS,

ORDER/VERDICT

And now this 18th of October, 2011, is accordance with the foregoing it is hereby Ordered and Decreed that it is the verdict of this court that I find in favor of the Plaintiff, Hartland Machinery Company, Inc., and against the Defendants, Lawrence Newman and Caroline Newman, individually and t/d/b/a Briar Cliff Financial Services, A Fictitious Name, in the amount of $23,089.80 in compensatory damages and $5,000.00 in punitive damages.

By The Court:

Gary P. Caruso

Attest: Kristen O'Brien