2014 IL App (2d) 121084-U
Nos. 2-12-1084 & 2-12-1085 cons.
Order filed August 6, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Estate of Alan Leigh Sevy, Deceased (Bruce Sevy, Petitioner-Appellee, v. Enterprise Investment Corporation and Roland Kaeser, Respondents-Appellants).	)	Appeal from the Circuit Court of Kane County. No. 09-P-572 Honorable Thomas E. Mueller, Judge, Presiding.

BRUCE SEVY as Administrator of the Estate of Alan Leigh Sevy, Petitioner-Appellee, v. ENTERPRISE INVESTMENT CORPORATION, and ROLAND KAESER, Respondents-Appellants.	)	Appeal from the Circuit Court of Kane County. No. 09-CH-4589 Honorable Thomas E. Mueller, Judge, Presiding.

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

ORDER

¶ 1 *Held*: The trial court did not improperly rely on a statute that had not yet gone into effect (the Mortgage Rescue Fraud Act) in order to find that defendants had

violated the Illinois Consumer Fraud and Deceptive Practices Act and committed common law fraud; (2) trial court did not err in finding fraud in defendants' recording quitclaim deed containing no restrictions as to the conveyance and future ownership while claiming that the deed was recorded merely as "collateral"; (3) trial court's findings regarding intent to deceive were not against the manifest weight of the evidence; (4) trial court's determination of damages was not against the manifest weight of the evidence.

¶ 2 In these consolidated cases, defendants/respondents, Enterprise Investment Corporation (Enterprise) and Roland Kaeser, Enterprise's president and sole shareholder, appeal from (1) the trial court's judgment in the amount of $175,241.49 in favor of plaintiff, Bruce Sevy, as administrator of the estate of Alan Leigh Sevy (appeal 2-12-1085); and (2) the trial court's judgment of $10,000 in damages plus fees in favor of petitioner, the Estate of Alan Sevy (appeal 2-12-1084). We affirm both judgments.

¶ 3 I. BACKGROUND

¶ 4 In October 2006, Wells Fargo Mortgage initiated a foreclosure action against Alan Sevy involving Alan's residence in Batavia, Illinois. He was approximately $5,000 behind on his mortgage, which had a balance due of approximately $109,000. Enterprise was an Illinois corporation in the business of building, remodeling, purchasing, selling, and leasing of residential properties from 2005 through 2010. It also purchased distressed properties and leased them back to the former owners with an option to repurchase.

¶ 5 On October 28, 2006, Enterprise sent a solicitation letter to Alan, claiming, among other things, "We can stop the foreclosure!" Enterprise offered a two-year lease with the option to repurchase any time during the two years at 90% of the fair market value at the time of repurchase. Enterprise would also attempt to keep the lease payment similar to the original mortgage payments.

¶ 6 Alan contacted Enterprise, which sent him a proposed agreement, and he met with Sheryl Kubin, an Enterprise employee, to discuss the proposal. On December 1, 2006, Alan signed a final agreement with Enterprise. Alan conveyed his property to Enterprise via a quitclaim deed and received $10,000. He also entered into a two-year lease at a rental of $1650 per month.[1] He could repurchase the property any time during the two years by paying the greater of $162,000 or 90% of the fair market value. The lease and option ran through December 31, 2008.

¶ 7 The agreement also stated that the property "will be sold to Enterprise or an Enterprise partner." Enterprise would either remortgage the property at an amount not to exceed 90% of its current fair market value or re-sell the property to an Enterprise partner, who similarly would remortgage the property. Pursuant to the agreement:

> "If the Property is sold to an Enterprise partner, pursuant to Enterprise's agreements with such partner, the property will be thereafter conveyed by warranty deed by such partner to a Chicago Title Land Trust Company land trust with sole power of direction in Enterprise. Enterprise will thus maintain control and direction of the Property for the purpose of re-conveyance to you upon your exercise of the Option to repurchase."

¶ 8 In September 2008, Alan signed a new agreement with Enterprise that made "null and void" any previous agreements. Under the new agreement, Alan's rent increased to $1900 per month with $250 of each payment put aside for closing costs should Alan exercise his option to repurchase the property. Alan paid an additional non-refundable fee of $25,000 in exchange for a new option to repurchase; if Alan exercised the option by October 1, 2009, the $25,000 would

[1] At the time, Alan had approximately $100,000 of equity in the house and a mortgage payment of $1021.75 per month.

be applied to the purchase price; however, if the option was not exercised by that date, the money was forfeited. The repurchase price was increased to $224,000; however, the $25,000 option payment would be applied, and the additional amount due would be $199,000. Alan was also required to provide additional collateral in the form of a quitclaim deed to property that he owned in Indiana. The property would be transferred back to Alan when the purchase option for Alan's home was exercised. The property was quit-claimed to Kaeser, not to Enterprise. Kaeser subsequently recorded this deed with the Kosciusko County, Indiana, Recorder of Deeds. According to Kubin, she recorded the deed pursuant to the instruction of someone at the recorder of deed's office.

¶ 9 Alan died on October 14, 2009. His brother, Bruce, went to Alan's house and found the paperwork relating to the sales transactions. On November 2, Kaeser and Kubin entered Alan's house and changed the locks on the house and the garage. Kaeser never filed a forcible entry suit. On November 3, he sent a letter to the representative of Alan's estate advising that he was the owner of both Alan's house and the Indiana property. Later that month, he and Kubin returned to the house and removed almost all of Alan's personal property. They left the washer, dryer, refrigerator, and stove in the house, even after Enterprise leased the property to new tenants. Kaeser inventoried certain power tools, along with other property found in the garage, and stored them at another location. Kaeser discarded all other possessions found in the house, including furniture and clothing.

¶ 10 In November 2009, Bruce, as administrator of Alan's estate, filed a five-count complaint against Enterprise and Kaeser. In May 2012, as executor of the estate, Bruce filed a petition to recover assets against Enterprise and Kaeser.

¶ 11 A bench trial was held in July 2012 on the petition to recover assets. Bruce provided an inventory of items and proposed values for the items. Bruce testified that he put the inventory together "from memory" and ascribed values to the items from invoices, checks, and receipts contained in Alan's financial materials that had been recovered, from what Alan had told him, or from "estimates of what those items sell for these days." Bruce estimated the value of the property to be approximately $20,400.

¶ 12 Kaeser testified[2] that he changed the locks and took possession of the property without ever filing an eviction notice. He proceeded to clear Alan's possessions from the house and the garage. Kaeser inventoried and stored some property, especially tools from the garage. Appliances, including a refrigerator, stove, washer and dryer, stayed with the residence and were used by the new tenants. Kaeser did not provide an estimate of the value of the items that he had stored, left in the house, or thrown away. He did, however, describe the furniture as "urine-soaked with dog urine," and the clothing that was thrown away as urine-soaked and covered with mold, sawdust, and dog hair. The trial court entered a judgment in the amount of $10,000. Later, the court awarded approximately $4,100 in attorney fees to the estate and amended the judgment to include that amount. Appeal No. 2-12-1084 followed.

¶ 13 The parties also proceeded to a bench trial on two counts of Bruce's second amended complaint arising out of the real estate transactions between Alan and defendants: violation of the Illinois Consumer Fraud and Deceptive Practices Act (Consumer Fraud Act)(815 ILCS 505/1 *et seq.* (West 2006)) (count II) and common law fraud (count III),. On August 1, 2012, the trial court entered judgment in favor of Bruce in the amount of $136,246.58. The court also granted

[2] We note that, while Kaeser and Kubin also testified at the hearing; respondents fail to mention, let alone address, this testimony.

Bruce leave to file an amended complaint to conform to the proofs offered at trial and to file a petition for attorney fees and costs.

¶ 14 On August 21, 2012, Bruce filed a two-count third amended complaint alleging violation of the Act and common law fraud, along with a petition for attorney fees and costs. On August 31, defendants filed a motion to vacate and reconsider the August 1 judgment order. Following a hearing on Bruce's petition, the trial court awarded Bruce $37,752.08 in attorney fees and issued an amended judgment, dated September 7, 2012, for $175,241.49, which included the original judgment, attorney fees, and interest. On that same date, the trial court denied defendants' motion to vacate and reconsider the original order. Appeal No. 2-12-1085 followed.

¶ 15 II. ANALYSIS

A. Appeal No. 2-12-1085

¶ 16 The trial court found that defendants committed common law fraud and also violated the Consumer Fraud Act. We will reverse a trial court's findings following a bench trial only if they are against the manifest weight of the evidence; that is, only when an opposite conclusion is apparent or when the findings appear to be arbitrary, unreasonable, or not based on the evidence. *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, ¶ 41.

¶ 17 To prove common law fraud, a plaintiff must establish that: (1) the defendant made a false statement of material fact; (2) the defendant knew that the statement was false; (3) the defendant intended that the statement induce the plaintiff to act; (4) the plaintiff relied upon the truth of the statement; and (5) the plaintiff suffered damages resulting from his reliance on the statement. *Kirkpatrick v. Strosberg*, 385 Ill. App. 3d 119, 128 (2008). The elements of a claim under the Consumer Fraud Act are: (1) a deceptive practice or act by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; (3) the occurrence of the deception in

the course of conduct involving commerce and trade; and (4) actual damage suffered by the plaintiff (5) proximately caused by the defendant's deception. *Id.* A plaintiff may recover under the Act for unfair conduct as well as deceptive conduct. *Rockford Memorial Hospital v. Havrilesko*, 368 Ill. App. 3d 115, 121 (2006). A practice can be unfair without being deceptive; generally, issues involving the concealment of facts are treated as deceptive conduct, while issues involving excessive fees are treated as unfair conduct. *Id.*

¶ 18 Defendants first contend that the trial court erred in finding that they violated the Consumer Fraud Act because the court considered and addressed their actions in light of the Mortgage Rescue Fraud Act (765 ILCS 940/1 *et seq.* (West 2012)), which went into effect on January 1, 2007 and, thus, was not in effect at the time that Enterprise purchased Alan's property. In making its ruling, the trial court stated:

> "Is there pressure? Well, of course, there's pressure because Roland Kaeser and Sheryl Kubin are both well aware, as they have testified in open court, to the effective date of the Mortgage Rescue Fraud Act being January 1, 2007, a date after which they didn't do this business anymore, by their own admission, because they couldn't.
>
> So while the Mortgage Rescue Fraud Act has no direct application to this case, counsel wishes the Court to ignore it's [*sic*] pendency when, in fact, what we have here is an act [MFRA] that overshadows the case. Quite simply put, if there is a law that's going to go into effect on January 1st that tells me I can't do A, B and C, what am I doing A, B and C for 30 days prior?
>
> If there is a law that our legislature has seen fit to pass to protect distressed property owners, what am I doing further abusing one 30 days prior thereto? I

> know what the [MFRA] says. I know what the [MFRA]'s purpose is. I know what the [MFRA] is going to do, and that's why I'm going to go out of the business, so I'm going to get the one more transaction in under the wire. That's the relevance of the Mortgage Rescue Fraud Act in this case.
>
> * * *
>
> Mr. Dreyer [defense counsel] argues that nothing was done against public policy. Well, I would suggest to you that the purpose of the Mortgage Rescue Fraud Act was public policy, was to protect individuals in distressed property situations with a foreclosure balloon with the economy tanking and with predators out there doing whatever they could to abuse and take advantage of these people.
>
> That was the public policy of the [MFRA], if you read the legislative comments. And so, to circumvent the act by getting in under the wire certainly is action against public policy."

¶ 19 Defendants argue that the trial court "indicated that Roland Kaeser's and Sheryl Kubin's knowledge of the MFRA prior to its enactment meant that the defendants violated public policy by not preparing the December 1, 2006 contract with the decedent in accordance with the parameters set by the Act." However, evidence that defendants knew that the type of transaction into which they entered with Alan was about to become illegal is evidence of evil motive, which may be the basis for a punitive damage award under the Act. See *Kirkpatrick*, 385 Ill. App. 3d at 132; *Linhart v. Bridgeview Creek Development, Inc.*, 391 Ill. App. 3d 630, 641 (2009). That the trial court did not award punitive damages does not mean that the court did not consider the possibility of imposing such damages. The court stated, "I don't think this is a case that rises to the level where punitive damages are appropriate, and I'm not one to shy away. *** But I don't

think this is a case where it is warranted, notwithstanding the fact that there is fraud." Evil motive, shown by knowledge of the impending illegality of their actions, was relevant.

¶ 20 Further, there is no indication that the MFRA was the basis of the trial court's decision. Merely mentioning the MFRA and its impending implementation shortly after the agreement at issue was signed does not mean that the court found a violation of public policy based on a violation of the MFRA. We find no error here.

¶ 21 Defendants next contend that the trial court erred in finding that they committed common law fraud in the transaction involving the Indiana property.[3] Citing to *Minch v.* George, 395 Ill. App. 3d 390, 399 (2009), defendants argue that common law fraud "must be shown by 'clear and convincing evidence.' " As Kubin testified, the 2008 restructuring was secured by the use of Alan's Indiana property as "collateral." The record contained a letter from Enterprise Investment to Alan, dated September 9, 2008, informing Alan that, "Per your request," the Indiana property had been added

> "[a]s additional collateral to the Letter Agreement dated September 9, 2008. It is understood by all parties that the deed for this property will be transferred back to Alan Sevy when the purchase option for 524 N College, Batavia, Illinois 60501 is exercised."

Alan signed the letter on September 17. Also in the record was a quitclaim claim deed conveying the Indiana property to Kaeser. Both Kaeser and Kubin testified that, on the advice of an employee at the office of the Recorder of Deeds in Kosciusko County, Indiana, Kubin recorded the deed "as collateral for contract performance" in order to "cloud title."

[3] Although defendants raise the Consumer Fraud Act in the heading of this contention, they fail to address it in the body of their argument. Therefore we address this issue only as to common law fraud.

¶ 22 The quitclaim deed executed by Alan stated that Alan:

> "*Conveys and quit claims to* Roland Kaeser, an adult in consideration of Ten Dollars and other good and valuable consideration, the receipt whereof is hereby acknowledged, the following described REAL ESTATE in Kosciusko Count [*sic*] in the State of Indiana, to wit:
>
> [legal description]
>
> Subject to any and all easements, rights-of-way, streets, highways and valid restrictions presently existing and of record, any rights of tile and drainage ditches, and any zoning ordinances applicable hereto."

¶ 23 "A cloud on title is the semblance of title, either legal or equitable, appearing in some legal form but which is, in fact, unfounded or which it would be inequitable to enforce." *Hoch v. Boehme*, 2013 IL App (2d) 120664, ¶ 41, quoting *Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App. 3d 21, 52 (2009). To constitute a cloud, there must be some semblance of title that is, in fact, unfounded and that casts doubt on the validity of the record title. *Hill v. 1550 Hinman Avenue Building Corp.*, 365 Ill. 129, 134 (1936). A valid interest in property cannot constitute a cloud on title. *Illinois District. of American Turners, Inc. v. Rieger*, 329 Ill. App. 3d 1063, 1072 (2002). On the other hand, a quitclaim deed "shall be deemed and held a good and sufficient conveyance, release and quit claim *** in fee of all of the then existing legal or equitable rights of the grantor ***." 765 ILCS 5/10 (West 2008).

¶ 24 The quitclaim deed at issue here was no mere cloud on Alan's title. It was a conveyance to Kaeser with no evidence of any restriction that would cast doubt on its validity. For example, in *Goldberg v. Goldberg*,103 Ill. App. 3d 584 (1981), the defendant was required as part of a

property settlement agreement to execute a quitclaim deed in the marital residence; the judgment of divorce provided:

> "and that said deed shall be recited in such a way so that when it is recorded, it shall recite the fact that transference and real estate is subject to the provisions of this Decree, and the Defendant is given an interest in the marital residence in the amount of TWELVE THOUSAND FIVE HUNDRED DOLLARS ($12,500.00), and that if Defendant does not receive that amount on or before May 1, 1976, then the principal sum shall bear simple interest at the rate of FIVE PER CENT (5%) simple interest until received by the Defendant; it is further agreed that the Defendant shall receive the TWELVE THOUSAND FIVE HUNDRED DOLLARS ($12,500.00) at the earliest of the following contingencies:
>
> (1) remarriage of the Plaintiff;
>
> (2) sale of the home;
>
> (3) forty two (42) months from the date of May 1, 1975." (Internal quotation marks omitted.) *Id*. at 585-86.

¶ 25 Such a recitation would give notice of the restrictions to anyone. Here, however, the recorded quitclaim deed gives no notice of any claimed restrictions involving Sevy's actual continued ownership interest in the property. The only restrictions involved easements, rights of way, streets, drainage and zoning. Alan Sevy and his alleged continuing ownership of the property are nowhere mentioned. This was no mere cloud on the title; the deed was not filed as evidence of collateral, it was recorded as an unrestricted conveyance of title, which was not the understanding given in the September 9, 2008, letter. We find no error here.

¶ 26 Defendants next contend that the trial court erred in finding both common-law fraud and a violation of the Consumer Fraud Act because all the terms of both the 2006 and the 2008

agreements were disclosed to Alan, who had the opportunity (and was encouraged by defendants) to get legal advice before signing the agreements. Defendants argue that there was no deception in the high rental payments that they charged. This argument misses the point. Fraud need not be shown in each statement and action of the defendants or in each clause of the contracts. The court did not have to find fraudulent intent specifically as to the monthly rental charged to Alan. We find no error here.

¶ 27 Defendants next contend that there was no evidence of intent to deceive Alan or of Alan's reliance upon any deceptive acts such that the court erred in finding common-law fraud. Defendants address only one basis of the trial court's findings at the conclusion of trial, that being a November 2009 letter that Kaeser sent to the attorney for Alan's estate. Defendants argue that "[t]here was no evidence of any intent to deceive" in the letter, as though the letter were the only evidence upon which the trial court relied. Defendants fail to address the trial court's findings as to the other evidence in the case, including the facts that (1) the repurchase option price was approximately $100,000 more than Alan owed at the time of the agreement; (2) Alan's home ended up being owned by Kaeser's son without being placed into a trust at Chicago Title, as was required by the agreement; (3) defendants could not agree on the amount of closing costs built into the payments under the second agreement—at times arguing such costs were $5,000, at other times suggesting that they were $30,0000; and (4) the quitclaim deed to Alan's Indiana property being recorded without any restrictions as to the deed being held as "collateral." As defendants do not address these other factors, we cannot find that the trial court's finding of intent to deceive was against the manifest weight of the evidence.

¶ 28 Defendants next contend that the trial court erred in awarding damages "where the plaintiff did not present at trial proper evidentiary support." Defendants' argument is wholly

inadequate; they cite to the record only once and never cite to any relevant authority. Again, they address only one aspect of the trial court's decision (the issue of the failure to convey the property to Chicago Title) and never attempt to explain how that aspect affected the award of damages. We find no error here.

¶ 29 B. Appeal No. 2-12-1084

¶ 30 In this case, respondents Enterprise and Kaeser appeal from the trial court's orders entering judgment in favor of petitioner, the Estate of Alan Leigh Sevy (Estate), on the Estate's citation to recover assets and awarding the Estate attorney fees. We affirm.

¶ 31 The Estate filed a petition for a citation to recover assets, alleging that respondents removed personal property from Alan's residence in Batavia after Alan's death and failed to return it. At trial, the Estate entered into evidence an inventory of furnishings, tools, and other property that Brian assembled after going to Alan's house and garage shortly after Alan's death and before Kaeser changed the locks. Brian testified that he put the inventory together "from memory" and ascribed values to the items from invoices, checks, and receipts contained in Alan's financial materials that had been recovered, from what Alan had told him, or from "estimates of what those items sell for these days." Bruce estimated the value of the property to be approximately $20,400.

¶ 32 The trial court ordered Kaeser to return the stored property within 72 hours. As to the other items, the court explained:

> "I recall Bruce Sevy's testimony to be consistent with that of [respondents' attorney] Mr. Dreyer's representation this morning, which was that it was replacement cost. I don't think he has to be an expert. There was nothing specialized about any of this. It was a washer, dryer, refrigerator, TV and audio equipment, clothing, none of which requires an

> expert to testify as to value. We all live in this world and I think can figure out value, but clearly it is not—it's not a situation in my opinion where even though it was wrongfully removed there is a valid claim for everything to be valued new and unused. I think the valuation is that of used items and what in fact the value of the property would have been on the date of the decedent's death.
>
> So I am going to—for lack of any evidence to provide me with more specificity as to the value, I am simply going to cut that in half. So there will be a judgment in the amount of $10,000."

¶ 33 Respondents argue that the trial court's judgment was made "without the petitioner presenting [a] proper evidentiary foundation for damages." The determination of damages is an issue that is reserved to the trier of fact, and a reviewing court will not lightly substitute its opinion for the judgment that was entered in the trial court. *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 247 (2006). Where damages are awarded after a bench trial, the standard of review is whether the trial court's judgment is against the manifest weight of the evidence. *1472 N. Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121191, ¶ 13. A judgment is against the manifest weight of the evidence only where "the opposite conclusion is clear or where the trial court's findings appear to be unreasonable, arbitrary, or not based on evidence." *Id*. To overturn a trial court's award of damages, a reviewing court must find that the trial court either ignored the evidence or that its measure of damages was erroneous as a matter of law. *Id*.

¶ 34 Respondents rely on *Razor v. Hyundai Motor America*, 222 Ill. 2d 75 (2006) for support. However, *Razor* is easily distinguished from the case before us. In *Razor*, the plaintiff sought damages for the diminution in value of a new Hyundai Sonata that repeatedly failed to start. The jury awarded the plaintiff $5,000. Our supreme court concluded that there was no sufficient

basis for the jury's award, as the plaintiff had submitted neither documentary evidence nor expert testimony regarding the decrease in the car's value; the "only possible evidence" on that issue was the plaintiff's testimony that she would not today pay the price that she had originally paid for the car because of all the problems that she had with it. *Id* at 107. The court stated that it was:

> "not prepared to endorse the proposition that jurors are as a class sufficiently familiar with automobiles as to be able to determine the degree of diminution of a particular vehicle's value based on a particular defect without the need for any evidence at all. This is more than a matter of simple common sense. Plaintiff testified, in essence, that 'It wasn't worth what I paid for it.' There was no number presented, nothing for the jury to work from." *Id*. at 108.

¶ 35 Here, there was something to work from. Bruce provided an inventory of items and proposed values for the items. This evidence was not refuted, as respondents failed to provide any such inventory or values. As the trial court noted, the items involved were common household items, "none of which requires an expert to testify as to value," as opposed to the diminution in value of a car, as was involved in *Razor*. The trial court awarded an amount that was less than what the Estate sought, as it was not a situation where "there is a valid claim for everything to be valued new and unused." However, the trial court was not required to accept all or nothing of Bruce's evidence of damages, nor was the court required to provide a list of each item with its associated value. We conclude that the trial court's damage award was not against the manifest weight of the evidence.

¶ 36 IV. CONCLUSION

¶ 37 For these reasons, the judgments of the circuit court in appeal Nos. 2-12-1084 and 2-12-1085 are affirmed.

¶ 38 Affirmed.