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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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KENNETH V. PINESCHI, DDS, individually,	)	Appeal from the Circuit Court
and as the representative of a class of similarly	)	of Winnebago County.
situated persons,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 09—L—0295
	)	
LARRY RICHARD RADANT, and unknown	)	
owners d/b/a Larry's Gun Shop,	)	Honorable
	)	Ronald L. Pirrello,
Defendant-Appellee.	)	Judge, Presiding.

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JUSTICE HUTCHINSON delivered the judgment of the court.  
Presiding Justice Jorgensen and Justice Hudson concurred in the judgment.

**ORDER**

*Held:* Plaintiff failed to present sufficient evidence to demonstrate that defendant converted the sales tax he collected for his own use, or that defendant knew his statements to plaintiff regarding the sales tax were false at the time he made the representations; therefore, summary judgment in defendant's favor was warranted. Plaintiff also failed to present a sufficient record to support his claim of error in the trial court's award of attorney fees. We affirmed the trial court's judgment.

Plaintiff, Kenneth V. Pineschi, DDS, individually and as a representative of a class similarly situated persons, brought this action alleging that defendant, Larry Richard Radant and unknown owners doing business as Larry's Gun Shop, improperly collected a 7.25% sales tax from plaintiff

and other known members of a class for out-of-state transfers of guns when defendant should have collected a 6.25% use tax because the guns were not purchased in Illinois. Plaintiff's complaint alleged common-law fraud, a class action common-law fraud, a violation of the Consumer Fraud and Deceptive Business Practice Act (the Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2008)), a class action violation of the Consumer Fraud Act, conversion, and class action conversion. Plaintiff voluntarily dismissed the class action allegations, and the trial court subsequently granted summary judgment in favor of defendant with respect to the common-law fraud and conversion claims, and in favor of plaintiff with respect to the Consumer Fraud Act claim. The trial court also awarded plaintiff attorney fees of \$220. Plaintiff now timely appeals, contending that (1) the trial court erred when it granted summary judgment in favor of defendant for the common-law fraud and conversion claims; and (2) the trial court abused its discretion when it awarded plaintiff only \$220 in attorney fees for his claim pursuant to the Consumer Fraud Act. For the reasons set forth below, we affirm.

The pleadings, depositions, and affidavits reflect that plaintiff purchased three firearms for retail price from a gun shop located in Kentucky. Pursuant to federal law, the Kentucky gun shop shipped the firearms to an Illinois licensed gun dealer for registration and a background check. The firearms were shipped directly to defendant, who performed the required registration and background checks. For each transaction, defendant charged a \$25 service fee and a \$5 state call fee. Defendant also charged a 7.25% tax on each transaction based on the purchase price of the firearms, but no tax was charged on the background service fee or the call fee. The total amount charged on the three transactions was \$103.31.

On July 29, 2009, plaintiff filed his six-count complaint. Count I alleged common-law fraud; count II alleged class action common-law fraud; count III alleged a violation of the Consumer Fraud Act; count IV alleged a class action violation of the Consumer Fraud Act; count V alleged conversion; and count VI alleged class action conversion. On September 18, 2009, defendant filed a motion to dismiss pursuant to section 2—619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2—619 (West 2008)), which the trial court subsequently denied.

On March 11, 2010, defendant filed a motion for summary judgment. Defendant argued that counts II, IV, and VI should be dismissed because there was “not sufficient numerosity to support a class action.” Defendant further argued that summary judgment in his favor for count I was warranted because defendant did not benefit from the improper tax collections, and therefore, there was no genuine issue of material fact that defendant engaged in fraud by engaging in a scheme to practice deception or obtain a profit. Defendant similarly argued that he was entitled to summary judgment with respect to the conversion claim because he did not use the proceeds from the improper tax for his own use; therefore, there was no genuine issue of material fact regarding conversion. Defendant further argued that he was entitled to summary judgment regarding count III because the parties were “equally capable of knowing and interpreting the law” as it pertained to the imposition of taxes, and therefore, because plaintiff could not have been deceived, the Consumer Fraud Act claim should be dismissed as a matter of law. Finally, defendant argued that plaintiff was not entitled to punitive damages because there was no genuine issue of material fact that defendant engaged in malice, evil motive, gross deception, or willful or wanton conduct. Attached to defendant’s summary judgment motion was an affidavit in which he averred that he performed the necessary background checks and administrative requirements to transfer the firearms. Defendant

further averred that he collected a tax based on the purchase price of the firearms and that he remitted the taxes he collected to the State of Illinois. Defendant also submitted his sales and use tax return he filed with the State, which reflected that he collected \$943 in total taxes for the relevant time period, and remitted \$928 to the State. The amount not remitted was pursuant to a retailer's discount.

On June 3, 2010, plaintiff filed his response to defendant's motion for summary judgment, arguing that summary judgment was inappropriate with respect to counts I, III, and V because there were genuine issues of material fact relating to those allegations. Plaintiff did, however, concede that the evidence was insufficient to satisfy the numerosity requirement of certifying a class against defendant. On June 7, 2010, plaintiff filed a cross-motion for summary judgment. Plaintiff argued that he was entitled to summary judgment for the claim alleging a violation of the Consumer Fraud Act because defendant knowingly required plaintiff to pay taxes that were not due or owing. In support, plaintiff attached a sales and use tax return for defendant's account for the periods of July 1, 2008, through September 30, 2008, and October 1, 2008, through December 31, 2008, which according to plaintiff, demonstrated that defendant knew that the assessable tax rate for general merchandise for sales located outside Illinois was 6.25%, and defendant knew that none of the transactions involved the sale of tangible personal property by defendant. Plaintiff further argued that it was entitled to summary judgment for the conversion claim because defendant's defense that he acted innocently and did not benefit from his conduct was not a defense to conversion, and further, plaintiff had established every element of the tort of conversion.

On June 14, 2010, the trial court entertained oral arguments regarding the pending summary judgment motions. A transcript of the hearing was not provided in the record on appeal, but the

bystander's report reflects that the trial court heard testimony from plaintiff's attorney regarding the amount of time he expended on the case. Plaintiff's attorney testified that he spent 102 hours working on this case at a rate of \$220 per hour, for a total amount of \$22,465. No other witnesses testified and no evidence outside of the exhibits and affidavits attached to the parties' motions was considered.

After the hearing, the trial court entered an order voluntarily dismissing the counts of plaintiff's complaint alleging a class action against defendant. The trial court's written order further granted summary judgment in favor of defendant with respect to the fraud and conversion claims, and granted plaintiff summary judgment with respect to the Consumer Fraud Act claim. The trial court entered a judgment against defendant in the amount of \$103, plus attorney fees in the amount of \$220 for a total of \$323, and further enjoined defendant from assessing improper taxes in the future. Plaintiff timely appealed.

Before turning to the merits of this appeal, we must initially address plaintiff's outstanding motion to strike a portion of defendant's brief. Plaintiff seeks to strike a portion of defendant's brief on the ground that he improperly stated an issue presented for review, attempted to introduce evidence not in the record, and made factual assertions without proper citation to the record. We ordered the motion taken with the case. Illinois Supreme Court Rule 341(I) (eff. Sept. 1, 2006) mandates that an appellee's brief must comply, with certain exceptions, to the requirements of Supreme Court Rule 341(h), including proper citations to the record. Having reviewed defendant's brief, we deny plaintiff's motion. However, we will disregard any statements unsupported by the record on appeal.

The first issue raised on appeal is whether the trial court erred when it granted summary judgment in favor of defendant for the common-law fraud and conversion claims. Plaintiff argues that he established the necessary elements of conversion; and therefore, was entitled to judgment in his favor on that claim. Plaintiff further contends that summary judgment in defendant's favor for the fraud claim was inappropriate because a genuine issue of material fact existed whether defendant intended to deceive plaintiff.

This court reviews *de novo* a trial court's ruling on motions for summary judgment. *Chubb Insurance Co. v. DeChambre*, 349 Ill. App. 3d 56, 59 (2004) (citing *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278 (2001)). Summary judgment motions are intended to pierce the pleadings and test whether the pleadings raise factual issues which warrant a trial. *Winnetka Bank v. Mandas*, 202 Ill. App. 3d 373, 387 (1990). Summary judgment is proper if, and only if, the pleadings, depositions, admissions, affidavits and other relevant matters on file show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Chubb Insurance Co.*, 349 Ill. App. 3d at 59 (citing *Prowell v. Loretto Hospital*, 339 Ill. App. 3d 817, 822 (2003)). In determining whether a genuine issue of material fact exists, we must construe the pleadings, affidavits, and admissions strictly against the movant and liberally in favor of the nonmoving party. *Chubb Insurance Co.*, 349 Ill. App. 3d at 59. The reasons given by a lower court for its decision or the findings on which a decision is based are not material if the judgment is correct. *Canada Life Assurance Co. v. Salwan*, 353 Ill. App. 3d 74, 79 (2004) (citing *City of Chicago v. Holland*, 206 Ill. 2d 480, 492 (2003)). However, if this court's review reveals the existence of a genuine issue of material fact or an error in legal interpretation by the trial court,

reversal is warranted. *American Family Insurance Co. v. Woiwode*, 276 Ill. App. 3d 176, 178 (1995) (citing *Zoeller v. Augustine*, 271 Ill. App. 3d 370, 374 (1995)).

In the current matter, summary judgment in favor of defendant for conversion and fraud claims was warranted. To establish a claim of conversion, a plaintiff must establish that (1) he has a right to the property; (2) he has an absolute and unconditional right to the immediate possession of the property; (3) he made a demand for possession; and (4) the defendant wrongly and without authorization assumed control, dominion, or ownership over the property. *Kovitz Shifrin Nesbit, P.C. v. Rossiello*, 392 Ill. App. 3d 1059, 1063-64 (2009). To establish conversion for money, “[i]t must be shown that the money claimed, or its equivalent, at all times belonged to the plaintiff and that the defendant converted it to his own use.” *In re Thebius*, 108 Ill. 2d 255, 261 (1985). While plaintiff is not required to prove his case at summary judgment, he has a duty to present a factual basis which could arguably entitle him to relief. *Smith v. Kurtzman*, 176 Ill. App. 3d 840, 846 (1988). Here, the affidavits, admissions on file, and exhibits do not reflect a genuine issue of material fact as to whether defendant converted the sales tax he collected from plaintiff for his own use. Rather, the undisputed facts reflect that defendant charged plaintiff a 7.25% sales tax for the three firearm transfers when he should have charged a 6.25% use tax. Defendant then remitted the taxes he collected from plaintiff to the State, and the only amount not remitted was pursuant to an authorized retailer’s discount. Because there is no dispute that defendant remitted the taxes he collected to the State, plaintiff has failed to present evidence that defendant arguably converted the sales tax for his own use, and thus, he did not provide a sufficient factual basis to entitle him to relief on the conversion allegation.

Similarly, defendant was also entitled to judgment as a matter of law regarding plaintiff's fraud claim. To sustain a claim of common-law fraud, a plaintiff must establish that the defendant made a false statement of material fact, the defendant's knowledge that the statement was false, the defendant's intent that the statement induce the plaintiff to act, the plaintiff's reliance upon the truth of the statement, and damages resulting from reliance on the statement. *Capiccioni v. Brennan Naperville, Inc.*, 339 Ill. App. 3d 927, 933 (2003). The defendant's knowledge of the falsity of the statement, or a deliberate concealment with the intent to deceive, is an essential element of common-law fraud. *Fox v. Heimann*, 375 Ill. App. 3d 35, 47 (2007). In this case, plaintiff has failed to present record evidence to establish that defendant knew his statements to plaintiff regarding the assessment of a sales tax was false or improper. Specifically, defendant averred in his affidavit that his primary business is selling guns to retailers and that he has only encountered two customers who have purchased guns from out-of-state vendors and then shipped them to him for processing. Defendant further averred that the tax he collected from defendant was based on the purchase price of the firearm, which was submitted to the State. In addition, in a response to plaintiff's request to admit, defendant denied that he knew he was assessing the wrong tax. Plaintiff subsequently filed an affidavit in which he averred that defendant knew he was not selling guns when he assessed the sales tax and that plaintiff paid the sales tax pursuant to representations made by defendant. However, these affidavits, along with defendant's admissions on file, do not create a factual a basis on which to conclude defendant knew his statements regarding the applicable tax were false. Instead, the record only demonstrates that defendant assessed a sales tax as opposed to a use tax, and it is silent as to whether defendant knew his statements to plaintiff regarding the proper tax assessment were false at the time he charged plaintiff. As noted above, summary judgment is

appropriate when the plaintiff fails to meet its burden to in presenting a factual basis that would arguably entitle him to judgment. See *Smith*, 176 Ill. App. 3d at 846.

Accordingly, because plaintiff failed to present sufficient evidence to demonstrate that defendant converted the sales tax he collected for his own use, or that defendant knew his statements to plaintiff regarding the sales tax were false at the time he made those representations, summary judgment in defendant's favor for the conversion and fraud counts was warranted.

The second issue on appeal is whether the trial court abused its discretion when it awarded plaintiff only \$220 in attorney fees after granting him summary judgment for his Consumer Fraud Act claim. Plaintiff argues that the trial court's decision to award only one hour's worth of attorney fees because the case should have settled was not supported by the record. We disagree.

Section 10a(a) of the Consumer Fraud Act authorizes a private cause of action for any person who suffers actual damage resulting from a violation of the Act. 815 ILCS 505/10a(a) (West 2008). Section 10a(c) of the Consumer Fraud Act further provides that a court may award reasonable attorney fees and costs to the prevailing party. 815 ILCS 505/10a(c) (West 2008). Our supreme court has identified several factors a trial court may consider when determining whether to award fees pursuant to the Consumer Fraud Act. The factors include: (1) the degree of the opposing party's culpability or bad faith; (2) the ability of the opposing party to satisfy an award of fees; (3) whether an award of fees against the opposing party would deter others from acting under similar circumstances; (4) whether the moving party sought to benefit all consumers or business or to resolve a significant legal question regarding the Consumer Fraud Act; and (5) the relative merits of the parties' positions. *Krautsack v. Anderson*, 223 Ill. 2d 541, 554 (2006). The decision to award attorney fees pursuant to the Consumer Fraud Act lies with the sound discretion of the trial court,

and its decision will not be overturned absent an abuse of discretion. *Haskell v. Blumthal*, 204 Ill. App. 3d 596, 600 (1990).

In the current matter, our review of the record presented on appeal indicates that the trial court's decision to deny attorney fees did not constitute an abuse of discretion. We note that the bystander's report indicates that the trial court heard arguments and received the testimony of plaintiff's attorney regarding the number of hours he expended handling this case. The trial court's order further provided that it entered its order following a hearing. However, a transcript of the hearing was not provided in the record on appeal. Illinois law is well settled that plaintiff, as the appellant, had the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Absent such a record, a reviewing court will presume that the order entered by the trial court was in conformity with the law, and any doubts arising from the incompleteness of the record will be resolved against the appealing party. *Id.* at 392. Pursuant to *Foutch*, without the transcript from the hearing, we must resolve any doubts arising from the incompleteness of the record against plaintiff, and therefore, we will presume the trial court's order was in conformity with the relevant standards put forth by our supreme court in *Krautsack*. Accordingly, we hold the trial court did not abuse its discretion in awarding plaintiff only one hour of attorney fees.

For the foregoing reasons, we affirm the judgment of the circuit court of Winnebago County.

Affirmed.