No. 2—09—1233
Order filed March 14, 2011

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CHARLES and PAMELA BAHURIAK,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiffs-Appellees,	)	
	)	
v.	)	No. 01—CH—488
	)	
BILL KAY CHRYSLER PLYMOUTH, INC.	)	Honorable
	)	Bonnie M. Wheaton,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Hudson concurred.

ORDER

Held: The trial court did not err in applying this court's directions in the previous appeal; the trial court did not err in denying defendant's motion to stay and compel arbitration; the trial court erred finding that plaintiff, Charles Bahuriak, established a cause of action for consumer fraud; the trial court erred in awarding attorney fees and costs to plaintiffs' counsel.

Defendant, Bill Kay Chrysler Plymouth, Inc., appeals from orders of the circuit court of Du Page County denying its motion to compel arbitration, entering judgment in favor of plaintiff, Charles Bahuriak (Charles), following a bench trial, and awarding attorney fees. For the reasons that follow, we affirm in part and reverse in part.

BACKGROUND

This is the second appeal in this case, which arose out of a transaction on Saturday, October 21, 2000, between Charles and defendant in which Charles purchased a 2000 Chrysler Sebring and traded in a 1996 BMW Z3 convertible owned by him and his wife, Pamela. Charles admittedly signed all of the contract documents, including an agreement to arbitrate, and turned over title to the BMW to defendant. The title to the BMW was in both Charles's and Pamela's names. However, Pamela refused to sign it over to defendant. Nevertheless, defendant sold the BMW to an entity in Minnesota.

On Monday, October 23, 2000, Charles contacted defendant and demanded the return of the BMW, saying Pamela did not agree to trade it. Charles offered to pay the $14,000 trade-in allowance for the return of the vehicle. Because the BMW had already been sold, defendant did not return it to Charles. Plaintiffs filed suit against defendant on April 4, 2001. Count I alleged a cause of action for rescission and cancellation of the contract based on fraud in the inducement. Plaintiffs alleged that defendant had misrepresented that the transaction would not be final until Pamela agreed to the amount of the trade-in allowance and signed the title and that defendant misrepresented the value of the BMW. Counts II and III alleged a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.* (West 2000)), based upon the same misrepresentations, and an action for common law fraud. In count IV, Pamela individually alleged that defendant unlawfully converted her BMW.

Defendant filed a motion to stay the proceedings and to compel arbitration of Charles's claims pursuant to the Federal Arbitration Act (9 U.S.C. §1 *et seq.* (2000)) and the Illinois Uniform Arbitration Act (710 ILCS 5/1 *et seq.* (West 2000)). In their response, plaintiffs denied the existence

of a contract to arbitrate. The trial court denied the motion to stay and to compel arbitration on the basis that the allegations in plaintiffs' complaint fell within one of the exceptions to arbitration in the arbitration agreement. Defendant appealed.

The First Appeal

This court filed an opinion on January 8, 2003. Following consideration of a petition for rehearing filed by defendant, we issued a modified opinion upon denial of rehearing on March 27, 2003. *Bahuriak v. Bill Kay Chrysler Plymouth, Inc.*, 337 Ill. App. 3d 714 (2003) (*Bahuriak I*). In *Bahuriak I*, we held that the parties expressly agreed to arbitrate the issue of arbitrability, and the trial court erred in making the decision whether Charles's claims fell within one or more of the exceptions to the arbitration agreement. *Bahuriak I*, 337 Ill. App. 3d at 718-19. We then stated that our determination that the trial court erred in deciding the issue of arbitrability did not end our inquiry because, before reaching the arbitrability of a given claim or dispute, the issue of whether the parties actually entered into an agreement to arbitrate had to be resolved. *Bahuriak I*, 337 Ill. App. 3d at 719. We then held that "[t]he issue of whether a contract to arbitrate exists must be determined by the court, not an arbitrator." *Bahuriak I*, 337 Ill. App. 3d at 719. We pointed out that both the Illinois Act and the Federal Act provide that if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of that issue. *Bahuriak I*, 337 Ill. App. 3d at 719. We noted that plaintiffs in their response to defendant's motion to stay and compel arbitration denied the existence of an arbitration agreement. *Bahuriak I*, 337 Ill. App. 3d at 720. The trial court's failure to make a finding with respect to an agreement to arbitrate constituted error. *Bahuriak I*, 337 Ill. App. 3d at 720. We accordingly remanded the cause to the trial court with the following directions:

"On remand, the circuit court is directed to make the findings necessary to determine whether there was an agreement to arbitrate Charles's claims, and then rule on [defendant's] motion to stay and compel arbitration." *Bahuriak I*, 337 Ill. App. 3d at 720.

The next paragraph of the opinion stated as follows:

"The parties have made various arguments as to the existence of an agreement to arbitrate Charles's claims. For example, plaintiffs claim that Pamela's approval of the amount of the trade-in allowance for the BMW and her agreement to trade in the BMW were conditions precedent to the formation of the contract to purchase the Sebring, which in turn, they argue, determines the existence of the arbitration agreement. On the other hand, [defendant] has argued that the contract was ratified by Charles's retention of the Sebring and that, even if there was no contract to purchase the Sebring, the arbitration agreement is enforceable independent of the contract. *These, and any other arguments as to the existence of an agreement to arbitrate, should be addressed to the trial court on remand.*" (Emphasis added). *Bahuriak I*, 337 Ill. App. 3d at 720.

Proceedings After Remand

On June 26, 2003, the parties appeared for the hearing on the issue of the existence of an agreement to arbitrate. A preliminary matter involving discovery requests arose. Counsel for defendant addressed the discovery dispute as follows:

> "[MR. GORDON]: Judge, the hearing is to determine whether or not—there was a condition precedent to the arbitration agreement. If we engage in discovery, that defeats the purpose of the arbitration agreement."

Over the course of the hearing, defendant's counsel interjected five more times that the purpose of the hearing was to determine whether there was a condition precedent.

At the hearing, Charles testified that he made defendant aware that the transaction was contingent on Pamela's approval and that defendant assented to that contingency. Pamela testified that she did not approve the transaction. Representatives of defendant testified that the transaction was not contingent on Pamela's approval and that Charles signed all of the paperwork and gave defendant a check for the purchase of the Sebring. The trial court stated that it understood this court's directions on remand to require it to answer four questions: (1) whether there was a condition precedent to the formation of the contract to purchase the Sebring; (2) if so, was the condition met; (3) whether the arbitration agreement was independent of the purchase agreement; and (4) whether there was a waiver of the condition precedent by plaintiffs' retention of the Sebring. The trial court found that Charles's testimony was credible.[1] The court ruled that Pamela's approval was a condition precedent to the formation of the contract to purchase the Sebring, which was not met because Pamela did not approve. The trial court further ruled that the arbitration agreement was not independent of the purchase agreement because, *inter alia*, the arbitration agreement provided that it survived the termination or expiration of the purchase contract, which presupposed a valid contract. Finally, the trial court ruled that there was no waiver because defendant sold the BMW and plaintiffs had no choice except to retain the Sebring. The trial court denied defendant's motion to stay and compel arbitration.

The Trial

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[1]Defendant does not make an argument that this finding was against the manifest weight of the evidence.

The trial on plaintiffs' complaint was held on November 24, 2008.[2] Charles again testified that the transaction was contingent on Pamela's approval, which she refused to give. He testified that the BMW was worth more than the $14,000 trade-in allowance given by defendant. According to Charles, he checked newspaper advertisements that indicated the BMW was worth more than $20,000. He admitted that, as of the time of trial, he and Pamela had driven the Sebring for eight years and 50,000 miles, and that it had been involved in two accidents.

Pamela again testified that she did not approve of the purchase of the Sebring and the trade-in of the BMW.

Representatives of defendant testified that Charles purchased the Sebring with cash and agreed to trade the BMW for a $14,000 trade-in allowance, which was calculated by consulting a "Black Book," a publication used by dealerships to appraise used cars. According to defendant's representatives, there was no agreement to make the transaction contingent on Pamela's approval. John Spellman, defendant's general manager, testified that Charles told him he wanted to buy the BMW back because his neighbor had offered more than $14,000 for it. The BMW had already been sold, so defendant could not return it to Charles.

The trial court held that remedies for breach of contract, such as rescission, were not available because the court had already determined that there was a condition precedent to the formation of a contract for the purchase of the Sebring that had not been met. The trial court ruled that Pamela could not recover under the Consumer Fraud Act because defendant had not made any misrepresentations to her. The court found that plaintiffs failed to prove the value of the BMW, so there could be no recovery for conversion. The court found in Charles's favor on the Consumer

[2]Pamela withdrew as a plaintiff and then was reinstated as a plaintiff.

Fraud Act violation and assessed his damages as the full transaction price, $27,473.39. The court ordered Charles to return the Sebring to defendant once defendant paid the judgment. The trial court denied defendants' posttrial motions, and awarded plaintiffs' attorney in excess of $80,000 in fees. Defendant filed a timely notice of appeal.

ANALYSIS

Defendant first argues that the trial court did not follow this court's mandate in *Bahuriak I* in that it did not make any findings as to whether Charles executed the arbitration agreement. Defendant maintains that we must remand this cause with instructions to the trial court to grant defendant's motion for stay and to compel arbitration, because the evidence showed that Charles signed the arbitration agreement. Secondarily, defendant asserts that the trial court had no authority to determine that there was a condition precedent to the formation of the contract to purchase the Sebring. Defendant argues that this was an issue for arbitration. We review the issue of whether the trial court acted within the bounds of the remand *de novo*. *Clemons v. Mechanical Devices Co.*, 202 Ill. 2d 344, 351 (2002).

Defendant reads our directions on remand to restrict the trial court to deciding whether Charles executed the arbitration agreement. The arbitration agreement was introduced in evidence. It is a single-page document separate from the purchase agreement. There is no dispute that Charles signed it. However, plaintiffs denied the existence of the arbitration agreement on the ground, *inter alia*, that defendant showed Charles the signature line and advised him to sign it when Charles did not read the document or agree to its terms. Plaintiffs further asserted that the agreement to arbitrate did not exist because there was a mutual understanding between the parties that the "whole deal" was contingent on Pamela's signing the title to the BMW. This court specifically directed that arguments

regarding a condition precedent should be addressed to the trial court on remand. Thus, our directions on remand were not so narrow as defendant posits. Defendant acknowledges that we ordered the parties to address issues of condition precedent and waiver to the trial court on remand, but defendant contends that the trial court should have declined to adjudicate the argument.

This is an anomalous position for defendant to take. When the trial court convened the hearing after remand, plaintiffs' attorney brought to the court's attention defendant's lack of compliance with discovery requests. In response, counsel for defendant argued that discovery was premature because the purpose of the hearing "[was] to determine whether or not—there was a condition precedent to the arbitration agreement." Then a colloquy on whether Pamela was bound by the arbitration agreement ensued. Counsel for defendant suggested that Pamela's claims had nothing to do with the arbitration agreement, "[s]o the first issue is whether or not there was a condition precedent, and that's what everybody is here to testify to." When the trial court questioned why defendant's counsel was asking it to make a decision as to Charles and then make a decision as to Pamela at some future time, defense counsel replied:

> "The issue with respect to Charles is as framed by the Appellate Court, was, was there a condition precedent to the entire contract, therefore, was—would the arbitration agreement not be enforceable because this condition precedent wasn't fulfilled. That's the issue on Charles."

Defense counsel argued that if the trial court found that the arbitration agreement was enforceable against Charles "because there was no condition precedent," then he would have the right to suggest that Pamela was bound by the arbitration agreement.

The trial court determined that defendant had the burden of going forward, and defense counsel presented evidence relating to the issue of a condition precedent. During the hearing, when plaintiffs' counsel objected on relevance grounds to the question asked of Charles as to who was driving the Sebring, defendant's counsel responded, "The issue is a condition precedent. The fact is that if they consummated the transaction, they'd be using the vehicle." Defendant's counsel again reminded the trial court during the hearing that "[t]he issue here, Judge, is whether or not there was a condition precedent."

Then, in his closing argument, defense counsel argued that the issue of the condition precedent was for the arbitrator to decide at arbitration. The trial court rejected this position on the ground that the arbitration agreement provided that it survived termination of the contract to purchase the Sebring, which "presupposes that there was a valid contract to begin with."

We are not invoking the forfeiture rule against defendant, but merely pointing out that defendant wanted it both ways at the hearing. When it suited defendant not to have to comply with discovery, it was because the issue before the court was the condition precedent. When it suited defendant not to argue Pamela's status vis-a-vis the arbitration agreement, it was because this court had framed the issue as whether a condition precedent applied to Charles. Then, when it suited defendant to have the trial court evade the issue altogether (because the trial court had directed a finding against defendant and then effectively vacated the directed finding), defendant argued that the arbitrator should decide it. Both parties and the trial court correctly understood and applied our directions on remand, and defendant does not argue that the trial court's decision was against the manifest weight of the evidence.

We also reject defendant's argument that the trial court lacked authority to decide whether there was a condition precedent. In *Bahuriak I*, we held that the issue was for the court to decide. "The issue of whether a contract to arbitrate exists must be determined by the court, not an arbitrator. [Citation.]" *Bahuriak I*, 337 Ill. App. 3d at 719. Consequently, this was the law of the case. Generally, the law-of-the-case doctrine bars relitigation of an issue previously decided in the same case. *Bjork v. Draper*, 404 Ill. App. 3d 493, 501 (2010). The doctrine applies to both issues of law and fact. *Bjork*, 404 Ill. App. 3d at 501. Questions of law that are decided on a previous appeal are binding on the trial court on remand as well as on the appellate court in subsequent appeals. *Bjork*, 404 Ill. App. 3d at 501. There are two recognized exceptions to the doctrine: (1) when a higher reviewing court makes a contrary ruling on the same issue subsequent to the lower court's decision, and (2) when a reviewing court finds that its prior decision was palpably erroneous. *Bjork*, 404 Ill. App. 3d at 501. Here, the law-of-the-case doctrine bound the trial court to decide the issue of whether there was a condition precedent. In the present appeal, defendant does not argue that *Bahuriak I* was palpably erroneous, and we decline to so find. Under either the Illinois Act or the Federal Act, if the existence of the arbitration agreement is at issue, the trial court decides the issue. *Bahuriak I*, 337 Ill. App. 3d at 719. Accordingly, the trial court did not err in deciding the issue on remand.

Defendant next argues that the trial court's finding that defendant violated the Consumer Fraud Act was not supported by the evidence and that Charles failed to prove any damages. Where testimony is conflicting in a bench trial, the trial court's findings will not be disturbed unless they are against the manifest weight of the evidence. *Bazydlo v. Volant*, 164 Ill. 2d 207, 215 (1995). To prove a cause of action under the Consumer Fraud Act, the plaintiff must establish: (1) a deceptive

act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; (3) the occurrence of deception in the course of conduct involving trade or commerce; and (4) actual damage to the plaintiff (5) proximately caused by the deception. *Mulligan v. QVC, Inc.*, 382 Ill. App. 3d 620, 625 (2008). Because we agree with defendant that Charles failed to prove any actual damage, we will examine that issue.

The trial court ruled that its prior determination that Pamela's consent to the transaction was a condition precedent to the formation of the contract, and that the condition precedent was not met, meant there was no contract. Consequently, the trial court ruled that plaintiffs, as a matter of law, could not recover for rescission, revocation of the contract, or breach of contract. Plaintiffs withdrew the claim for common law fraud, which left consideration of the consumer fraud and conversion claims. As to conversion, the trial court held that the measure of damages was the value of the BMW at the time defendant exercised unauthorized control over it. Then the court stated:

> "There is no credible proof as to the value of the 1996 BMW Z3. What we have is the used car allowance which appears by the testimony not to always or even in this case reflect the true market value. But there is no credible testimony as to what the actual value of the vehicle is."

Having found against plaintiffs on the conversion count of the complaint, the trial court ruled on the only count left, consumer fraud. The trial court found Charles's testimony regarding the "sequence of events" and the representations made to him by defendant to be credible. As to damages, the court found:

> "So I believe that the measure of damages that was suffered by [Charles] as a result of the consumer fraud was the value of this entire transaction, that being $27,473.39. That was the, quote, out-the-door, unquote price of this vehicle."

The trial court found that Charles mitigated damages by using the Sebring, reasoning that the use of the Sebring was equal in value to the use he would have had of the BMW, although the court stated, "I have no means of assessing what the value of either one is, especially declining over the period of time that this case has been on file."

Defendant contends that the trial court's award of the entire amount of the transaction was in reality the grant of relief for revocation of the contract, relief to which the trial court held Charles was not entitled, because no contract was ever formed. We agree. The trial court attempted to restore the parties to their respective positions before the transaction occurred. This was impossible, as defendant had sold the BMW and plaintiffs had driven the Sebring for eight years and 50,000 miles, and there was testimony that the Sebring was in two accidents. Accepting the trial court's assessment of the witnesses' credibility, plaintiffs' loss was the BMW that defendant sold without Pamela's permission. Plaintiffs would be entitled to the value of the BMW at the time it was wrongfully sold minus the $14,000 trade-in allowance. The trial court found that plaintiffs failed to prove the value of the BMW. Consequently, there was no proof of actual damage, an essential element of the cause of action.

Plaintiffs argue that they were not estopped from obtaining damages for revocation of the contract as their continued use of the Sebring was reasonable. This misses the point. Plaintiffs were not entitled to damages for revocation of the contract because the trial court found there was no

contract. Plaintiffs spent years in litigation and finally convinced the trial court that there was no contract. They cannot now be heard to argue that they are entitled to contract damages.

With respect to actual damages, Charles testified that in his opinion the BMW was worth a retail value of $24,000 to $28,000. He gave no basis for this opinion except to say that he "reviewed in the newspaper" and concluded that "gee, this [BMW] is worth more [than the trade-in allowance.]"

The trial court found that there was no credible proof of the value of the BMW in the record. Plaintiffs now argue that Charles's testimony was sufficient because it is not necessary to prove damages with mathematical certainty, and a defendant should not escape liability because the damages are difficult to prove. Plaintiffs rely on *Razor v. Hyundai Motor America*, 222 Ill. 2d 75 (2006). However, *Razor* is of no help to plaintiffs. In *Razor*, the supreme court held that there was no sufficient basis for the jury's award of damages where there was no documentary evidence submitted on the damages question, nor was expert testimony presented. *Razor*, 222 Ill. 2d at 107. The only evidence as to damages in *Razor* was the plaintiff's testimony that she would not pay the price she had originally paid for the vehicle because of all the problems she had with the vehicle, which was insufficient to support the jury's award of $5,000. *Razor*, 222 Ill. 2d at 107. In our case, plaintiffs' reliance on *McGrady v. Chrysler Motors Corp.*, 46 Ill. App. 3d 136 (1977), is also misplaced. In *McGrady*, the appellate court reviewed an award of consequential damages consisting of inconvenience, aggravation, and loss of use. *McGrady*, 46 Ill. App. 3d at 140. The appellate court in *McGrady* held that those items of damages were provable notwithstanding "the want of mathematical specifics" so long as the trier of fact's assessment was reasonable and not punitive. *McGrady*, 46 Ill. App. 3d at 140. Here, we are not concerned with damages for intangibles that are

not susceptible to mathematical certainty; the value of the BMW at the time defendant sold it had an objective value that was subject to documentary or expert proof. Finally, plaintiffs' reliance on *Kirkpatrick v. Strosberg*, 385 Ill. App. 3d 119 (2008), for the proposition that they were entitled to nominal damages in the absence of proof of actual damages, is erroneous. In *Kirkpatrick*, this court upheld an award of nominal damages even though plaintiffs failed to provide a sufficient basis for the computation of actual damages, because the trial court made a specific finding of fact that the plaintiffs "did indeed prove actual damages for the purpose of proving their consumer-fraud claims." *Kirkpatrick*, 385 Ill. App. 3d at 132. Here, the trial court did the opposite of what the trial court did in *Kirkpatrick* and made a specific finding that plaintiffs did not prove the value of the BMW.

Lastly, plaintiffs contend that Charles testified that he sustained damages in the form of aggravation and inconvenience. However, plaintiffs ignore that the trial court refused to award damages for aggravation and inconvenience. Plaintiffs had the use of the Sebring for eight years and 50,000 miles. They drove the Sebring year-round, whereas they garaged the BMW in the winters. We cannot say that the trial court's finding was against the manifest weight of the evidence. Consequently, we agree with defendant that plaintiffs failed to prove an element of the consumer fraud claim, that is, actual damages. Accordingly, we reverse the trial court's finding in favor of Charles on the consumer-fraud count and vacate the award of $27, 473.39 to Charles.

Defendant's last contention is that the trial court erred in its award of attorney fees to plaintiffs' counsel. We agree because, having determined that Charles failed to prove consumer fraud, he is not a prevailing party. Section 10a(c) of the Consumer Fraud Act provides that a court may award reasonable attorney fees and costs to the "prevailing party." 815 ILCS 505/10a(c) (West 2008); *Boeckenhauer v. Joe Rizza Lincoln Mercury*, 372 Ill. App. 3d 926, 928 (2007).

CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment denying defendant's motion for stay and to compel arbitration. We reverse that part of the judgment finding in favor of Charles and against defendant on count II (consumer fraud) of the complaint. We reverse the judgment of the trial court awarding attorney fees and costs to Charles.

Affirmed in part; reversed in part.