

NOTICE
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2012 IL App (4th) 110634-U

Filed 3/15/12

NO. 4-11-0634

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

SHERYLE HENRY,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Sangamon County
MIKE BICKERS, d/b/a U.S. AUCTION COMPANY,)	No. 09SC7605
Defendant-Appellee.)	
)	Honorable
)	Chris Perrin,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Steigmann and Cook concurred in the judgment.

ORDER

¶ 1 *Held:* Where plaintiff failed to prove a violation and damages under the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 through 12 (West 2008)), the trial court did not err in entering judgment in favor of defendant.

¶ 2 Plaintiff, Sheryle Henry, filed a small-claims complaint against defendant, Mike Bickers, d/b/a U.S. Auction Company, for fraud under the Consumer Fraud Act. Plaintiff purchased two diamond rings at an auction conducted by defendant. The certificates of authenticity revealed a certain value and diamond rating for each ring. Plaintiff claims she had the two rings appraised and their values and ratings were greatly overstated in the certificates of authenticity. She sued defendant for damages, seeking the difference between the represented values and the appraised values. After a bench trial, the trial court entered judgment in favor of defendant. Plaintiff appealed and we affirm.

¶ 3

I. BACKGROUND

¶ 4 On April 26, 2011, the trial court conducted a bench trial. Because both parties proceeded *pro se*, the trial court conducted the witness examinations. First, plaintiff testified she was seeking damages under the Consumer Fraud Act. She had purchased two diamond rings at defendant's auction, one for \$2,900 and one for \$3,100. Each ring had a price tag and an accompanying certificate of authenticity, which plaintiff observed before bidding. According to the certificates and price tags, the first ring was worth \$20,000, and the second ring worth \$21,000. After the auction, plaintiff had the rings appraised by a local jeweler and "found out that they weren't really appraised at the value that they had stated next to the rings." The first ring was appraised at \$4,500 and the second ring at \$5,025. Plaintiff acknowledged the rings were worth more than what she paid for them but, she "thought [she] would at least make some money on [them]."

¶ 5 Brian Denney, a jeweler who performed the appraisal for plaintiff, testified he examined the rings under a microscope and evaluated the cut, color, clarity and carat weight of each diamond. He immediately advised plaintiff that the quality of both rings "was, in fact, different than what was stated." He said his appraised values represented the amounts he would list as the costs of the rings in his retail store. Denney would not reveal the markup for jewelry in his retail store, stating it was "proprietary information." He did state he was familiar with the term "triple keystone," a term used by jewelers to describe a markup of "three times the amount it was purchased for."

¶ 6 Plaintiff presented several exhibits, including the two certificates of authenticity from the auction, the price tags that were on the rings, the receipt from the auction, and the appraisal. Plaintiff rested.

¶ 7 Defendant presented the testimony of Denise Wilhoit, the cashier at the auction, who

provided no testimony relevant to the issues presented in this appeal. Defendant testified on his own behalf, referring to the certificates of authenticity as follows:

"We provide those, and we tell the people before the auction they're insurance certificates, and our guarantee is that the gold is genuine, and the diamonds are genuine. We can't guarantee the color, clarity[,] or any of that because if you take it to 20 different jewelers, you get 20 different evaluations.

And when you have rings like that that go through a jewelry company, they electronically put those tags on there, and when they do, they put a retail price on them, which you can see the same retail on there as on the certificate, and we consider that to be a full retail value.

The jeweler just testified that there's a 300 percent markup in jewelry. I mean, he testified to that on the triple keystone."

¶ 8 Defendant further testified that each certificate of authenticity included a disclaimer, which explained that the broker, International Diamond Distributors in Charleston, Illinois, was not liable "for anything because there's too many discrepancies on color, clarity[,] and cut." The disclaimer on the face of the certificate provides in full: "The above estimate is made with the understanding the broker assumes no liability with respect to any action that may be taken on the basis of this estimate." The certificate also contains the following language: "We estimate the value as listed for insurance or other purposes. In making this estimate, we DO NOT agree to purchase or replace the articles."

¶ 9 After considering the evidence, the trial court noted that the disclaimer on the face of the certificate should have put plaintiff on notice that she could not rely on the information stated therein. The court concluded that plaintiff had failed to establish actual damages because she paid less than fair market value for the rings. The court stated: "You made close to \$3,500 off both transactions, so because you don't have any damages, you don't have a cause of action, and I'm finding for the defendant in this case, and I'm dismissing the case."

¶ 10 Plaintiff filed a timely posttrial motion, which the trial court denied. This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 Section 2 of the Consumer Fraud Act declares as unlawful "the use or employment of any deception, fraud, false pretense, false promise, [or] misrepresentation." 815 ILCS 505/2 (West 2008). Section 10a(a) of the Consumer Fraud Act authorizes private causes of action for practices proscribed by section 2. Section 10a(a) states, in pertinent part: "Any person who suffers actual damages as a result of a violation of [the] Act committed by any other person may bring an action against such person." 815 ILCS 505/10a(a) (West 2008).

¶ 13 To establish a claim under the Consumer Fraud Act, the plaintiff must allege (1) the commission of a deceptive act or practice, (2) intent on defendants' part that plaintiff rely on the deception, (3) the deception occurred in the course of conduct involving trade or commerce, and (4) actual damages to plaintiff, (5) proximately caused by the deception. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 180 (2005). The Consumer Fraud Act is to be liberally construed to effect its purposes. 815 ILCS 505/11a (West 2008).

¶ 14 Though the situation presented here does not exactly utilize price-comparison

advertising, the purpose of displaying the retail price tags and stated values on the certificates is similar to such an advertising technique, and Illinois has adopted regulations relevant to plaintiff's cause of action. The Illinois Attorney General has recognized:

"Price comparison advertising is a form of advertising used in the sale of products whereby current prices are compared with *** the prices of other sellers, or other stated values, to demonstrate price reduction or cost savings. It is the intent of this Part to ensure that the comparative price used in any price comparison advertisement provides accurate information and meaningful guidance to the consumer. The use of misleading price comparisons is injurious to both the consuming public and competitors and is an unfair or deceptive act and an unfair method of competition under Section 2 of the [Consumer Fraud Act]." 14 Ill. Adm. Code § 470.110, adopted at 13 Ill. Reg. 11441, 11444 (eff. June 29, 1989).

¶ 15 Despite this regulation and the purpose behind it, we find plaintiff failed to present a claim under the Consumer Fraud Act that defendant engaged in a deceptive practice by stating retail values for the rings that were significantly higher than the actual retail values. In other words, even if we conclude that defendant's retail values were overstated, plaintiff failed to establish the elements of actual damage and proximate cause.

¶ 16 Plaintiff insists that her damages should be measured using the benefit-of-the-bargain rule, that is, the difference between the actual value of the items sold and the value the item would have had at the time it was sold if the representations had been true. *Gerill Corp. v. Jack L.*

Hargrove Builders, Inc., 128 Ill. 2d 179, 196 (1989). The problem, however, is that plaintiff failed to establish that she, in fact, suffered actual damages. Plaintiff received the benefit of her bargain by paying a price for the rings below what it would have cost her in a retail establishment, according to her expert witness. See *Mulligan v. QVC, Inc.*, 382 Ill. App. 3d 620, 628 (2008). Even if defendant's allegedly inflated value may have induced plaintiff to purchase the rings at the auction, she suffered no pecuniary loss. *Mulligan*, 382 Ill. App. 3d at 628.

¶ 17 Further, we find the certificates of authenticity represented the broker's opinion, not fact, as to the value of the rings. On this topic, our supreme court has stated:

"Wherever a party states a matter which might otherwise be only an opinion but does not state it as the expression of the opinion of his own but as an affirmative fact material to the transaction, so that the other party may reasonably treat it as a fact and rely upon it as such, then the statement clearly becomes an affirmation of the fact within the meaning of the rule against fraudulent misrepresentation. Statements of value are common examples, and where made in pursuance of a scheme on the part of the defendant to induce plaintiff to trade with him such statements constitute fraud and deceit."

Buttitta v. Lawrence, 346 Ill. 164, 173 (1931).

However, we conclude that the certificates in this case constituted "a correlation of data used to formulate a professional opinion of the value of the property." *Sampen v. Dabrowski*, 222 Ill. App. 3d 918, 924 (1991) (use of the word "estimate" on the appraisal report is synonymous with "opinion" and thus, the appraisal report could not support an actionable fraudulent misrepresentation). The

face of the certificates clearly indicate the broker examined each ring and "estimate[d] the value" thereof. Use of the word "estimate" is another way of conveying the broker's opinion as to the quality and value of each ring. Generally, an expression of opinion will not support an action for fraud. *Peter J. Hartmann Co. v. Capital Bank & Trust Co.*, 296 Ill. App. 3d 593, 601 (1998).

¶ 18

III. CONCLUSION

¶ 19 We affirm the trial court's judgment in favor of defendant because (1) plaintiff failed to establish actual pecuniary damages and (2) the representations provided on the certificates of authenticity were the broker's expressions of opinions and not actionable as fraud.

¶ 20

Affirmed.