

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ERICA FRASER,)	NO. 66469-7-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	UNPUBLISHED OPINION
DIRK M. MAYBERRY and DIRK M.)	
MAYBERRY, INC., a Washington)	
corporation,)	
)	
Appellants.)	FILED: September 24, 2012
)	

Leach, C.J. — Erica Fraser commenced this action to void a real estate purchase and sale agreement, claiming that Dirk Mayberry fraudulently induced her into entering into a contract to sell her fire-damaged property. Following a bench trial, the court found the contract ambiguous and therefore unenforceable, quieted title in Fraser, and ruled that Mayberry violated the Consumer Protection Act (CPA), chapter 19.86 RCW. Because unchallenged findings of fact support the trial court's conclusions of law and Mayberry otherwise fails to establish any error, we affirm.

FACTS

Approximately twenty years ago, Erica Fraser owned several parcels of real estate. By October 2008, due to struggles with mental illness, and drug and

alcohol dependence, Fraser had lost all but one property to foreclosure. Her last remaining property was a rental house in Seattle. Fraser planned to reside in this house and was in the process of making repairs and improvements to the property so she could do so. On October 6, 2008, the house was severely damaged by fire.

Fraser's attorney introduced her to Dirk Mayberry as someone who could potentially help her financially by purchasing her property. Initially, Fraser was not interested in selling it.

But after the fire, Fraser's financial problems worsened. She had no place to live, and her fire insurance company had denied coverage for her claim. So when Mayberry contacted her again, she was more receptive to his offer. They had several discussions about the specifics of the sale. Mayberry planned to renovate the property as quickly as possible to resell it.

Eventually, on April 2, 2009, Mayberry, acting on behalf of a company he controlled, and Fraser signed a purchase and sale agreement. According to Fraser, they completed this transaction at a Mexican restaurant where Mayberry bought her several alcoholic drinks and she was "pretty well intoxicated." Although Fraser had no recollection of doing so, she also signed a statutory warranty deed to the property, which Mayberry recorded the next day.

The contract signed by the parties contains numerous crossed-out terms

and handwritten interlineations. The document lists, by interlineation, a \$150,000 purchase price. A provision for earnest money of \$2,000 is crossed out. The contract states that the buyer will execute a note and deed of trust in favor of the seller for “approximately \$50,000 (less liens or encumbrances)” and the seller will “take over 1st mortgage” and pay a down payment. The down payment amount appears to be \$15,000 but is difficult to read. The contract provides for a closing date of April 30, 2009, and states that the parties will use a closing agent of the buyer’s choice or “between parties if no escrow can be found to close in time.” According to Fraser, Mayberry made additional changes to the contract after she signed it. Mayberry gave Fraser a cashier’s check for \$1,000 on April 2. He never made any mortgage payments, paid a down payment, or recorded a deed of trust in favor of Fraser.

Fraser filed suit a couple of weeks after the contract was signed, before the scheduled closing date. She sought to rescind the contract and alleged violations of the CPA and the distressed property act, chapter 61.34 RCW. A two-day bench trial took place in October 2010. At that time, Fraser’s lender had started foreclosure proceedings. At the conclusion of the trial, the court determined that the contract was unenforceable. The court also ordered Mayberry to pay attorney fees of \$39,653 and costs to Fraser after finding a violation of the CPA.¹

DECISION

Following a bench trial where the trial court has evaluated the evidence, our review is limited to determining whether substantial evidence supports the trial court's findings of fact and whether those findings support the court's conclusions of law.² Substantial evidence supports findings of fact if the evidence is sufficient to persuade a fair-minded person of their truth.³ Evidence may be substantial even if there are other reasonable interpretations of the evidence.⁴ Appellate courts defer to the trial court's determinations on the persuasiveness of the evidence, witness credibility, and conflicting testimony.⁵ We will not disturb a trial court's ruling if substantial, though conflicting, evidence supports its findings of facts.⁶ "Unchallenged findings are verities on appeal."⁷

Mayberry claims the evidence does not support the trial court's

¹ The court also initially imposed a civil penalty of \$40,000 on both Mayberry and the corporation, Dirk M. Mayberry Inc. The court reconsidered and ultimately concluded there was no basis for a civil penalty. And, while concluding that Fraser incurred damages, the court also determined there was insufficient factual basis to award a specific amount of damages.

² Standing Rock Homeowners Ass'n v. Misich, 106 Wn. App. 231, 242-43, 23 P.3d 520 (2001).

³ Hegwine v. Longview Fibre Co., 132 Wn. App. 546, 555-56, 132 P.3d 789 (2006).

⁴ Sherrell v. Selfors, 73 Wn. App. 596, 600-01, 871 P.2d 168 (1994).

⁵ Snyder v. Haynes, 152 Wn. App. 774, 779, 217 P.3d 787 (2009).

⁶ Merriman v. Cokeley, 168 Wn.2d 627, 631, 230 P.3d 162 (2010).

⁷ Robel v. Roundup Corp., 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

determination that he violated the CPA. He contends the evidence fails to establish that he engaged in an unfair or deceptive act, that his acts had the capacity to deceive a substantial portion of the public, or that the public interest was affected.

The CPA declares unlawful “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.”⁸ To prevail in a private CPA claim, the plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person’s business or property, and (5) causation.⁹

But Mayberry has not assigned error to any of the court’s findings of fact, including the findings that Mayberry’s acts were deceptive, affected the public interest, and caused injury.¹⁰ The court determined that Mayberry’s conduct was deceptive under the CPA:

Dirk Mayberry promised on behalf of the corporation to make payments on the underlying mortgage “according to its terms” and his testimony indicated that there were little to no resources to carry through on that promise and there is no indication that he even knew what the obligation for the mortgage was. He also represented that he would help the plaintiff take care of her belonging[s]. His actions belie those statements. He also drafted documents that called for a closing date of April 30, 2009, and for

⁸ RCW 19.86.020.

⁹ Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986).

¹⁰ See RAP 10.3(a)(4) (appellant must set forth assignments of error that identify “each error a party contends was made by the trial court”).

use of escrow, when it appears he had no intention of waiting that long since he had all documents ready to close that day. He essentially represented himself to plaintiff, who was vulnerable because of her financial status (even Mr. Mayberry admitted that he knew that she “needed money right away”) and substance abuse, as a friend who was acting for their mutual interest when he was, in fact, acting solely for his own interest and the interest of the defendant corporation.

The court also found that Mayberry’s acts affected the public interest because

the defendant on his own behalf and on the behalf of the corporation said that he solicited plaintiff’s business and that he does this kind of solicitation on behalf of himself and other investors, and the defendant corporation.

In addition, the court found injury to business or property because Mayberry

caused injury to plaintiff in that she entered into a transaction in which she transferred her residence to the defendant and which the benefits to her were illusory because of the way the defendant drafted the documents and acted upon the obligations arising from the written documents.

Mayberry argues that certain evidence demonstrates that his acts were neither unfair nor deceptive. He asserts, in a conclusory manner, that the evidence fails to establish the injury and public interest elements of a CPA claim. But because Mayberry does not properly assign error to the trial court’s findings to the contrary, we must accept them as verities on appeal and decline to reweigh the evidence supporting them.¹¹

¹¹ See Robel, 148 Wn.2d at 47.

Mayberry also challenges the court's determination that the contract was ambiguous and indefinite. The trial court expressly found, however, that the contract was "ambiguous" and "not followed by the defendants." Specifically, the court pointed to the following facts:

- a. The contract said the seller would get a note for \$2000 earnest money and the parties testified that the seller received a cashier's check for \$1000 as earnest money;
- b. The contract provided that the closing agent would be a "qualified closing agent of Buyer's choice or between parties if no escrow can be found to close in time" (closing date was April 30, 2009) but no attempt was made to find a closing agent and the deal was "closed" the same day the seller signed, which was 28 days before the stated closing date;
- c. The contract provided that the seller was to receive "approximately \$50,000" less liens or encumbrances and the Buyer would "take over" the first mortgage, but buyer acknowledged at trial that he was to pay the first and second mortgage so the contract is unclear what "liens or encumbrances" were to be deducted from the seller's payment. And, as stated above, it is clear the defendant had no intention of paying the mortgage according to its terms[;]
- d. The contract says that the seller was to pay a certain amount as a down payment, which appears to be \$15,000 (it is difficult to read), but this was never done[;]
- e. The parties did talk about an addendum referred to in the contract, but the addendum cannot be found and the parties disagree as to its terms. The terms cannot be established by a preponderance of the evidence because both parties were vague as to their recollection of the specific terms of the addendum.

Again, Mayberry does not assign error to any of these findings. Mayberry claims the trial court found the contract to be ambiguous because neither party was able to locate and produce the addendum referenced in the contract. He argues that the addendum, which he later found and submitted in support of his motion for reconsideration after the trial, eliminates the ambiguities identified by the court.

But the trial court denied Mayberry's motion for reconsideration. Contrary to Mayberry's apparent belief, the trial court did not admit into evidence or consider the belatedly produced document. To the extent Mayberry challenges the denial of reconsideration, we find no manifest abuse of discretion.¹² Moreover, even if the trial court had admitted the addendum, it, like the contract itself, contains numerous crossed-out provisions and unintelligible interlineations. It does not clarify the essential terms of the contract nor undermine the court's conclusion of nonperformance. The trial court's findings support its conclusion that the contract was unenforceable because its terms were ambiguous.

Mayberry claims the court erred in finding that Fraser lacked capacity to enter into a contract due to her alcoholism and intoxication. But although the

¹² See Wagner Dev., Inc. v. Fid. & Deposit Co. of Md., 95 Wn. App. 896, 906, 977 P.2d 639 (1999) (motions for reconsideration are addressed to the sound discretion of the trial court; reviewing court will reverse only upon a showing of manifest abuse of discretion).

court found that Fraser was not “lucid and coherent” when she entered into the contract, the court made no conclusion as to her capacity. Instead, based on the omissions and inconsistencies apparent from both the document and the parties’ testimony, the court concluded the contract was ambiguous and no meeting of the minds occurred as to the essential terms.

Finally, Mayberry contends there was no basis to impose personal liability. The trial court questioned Mayberry extensively about his relationship to the corporation he controlled, Dirk M. Mayberry Inc. The court concluded that because he acted both on his own personal behalf and on behalf of the corporation, Mayberry was not shielded from personal liability. Therefore, the court’s order imposes liability for Fraser’s attorney fees and costs on Mayberry and the corporate entity. A corporate officer may be held personally liable when the officer knowingly and in bad faith commits or condones a wrongful act or disregards the corporate entity.¹³ Here, the court found that Mayberry engaged in deceptive acts. And although Mayberry identified the corporation as the contracting party and purchaser of the property, some evidence suggested a personal transaction. For instance, according to Mayberry’s testimony, the corporation had no bank account, and Mayberry paid all funds, including the

¹³ See Schwarzmann v. Ass'n of Apartment Owners of Bridgehaven, 33 Wn. App. 397, 403, 655 P.2d 1177 (1982); Grayson v. Nordic Constr. Co., 92 Wn.2d 548, 554, 599 P.2d 1271 (1979); Johnson v. Harrigan-Peach Land Dev. Co., 79 Wn.2d 745, 753, 489 P.2d 923 (1971).

\$1,000 check to Fraser, from his personal bank account. The record supports the imposition of both corporate and individual liability.

Upon her compliance with the provisions of RAP 18.1, Fraser is entitled to her attorney fees and costs on appeal.¹⁴

We affirm.

Leach, C. J.

WE CONCUR:

Edmonton, J.

Grosse, J.

¹⁴ RCW 19.86.090.