2012 IL App (1st) 120748-U

Third Division
December 21, 2012

No. 1-12-0748

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(3)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

K and J GROUP, INC., d/b/a PLAZA DELI, an Illinois Corporation,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
v.	)	09 L 8795
DELI TIME, LLC,	)	Honorable John C. Griffin,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justice Steele concurred in the judgment.
Justice Sterba specially concurred in the judgment.

ORDER

¶ 1 *Held*: When a seller's misrepresentations about a property might have induced the property's buyer to pay a price in excess of the property's actual value, the buyer may have suffered a recoverable loss. The trial court erred when it granted summary judgment in favor of the seller on grounds that the seller did not cause the buyer's business to fail.

¶ 2 K and J Group, Inc., sued Deli Time, LLC, for fraudulently misrepresenting the value of a restaurant Deli Time sold K and J. The trial court granted Deli Time's motion for

summary judgment, finding that K and J could not prove a causal connection between the alleged misrepresentations and the failure of the restaurant. Because the parties misinterpreted the measure of damages for fraudulent misrepresentation, we reverse the judgment and remand for further proceedings in accord with this order.

¶ 3 BACKGROUND

¶ 4 In November 2004, Deli Time advertised, as available for purchase, a restaurant in a suburban office complex. The advertisement described the business as a turnkey operation with trained staff. Jean Malnarick, president of K and J, called Deli Time in response to the ad. After some discussions with Deli Time, K and J purchased the advertised restaurant for $133,500 in January 2005. The contract provides:

> "This Agreement contains the complete and entire agreement between the parties respecting the transaction contemplated herein, and supersedes all prior negotiations, agreements, representations and understandings, if any, between the parties respecting such matters."

The contract makes no mention of a turnkey operation or the profitability of prior businesses at its location.

¶ 5 K and J operated a restaurant at the location from January 2005 until September 2007, when K and J closed the business. In July 2009, K and J sued Deli Time for fraudulent misrepresentation. K and J alleged in its complaint that Terry Ramsett, CEO of Deli Time, told Malnarick of K and J that the turnkey operation "was a successful location at which [K and J] could make money." According to the complaint, the prior tenants of the space ran

a restaurant that did not make money. K and J relied on Deli Time's false representations that it could sell K and J a turnkey operation at a location where Deli Time had run a successful restaurant. The false representations caused K and J to purchase the business and to lose money running the unsuccessful business. K and J prayed for an award of damages.

¶ 6 Deli Time, in its answer, admitted that it did not have a turnkey operation, as it advertised. Deli Time moved for summary judgment, based in part on Malnarick's deposition. Malnarick said that Ramsett told her he "had a nice turnkey operation that was ready to go in *** a building that was full of people." K and J had to hire all new staff for the restaurant, which never turned a profit. Deli Time's attorney asked Malnarick, "Was it the loss of business from the loss [of a major tenant of the office complex] that caused you to cease operations?" Malnarick admitted that the loss of the tenant led to the closing of the restaurant, and that Deli Time could not control the tenants of the complex. Deli Time argued that it owed K and J nothing because it did not cause K and J's losses. K and J argued that the court should award it rescission and restitution, although in its complaint K and J prayed for only compensatory and punitive damages.

¶ 7 The trial court found that the agreement included no promise of profits, and K and J had not shown any connection between the fraudulent misrepresentations and its lost profits. On those bases, the court granted Deli Time's motion for summary judgment.

¶ 8 ANALYSIS

¶ 9 We apply familiar standards for review of the order granting the motion for summary judgment.

> "Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. [Citation.]
>
> Because summary judgment is a drastic means of disposing of litigation, a court must exercise extraordinary diligence in reviewing the record so as not to preempt a party's right to fully present the factual basis for its claim. [Citation.] At the summary judgment stage, plaintiffs are not required to prove their cases. [Citation.] Although summary judgment is appropriate if a plaintiff cannot establish an element of his claim (citation), it should only be granted when the right of the moving party is clear and free from doubt." *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd*, 216 Ill. 2d 294, 305-06 (2005).

¶ 10 To recover a judgment for fraudulent misrepresentation, the plaintiff must establish "(1) [a] false statement of material fact (2) known or believed to be false by the party making it; (3) intent to induce the other party to act; (4) action by the other party in [justifiable] reliance on the truth of the statement; and (5) damage to the other party resulting from such reliance." *Soules v. General Motors Corp.*, 79 Ill. 2d 282, 286 (1980).

¶ 11 Deli Time admitted, in its answers to the amended complaint, that it advertised the

business for sale as a turnkey property, already fully operating. See *Barfield v. Hall Realty, Inc.*, 232 P.3d 286, 292 (Colo. 2010). K and J also alleged that Ramsett said it was a "successful location," although the restaurant that operated there had failed. "On this point, *** Illinois law is well settled, holding consistently that although representations of future income are not actionable, representations as to past income of a business constitute statements of fact (citations). Even a statement that a business is profitable may be actionable." *Mother Earth, Ltd. v. Strawberry Camel, Ltd.*, 72 Ill. App. 3d 37, 48-49 (1979). Deli Time presented no evidence to rebut K and J's allegations, as Deli Time effectively conceded, for purposes of this motion, that Ramsett misrepresented material facts about the prior operations at the location.

¶ 12 Malnarick testified that Deli Time's misrepresentations about the profitability of the turnkey operation induced K and J to purchase the business. Deli Time contends only that K and J cannot prove that the misrepresentations damaged K and J.

¶ 13 Our supreme court held that damages are computed in fraudulent misrepresentation cases as follows:

> "Under the benefit-of-the-bargain rule, which governs the damage computations in fraudulent misrepresentation cases, damages are determined by assessing the difference between the actual value of the property sold and the value the property would have had if the representations had been true." *Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 128 Ill. 2d 179, 196 (1989).

The parties have not presented evidence of the difference between the value of the property as a historically profitable turnkey operation, and the value of the business K and J actually purchased. The failure of the business does not determine K and J's damages, as the court should award K and J only the difference between the value of the property if Deli Time's representations had proved true, and the actual value of the property. *Gerill*, 128 Ill. 2d at 196. The record leaves unresolved the issue of whether the misrepresentations affected the value of the property. Accordingly, we cannot say as a matter of law, on this record, that the trial court should have awarded judgment in favor of Deli Time.

¶ 14 K and J argues that it has presented sufficient evidence to support rescission of the contract. K and J, in its complaint and its amended complaint, requested only an award of damages, and not the equitable remedy of rescission. See *Newton v. Aitken*, 260 Ill. App. 3d 717, 719-20 (1994); 735 ILCS 5/2-604 (West 2008); *Kleczek v. Jorgensen*, 328 Ill. App. 3d 1012, 1026-27 (2002). Because we can resolve the appeal without deciding any issue concerning the availability of rescission, we will not address the issue of rescission here. On remand, the parties may look to *Sciarabba v. Chrysler Corp.*, 173 Ill. App. 3d 57, 61-62 (1988), and *Newton*, 260 Ill. App. 3d at 719-20, for guidance concerning rescission. We find that Deli Time has not shown an entitlement to a judgment in its favor because Deli Time's misrepresentations might have induced K and J to pay a price for the property in excess of its actual value. Therefore, we reverse the trial court's judgment and remand for further proceedings in accord with this order.

¶ 15 Reversed and remanded.

¶ 16 JUSTICE STERBA, specially concurring:

¶ 17 Although I concur in the result, I write separately because I do not believe application of the benefit-of-the-bargain rule is appropriate to calculate damages in this case. The application of this rule is premised on a loss to the plaintiff rather than a gain to the defendant. *Mulligan v. QVC, Inc.*, 382 Ill. App. 3d 620, 627 (2008). However, in the case *sub judice*, plaintiff implicitly concedes that it cannot show the losses it suffered in operating its business were due to misrepresentations by defendant. Therefore, plaintiff seeks not damages, but restitution. As our supreme court has explained, and as plaintiff aptly notes on appeal, " 'damages differs from restitution in that damages is measured by the plaintiff's loss; restitution is measured by the defendant's unjust gain.' " *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 257 (2004) (quoting 1 D. Dobbs, Remedies § 3.1, at 280 (2d ed. 1993)).

¶ 18 Thus, in my view, the issue on appeal is in fact whether the equitable remedy of rescission and restitution is available to plaintiff. I would hold that it is. It is well settled that a party alleging that it has been the victim of fraud may seek to have the contract rescinded and restitution ordered. *Sciarabba v. Chrysler Corp.*, 173 Ill. App. 3d 57, 61 (1988). Rescission is a remedy that voids the contract and returns the parties to their pre-contract status *(Newton v. Aitken*, 260 Ill. App. 3d 717, 719 (1994). Similarly, the purpose of restitution is to " 'restore, so far as possible, the parties to their former position.' " *West Suburban Bank v. Lattemann*, 285 Ill. App. 3d 313, 316 (1996) (quoting *Watkins v. Dunbar*, 318 Ill. 174, 178 (1925).

¶ 19 I would find that plaintiff has properly pursued these remedies here, where, in paragraph 15 of its amended complaint, plaintiff alleges: "As a direct and proximate result of Defendant's misrepresentations, Plaintiff entered into the Agreement with Defendant causing plaintiff to loss [sic] the $133,500.00 paid to acquire the assets under the agreement." Plainly, this language establishes that plaintiff sought a return to the position in which it was prior to defendant's misrepresentations.[1] Because I believe there is an issue of material fact as to whether plaintiff can obtain the equitable remedy of rescission and restitution, I concur in the result reversing the lower court's grant of summary judgment and remanding the case for further proceedings.

[1] Though plaintiff did not explicitly request rescission and restitution in its prayer for relief, this is not dispositive as "the prayer for relief does not limit the relief obtainable," except to avoid prejudice to the opposing party. 735 ILCS 5/2-604 (West 2010).