



In the Missouri Court of Appeals Eastern District

DIVISION TWO

DISALVO PROPERTIES, LLC,	)	No. ED108743
	)	
Respondent/Cross-Appellant,	)	Appeal from the Circuit Court
	)	of St. Louis County
v.	)	
	)	
DONNA MAE HALL AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE	)	
OF GARY L. HALL, and	)	
DONNA MAE HALL, SUCCESSOR	)	Honorable Joseph S. Dueker
TRUSTEE OF THE GARY L. HALL	)	
REVOCABLE LIVING TRUST	)	
DATED NOVEMBER 12, 1989,	)	
	)	
Defendants/Appellants.	)	Filed: December 22, 2020

Introduction

Donna Mae Hall, as personal representative of the Estate of Gary L. Hall and Successor Trustee of the Gary L. Hall Revocable Living Trust, appeals from the judgment entered on the jury verdict in favor of DiSalvo Properties, LLC on a fraudulent misrepresentation claim and from the trial court's judgment on DiSalvo's specific performance claim.

For the following reasons, we reverse.

Factual and Procedural Background

In 2009, DiSalvo and Deborah Purvis entered into a real estate investment deal that collapsed shortly afterwards. In 2011, DiSalvo successfully sued Purvis and obtained a judgment

against her in the amount of \$1,501,000. Around the same time, Purvis was hired by Hall as a real estate consultant. Following the 2011 judgment, DiSalvo failed to collect any of the judgment from Purvis. DiSalvo filed suit against Purvis, her wife Elizabeth Nolan, her wife's company NIS Construction, Gary Hall, and several other companies owned by the defendants, claiming they all conspired with the intent to defraud DiSalvo. Ultimately, Hall and his companies were granted summary judgment and the case was proceeding toward a January 11, 2016 trial date as to the other defendants.

In the months leading up to the trial date, Purvis, Nolan, NIS, and DiSalvo engaged in settlement negotiations. Hall was discussed as a potential guarantor for Purvis. When the settlement negotiations failed, DiSalvo filed the present suit against Hall, alleging fraudulent misrepresentation, specific performance of an oral settlement agreement, and breach of contract. The fraud claim was tried in front of a jury. Numerous exhibits containing emails and drafts from the settlement negotiation process were admitted and the jury heard testimony from Hall; DiSalvo Properties' co-owner—Anthony DiSalvo; and the attorneys involved in the negotiations. Nolan's attorney, Rick Abrams, led negotiations for Nolan, NIS, and Purvis. Abrams testified that he spoke on behalf of Hall at times, but only after receiving distinct approval from Hall's attorney, Bill Modrcin. Meanwhile, Larry Mass and Steve Koslovsky represented DiSalvo. Numerous emails and modifications to the settlement agreement were exchanged during November and December 2015 and January 2016.

As the modifications and communications continued, a draft settlement agreement developed several features. Purvis was to pay \$430,000 to DiSalvo, with \$100,000 to be paid at closing and the remaining \$330,000 to be paid over a two-year period. Purvis was also to provide collateral agreed upon by the parties as a security for the settlement agreement. The parties were

to sign the settlement agreement on a scheduled closing date. DiSalvo was to release all parties upon completion of the settlement agreement. Purvis was also to provide a guaranty from Hall. DiSalvo testified he requested a guaranty from Hall because he feared Purvis would file for bankruptcy before fulfilling her obligations under the proposed settlement agreement. Hall testified that he was willing to sign a guaranty, but would need to know the details of Purvis's situation and require collateral before signing. Specifically, Hall's testimony was as follows:

Q. Let me ask you the question. Were you willing to sign the personal guaranty as an accommodation to Deborah Purvis to settle the lawsuit with DiSalvo Properties at any time?

A. Not at any time. If they had come to an agreement, which I had no knowledge of and never met Mr. DiSalvo, and if it would help her and it was collateralized, yes, I would sign a personal guaranty. I thought for only \$200,000.

DiSalvo attempted to impeach Hall on this point, pointing out Hall's previous deposition at which he had testified as follows:

QUESTION: Were you willing to sign a personal guaranty as an accommodation to Deborah Purvis to settle a lawsuit with DiSalvo Properties at any time?

ANSWER: Probably not. The only ... No.

QUESTION: No?

ANSWER: No.

QUESTION: Probably not or no?

ANSWER: No.

Hall agreed that was his testimony at the time.

On January 5, 2016, Abrams and Mass appeared before the trial court to request the case be passed for settlement. The terms of the settlement agreement were not announced to the trial court. The case was passed for settlement and moved to the settlement docket pursuant to Rule 17. Abrams then sent two emails, one on January 5, 2016 and one on January 13, 2016, which thanked DiSalvo's counsel for "getting this case settled." However, several revisions to the proposed settlement agreement occurred after January 5, 2016. Additionally, delays surrounding appraising the collateral occurred after January 5, 2016. On January 13, 2016 Modrcin forwarded

a draft guaranty to Hall for him to sign. Hall replied that he would send the document back to Modrcin within a few days.

Ultimately, no money was proffered to DiSalvo, collateral was not provided, Hall did not sign a guaranty, no closing occurred, and no party signed a written settlement agreement.

Abrams testified that he did not believe an oral settlement was reached. Mass testified that he believed the parties had reached an oral settlement agreement. Modrcin testified that he advised Hall to refrain from signing the guaranty until the parties had signed the settlement agreement, collateral had been agreed to and provided, and \$100,000 had been paid to DiSalvo. Hall also testified that he would not have agreed to guarantee an oral settlement agreement.

Additionally, over Hall's objections, evidence was presented to the jury of an exchange between Hall and Chase McKeague. In this exchange, Purvis owed McKeague money and Hall offered to pay McKeague a portion of the money, dependent upon his ongoing real estate transactions. DiSalvo introduced this evidence to establish that Hall exhibited a pattern of fraudulent behavior in similar circumstances. However, during Hall's testimony, Hall answered that he would have paid McKeague if McKeague had requested him to do so, but McKeague had a change of heart.

After Hall's motion for directed verdict was denied, the case was submitted to the jury. The jury returned a verdict of \$571,900 on the claim of fraudulent misrepresentation, finding Hall had made a false representation about his intent to guarantee Purvis's obligations under the settlement agreement.

Following the jury trial, the court ruled on DiSalvo's separate request for specific performance of the oral settlement agreement and guaranty. The court did not take additional evidence, but considered only the evidence presented at the jury trial as the parties had agreed.

DiSalvo argued the emails and draft agreements exchanged between the parties showed that an oral settlement agreement existed and was defaulted upon. Hall countered that an oral settlement agreement was never reached and the written settlement agreement was never signed; thus, there was no obligation that Hall could be required to pay. Hall also argued that Purvis, Nolan, and NIS were necessary parties under the settlement agreement and should have been joined in this case.

The trial court granted DiSalvo's request for specific performance. The court also granted Hall's Motion for Remittitur, which contained prejudgment interest, to \$430,000 after finding that DiSalvo failed to give a written demand for prejudgment interest of a fraud claim, as required by statute. All other post-trial motions for judgment notwithstanding the verdict and for a new trial were denied.

This appeal and cross-appeal followed.¹

Points Relied On

Hall has raised six claims of error on appeal. Points I, II, and III assert that DiSalvo did not make a submissible case of fraudulent misrepresentation. Point IV argues the case was not submissible because the contract relied upon was barred by the Statute of Frauds. Point V claims there was not substantial evidence to support the trial court's judgment granting specific performance of the oral settlement agreement. Finally, Point VI claims the trial court abused its discretion by allowing the jury to hear prejudicial evidence regarding McKeague. DiSalvo has raised one point on cross-appeal, asserting the trial court erred in granting remittitur. We find

¹ Hall has since passed away and the personal representative of his estate, Donna Mae Hall, has been substituted as a party. For ease of understanding, we will continue to refer to Gary Hall as the appellant in this opinion.

Hall's Points I and V dispositive and reverse both judgments on those bases, rendering the remaining points on appeal and the cross-appeal moot.

Fraudulent Misrepresentation

Standard of Review

Hall's first three points all claim the trial court erred in not granting his Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict because various elements of fraudulent misrepresentation were not proven. In Barron v. Abbott Labs., Inc., the Missouri Supreme Court addressed this standard of review, stating:

The standard of review for failures to sustain motions for directed verdict and for [judgment notwithstanding the verdict] is essentially the same. This Court must determine whether the plaintiff presented a submissible case by offering evidence to support every element necessary for liability. Evidence is viewed in the light most favorable to the jury's verdict, giving the plaintiff all reasonable inferences and disregarding all conflicting evidence and inferences.

529 S.W.3d 795, 799 (Mo. banc 2017) (internal quotation marks and citations omitted).

Thus, our inquiry is focused upon whether DiSalvo offered evidence to support every element necessary for liability. Newsome v. Kansas City, Mo. Sch. Dist., 520 S.W.3d 769, 775 (Mo. banc 2017). "Whether the plaintiff made a submissible case is a question of law that this Court reviews *de novo*." Id. "To make a submissible case, the [plaintiff] must present substantial evidence of every fact necessary to establish the liability of defendant." Tharp v. St. Luke's Surgicenter-Lee's Summit, LLC, 587 S.W.3d 647, 659 (Mo. banc 2019) (internal quotation marks and citations omitted). While we view evidence in the light most favorable to the verdict, "[l]iability cannot rest upon guesswork, conjecture, or speculation beyond inferences reasonably to be drawn from the evidence." Id.

Discussion

The elements of fraudulent misrepresentation are: “1) a representation; 2) its falsity; 3) its materiality; 4) the speaker’s knowledge of its falsity, or his ignorance of its truth; 5) the speaker’s intent that it should be acted on by the person and in the manner reasonably contemplated; 6) the hearer’s ignorance of the falsity of the representation; 7) the hearer’s reliance on the representation being true; 8) his right to rely thereon; and, 9) the hearer’s consequent and proximately caused injury.” Boland v. Saint Luke’s Health Sys., 588 S.W.3d 879, 883 n.7 (Mo. banc 2019), citing Heberer v. Shell Oil Co., 744 S.W.2d 441, 443 (Mo. banc 1988). Significantly, “[f]raud imputes venality and corruption to the person charged with it, and both reason and law require clear and convincing proof of it.” Dorsch v. Family Med., Inc., 159 S.W.3d 424, 432 (Mo. App. W.D. 2005). Therefore, “the plaintiff who alleges certain and definite misrepresentations bears the burden to substantially prove the misrepresentations that have been alleged.” Id.

Assuming that DiSalvo proved the existence of a representation by Hall to DiSalvo, Hall argues in Point I that DiSalvo failed to provide substantial evidence that such representation was false when it was made. That is, Hall argues DiSalvo failed to prove that when Hall represented that he would guarantee Purvis’s obligations under the settlement agreement, Hall actually had no intention to do so. We agree that there was no such substantial evidence at trial.

In the context of a future promise, like Hall’s allegedly false misrepresentation to provide a guaranty, this Court has stated:

It is well-settled that an unkept promise does not constitute actionable fraud unless the promise is accompanied by the defendant's present intent not to perform, which constitutes a misrepresentation of a present state of mind, itself an existent fact. The fact that the defendant did not perform as promised is not enough, and, without more, the plaintiff cannot show that the defendant did not intend to perform when the promise was made. Fraud must not be presumed, but, because fraud is rarely

susceptible of positive proof, the plaintiff may prove his case by circumstantial evidence.

CADCO, Inc. v. Fleetwood Enterprises, Inc., 220 S.W.3d 426, 436 (Mo. App. E.D. 2007)

(internal quotation marks and citations omitted). Moreover, “[t]he truth or falsity of representations for purposes of a fraud claim is judged in the light of the meaning which the plaintiffs would reasonably attach to them in existing circumstances and the words employed must be considered against the background and in the context in which they were used.” Renaissance Leasing, LLC v. Vermeer Mfg. Co., 322 S.W.3d 112, 133 (Mo. banc 2010) (internal quotation marks and citations omitted).

In Renaissance Leasing, the Missouri Supreme Court addressed a claim of fraudulent representation when a terrain leveling machine was not repaired to its original condition. Id. The plaintiff alleged the defendant had falsely stated he would repair or redesign the machine back to its original condition. Id. The court disagreed, stating “[t]he failure of performance does not establish intent.” Id. Turning to the record, the court found no evidence, which if believed, would allow a jury to find that the defendant’s statements were false when made. Id. Instead, the court found that the multiple invoices and warranty claim documents of defendant’s attempted repairs proved that the defendant was trying to perform consistently with his statement. Id.

Likewise, in Trotter’s Corp. v. Ringleader Restaurants, Inc., 929 S.W.2d 935, 940-41 (Mo. App. E.D. 1996), Ringleader Restaurants claimed that Trotter made a fraudulent misrepresentation by stating that he would provide trained individuals to the business and expend money on advertising. The court rejected Ringleader Restaurant’s claim because Trotter had only promised to take future action, and Ringleader failed to establish that he had no present intent to perform at the time of his representations. Id. See also Grosser v. Kandel-Iken Builders, Inc., 647

S.W.2d 911 (Mo. App. E.D. 1983) (no evidence was presented that, at the time the promise was made, defendant did not intend to build a swimming pool).

DiSalvo attempted to establish that Hall's statements were false when made with the following evidence: (1) Hall's May 30, 2018 deposition; (2) Hall's interactions with Chase McKeague; and (3) Hall's failure to sign the guaranty. Even viewed favorably to the verdict, this evidence did not constitute sufficient evidence of this element of the fraud claim.

First, DiSalvo argues that Hall's deposition—set out earlier in this opinion—provides direct evidence that Hall had an intent to defraud at the time of his representations. But the deposition only asked about a “personal guaranty” that Hall would give “at any time.” That is, it speaks only to whether Hall would sign *any guaranty* for Purvis to settle her lawsuit with DiSalvo. It does not speak at all to whether Hall intended to sign a collateralized guaranty at the time the representation was made. See Renaissance Leasing, 322 S.W.3d at 133. In light of this distinction, it would be mere speculation to assume Hall's response in the deposition indicated he would not sign a *collateralized* guaranty once an agreement had been fully established between Purvis and DiSalvo. See Tharp, 587 S.W.3d at 659 (liability cannot rest upon guesswork, conjecture, or speculation). The difference between a collateralized and uncollateralized guaranty is not insignificant, as the latter could lead to several hundred thousand dollars of increased liability for Hall. Consequently, even in a light most favorable to the verdict, all that Hall's deposition and trial testimony establish is that he was not willing to sign an uncollateralized guaranty for Purvis, an issue irrelevant to the question of whether Hall made a present, false representation about signing a collateralized guaranty.

Next, DiSalvo points to evidence showing that Hall failed to pay money on behalf of Purvis to Chase McKeague, arguing this shows a clear pattern of Hall making statements to pay

when he has no present intent to do so. Because the situations are readily distinguishable, the McKeague evidence is also merely speculative as to Hall's intent at the time he represented that he would provide Purvis a guaranty in this case. First, Hall's interactions with McKeague were not for a guaranty, but rather were to loan money to Purvis or pay McKeague a lesser sum upfront. Second, Hall's trial testimony was that he did not pay McKeague the lesser sum because McKeague never requested the payment from him and appeared to have a change of heart. Hall even stated that he would have met his obligation if it were requested of him. Additionally, the McKeague evidence never established that Hall made a fraudulent misrepresentation to McKeague.

Finally, DiSalvo's argument regarding Hall's failure to send the signed guaranty back to Modrcin has no merit. Showing that Hall later broke his promise does not establish he did not previously have a present intent to sign a guaranty. See Renaissance Leasing, 322 S.W.3d at 133.

In conclusion, DiSalvo did not present substantial evidence to allow the jury to find that Hall did not have a present intent to sign a guaranty, supported by appropriate collateral, when he made such representations to DiSalvo. Thus, DiSalvo did not make a submissible claim of fraudulent misrepresentation.

Point I is granted. Points II, III, and IV (also related to the submissibility of the fraud claim) and Point VI (related to the admission of evidence at trial) are denied as moot. DiSalvo's cross-appeal regarding remittitur is likewise denied as moot.

Specific Performance

Standard of Review

Hall's fifth point on appeal claims the trial court erred in entering a judgment ordering Hall to specifically perform his guaranty agreement. "On review of a court-tried case, an

appellate court will affirm the circuit court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." Ivie v. Smith, 439 S.W.3d 189, 198-99 (Mo. banc 2014), citing Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). Circuit courts are free to believe or disbelieve the evidence presented at trial and deference is given to the circuit court's findings of fact. ROH Farms, LLC v. Cook, 572 S.W.3d 121, 125 (Mo. App. W.D. 2019). "To prevail on the substantial-evidence challenge, [the appellant] must demonstrate that there is no evidence in the record tending to prove a fact that is necessary to sustain the circuit court's judgment as a matter of law." Ivie, 439 S.W.3d at 200.

"Specific performance is purely an equitable remedy and must be governed by equitable principles." ROH Farms, 572 S.W.3d at 125. Specific performance is not a matter of right and should not be invoked "where it will result in injustices." Id. "The party requesting specific performance of a settlement agreement has the burden of proving, by clear, convincing and satisfactory evidence, his claim for relief." Owen v. Hankins, 289 S.W.3d 299, 304 (Mo. App. S.D. 2009). See also ROH Farms, 572 S.W.3d at 125. "Evidence is clear and convincing if it instantly tilt[s] the scales in the affirmative when weighed against the evidence in opposition, [such that] the fact finder's mind is left with an abiding conviction that the evidence is true." Matthes v. Wynkoop, 435 S.W.3d 100, 106 (Mo. App. W.D. 2014).

Discussion

In Point V, Hall argues the trial court's judgment granting specific performance was not supported by substantial evidence. We agree.

DiSalvo's theory on this claim was that although no written agreement was ever finalized, there was an oral settlement agreement under which Purvis defaulted. Thus, DiSalvo contended that Hall should be ordered to specifically perform his agreement—also not reduced

to a signed writing—to guarantee Purvis’s obligations under that oral settlement agreement.

Having so ordered, we must presume that the court found the existence of a valid oral settlement agreement because, of course, Hall could only be liable to DiSalvo if a valid oral settlement agreement existed that Purvis then defaulted upon. As stated in Matthes:

Settlement agreements are contracts and subject to contract law. To show a legal, valid settlement agreement, one must prove the essential elements of a contract: offer, acceptance and consideration. Because a settlement agreement is a species of contract and, therefore, subject to contract law, a meeting of the minds is required. This court looks at the *objective manifestations of the parties* in order to determine whether a meeting of the minds has occurred. *It is the actions*, and not the intentions or suppositions of the parties, that determine whether or not there is a contract and the terms of the contract.

435 S.W.3d at 107 (emphasis added). An enforceable contract is not formed when terms are too uncertain. Bldg. Erection Servs. Co. v. Plastic Sales & Mfg. Co., 163 S.W.3d 472, 477 (Mo.

App. W.D. 2005). “In determining whether the terms of an agreement are too uncertain to create an enforceable contract, ‘a court is guided by principles of law applied with common sense and in the light of experience.’” Id., quoting Ketcherside v. McLane, 118 S.W.3d 631, 636 (Mo. App. S.D. 2003).

After thoroughly reviewing the record, we find there was no clear or convincing evidence of the terms of an oral settlement agreement, nor of an agreement on Hall’s part to provide a guaranty of an oral agreement, and therefore it was unjust to order Hall to specifically perform thereunder. DiSalvo lists several pieces of evidence that he claims are clear and convincing evidence of an oral settlement agreement. However, DiSalvo has not even stated the date he believes a meeting of the minds occurred. Even assuming it is January 5, 2016, the date the case was passed for settlement, the only evidence DiSalvo points to that occurred before the announcement in court was an email from that morning discussing several minor changes to the stipulation. Noticeably, the email made no mention of an oral agreement and a review of the

record does not show any other email that clearly indicates an objective manifestation of the parties to enter into an oral agreement. Moreover, while DiSalvo points to both the trial court memo and testimony regarding the case being passed for settlement, the parties conceded the settlement terms were not announced to the trial court on January 5, 2016, thus making it unknown what, if anything, the parties had agreed to. Additionally, several revisions to the written draft agreements occurred on or after January 5, 2016.

Finally, DiSalvo claims two emails from Abrams to Hall's lawyers, thanking them for getting the case settled, is proof of an oral settlement agreement. However, thanking Mass and Koslovsky for agreeing to pass the case for settlement is not the same as thanking them for reaching an oral settlement agreement. Additionally, without prior authorization from Modrcin, Abrams did not even represent Hall when making those statements.

Furthermore, no evidence whatsoever was presented showing that Hall's guaranty would be effective and enforceable based solely upon an oral settlement agreement. Instead, the evidence presented at trial shows that Hall would not agree to an enforceable guaranty until after the parties had entered into a valid *written* settlement agreement. During his testimony, Modrcin stated that he and Hall never agreed to guarantee an oral settlement agreement. Moreover, no evidence existed showing the parties had discussed this critical caveat. Common sense dictates it would not be just to hold Hall, a guarantor, liable under an oral settlement agreement and oral guaranty, when no evidence was presented that showed he acquiesced to such oral liability or had even discussed with DiSalvo the possibility of being liable without a written settlement agreement.

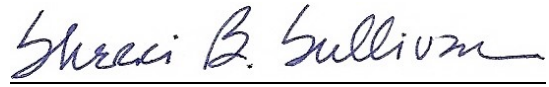
For all the reasons listed above, we hold that DiSalvo did not present clear, convincing, and satisfactory evidence of an oral settlement agreement and presented no evidence that Hall

agreed to be bound by an oral agreement. Therefore, there is no substantial evidence to support the court's judgment for specific performance.

Point V is granted.

Conclusion

The judgment entered on the jury verdict in favor of DiSalvo on the fraud claim is reversed. The judgment of the trial court ordering specific performance is reversed.



SHERRI B. SULLIVAN, J.

Robin Ransom, P.J., and
Lisa P. Page, J., concur.