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2014 IL App (3d) 130533-U

Order filed July 29, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

ANNEMARIE O'SHAUGHNESSY,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit
	)	Will County, Illinois
Plaintiff-Appellant,	)	
	)	Appeal No. 3-13-0533
v.	)	Circuit No. 10-L-369
	)	
MARGARET LASKOWSKI,	)	Honorable
	)	John Anderson
Defendant-Appellee.	)	Judge, Presiding.

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PRESIDING JUSTICE LYTTON delivered the judgment of the court.  
Justices Carter and O'Brien concurred in the judgment.

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**ORDER**

¶ 1 *Held:* Trial court did not abuse its discretion in awarding plaintiff, who proved that defendant breached real estate contract, committed fraud and violated Residential Real Property Disclosure Act, monetary damages, rather than rescission of contract. Trial court abused its discretion when it significantly reduced plaintiff's attorney fees.

¶ 2 Plaintiff, AnneMarie O'Shaughnessy, entered into a real estate contract to purchase a home from defendant, Margaret Laskowski. Immediately after closing on the property, plaintiff discovered a large amount of carpenter ants in the home. Plaintiff filed a complaint against defendant, alleging breach of contract, fraud and violation of the Residential Real Estate

Disclosure Act (Disclosure Act) (765 ILCS 77/1 *et seq.* (West 2010)), seeking monetary damages or, alternatively, rescission of the real estate contract. The trial court ruled in favor of plaintiff on all counts and ordered defendant to pay plaintiff \$3,600 in damages. Plaintiff filed a petition for attorney fees, seeking \$21,913. The court awarded plaintiff \$5,016 in attorney fees. Plaintiff appeals, arguing that the trial court (1) should have granted her rescission of the real estate contract, instead of monetary damages, and (2) erred in awarding her less than one-fourth of the attorney fees she sought. We affirm the trial court's award of damages but modify its award of attorney fees.

¶ 3 On May 28, 2009, plaintiff signed a real estate contract agreeing to purchase a home in Homer Glen from defendant for \$390,000. On the same date, defendant provided plaintiff a "Residential Real Estate Property Disclosure Report," in which defendant indicated that she was not aware of a "structural defect caused by previous infestation of termites or other wood boring insects." The real estate contract required defendant to provide plaintiff with "a written report \*\*\* by a licensed inspector certified by the appropriate state regulatory authority in the subcategory of termites, stating that there is no visible evidence of active infestation by termites or other wood destroying insects." The contract further provided that "if the report discloses evidence of active infestation or structural damage, Buyer has the option within five (5) Business Days of receipt of the report to proceed with the purchase or declare this Contract null and void."

¶ 4 On June 30, 2009, defendant provided plaintiff with a Wood Destroying Inspection Report from Michael Vanover d/b/a Hurricane Exterminators, stating that "no visible evidence of wood destroying insects was observed" in the home. After receiving that report, plaintiff proceeded with the sale and purchased the property on July 31, 2009. Shortly after moving into the home, defendant discovered hundreds of carpenter ants, as well as evidence that the ants had been in the home for some time.

¶ 5 In July 2010, plaintiff filed an amended complaint against defendant alleging a violation of the Disclosure Act, fraud and breach of contract. The complaint sought damages in excess of \$50,000 “or in the alternative rescission and restitution.” Plaintiff filed a motion for summary judgment as to her breach of contract cause of action, which the trial court granted. The case proceeded to trial on plaintiff’s remaining claims.

¶ 6 Prior to trial, William Moncrief, defendant’s realtor, provided deposition testimony. He stated that he never saw ants in the home. He estimated that plaintiff visited the property three to five times before entering into the real estate contract with defendant. Plaintiff completed a final walk-through of the property just prior to the closing on July 31, 2009.

¶ 7 At trial, defendant testified that in 1986, she and her husband purchased real estate in Homer Glen, which was densely wooded and consisted of 3.25 acres. They had a two-bedroom log cabin built on it in 1987. Her husband died in 2006, and she decided to sell the property. She saw one or two ants in her home from time to time but never saw any evidence that the house had an infestation of carpenter ants. She testified that plaintiff viewed the home four times before making an offer on it.

¶ 8 George Manning, an entomologist expert hired by plaintiff, testified that he saw “plenty of evidence” of a carpenter ant infestation in the house. He believed the ants had been in the house for at least five years. He testified that “it would be impossible” for someone living in the house not to see that there was an ant infestation. He testified that the ants could be eradicated in a safe and proper manner. He would charge between \$2,400 and \$3,600 to eradicate the ants, by baiting and spraying appropriate insecticides. He would provide a six-month guarantee that the ants would not return.

¶ 9 Tom Velasquez, an exterminator hired by plaintiff, testified that he went to plaintiff’s home on August 1, 2009, and saw “live ant activity.” In his opinion, the house was infested with

carpenter ants and had been for at least several months. He testified that “the live ant activity would have been very difficult to overlook.” He charged plaintiff \$285 to treat the property and recommended that she obtain follow-up treatment from another company.

¶ 10 Plaintiff testified that she now lives in Evanston with her 91-year-old mother. Approximately one hour after closing on the home she purchased from defendant, she observed carpenter ants crawling on the walls of one of the bedrooms. She called Tom Velasquez, who came the next day. While she waited for him to arrive, she saw ants “everywhere.” Velasquez treated the property, but she still saw ants. On August 8, 2009, Terminex treated the house, but the ants did not go away. She kept the windows to the house open at all times because she “was concerned about the pesticides.”

¶ 11 Plaintiff testified that as soon as she moved into the home, she began feeling dizzy and disoriented and started suffering from “terrible headaches,” as well as pain in her kidneys and liver. She testified that she “got really sick” at the end of September. On October 15, 2009, she “evacuate[d]” the house because she felt sick every time she returned. She has not lived in the house since then.

¶ 12 Plaintiff provided the court with copies of the bills she has incurred for the house since she purchased it. She claimed that she paid for the following expenses as a result of defendant’s actions: (1) replacement and installation of a new roof vent system after the original one was torn off by raccoons, (2) replacement of floors and carpeting because the old carpeting “was full of pesticides,” and (3) replacement of dry wall in the basement as the result of flooding caused by the absence of a working sump pump.

¶ 13 Plaintiff testified that at least three pest control companies have attempted to reduce or eradicate the ants in the house. She testified that the number of ants has “diminished quite a bit,”

but the ants are not gone completely. She does not think that she would be able to sell the house because she would have to disclose the carpenter ant situation. She no longer wants the house.

¶ 14 The court ruled in favor of plaintiff and awarded her \$3,600 in damages. Plaintiff then filed a motion for reconsideration, arguing that she was entitled to rescission of the real estate contract instead of money damages.

¶ 15 Plaintiff also filed a petition for attorney fees, seeking \$21,913.00. Attached to the petition were affidavits from plaintiff's two attorneys, as well as timesheets, checks from plaintiff and two invoices. The documentation showed that Frederick Goodwill, who assisted in plaintiff's trial, spent 15 hours on plaintiff's case for a total bill of \$3,000. Plaintiff's other attorney, Brian Stephenson, who represented plaintiff from 2010 until and including trial, provided time records showing that he spent 32.17 hours on plaintiff's case at an hourly rate of \$250, for a total of \$8,042.50 in fees.

¶ 16 The trial court entered an order requiring defendant to pay plaintiff \$5,016 in attorney fees after making the following deductions from plaintiff's requested fees: (1) \$10,647 because plaintiff failed to submit descriptive invoices or time sheets reflecting these charges; (2) \$1,500, which was half of Goodwill's bill, because it was unnecessary for plaintiff to have two attorneys at trial; (3) \$750 for court appearances that were billed for one hour and should have been billed for only half an hour; and (4) \$4,000 for plaintiff's attempts to seek "inappropriate measures of damage involving raccoons and water damage" and to pursue "unsuccessful and unpersuasive theories such as her supposed inability to live in the house and alleged physical ailments that were offered without adequate support and which were, at times, contradicted by her own witness' testimony."

¶ 17 Plaintiff filed a motion for reconsideration of her fee petition and attached thereto invoices from Stephenson reflecting an additional 18.3 hours of legal work performed by him for

plaintiff at a cost of \$4,575. Also attached to plaintiff's motion for reconsideration were affidavits from both Stephenson and plaintiff. Plaintiff stated in her affidavit that she maintained all records of repairs to her home, including carpet removal, problems caused by water damage and raccoons, and plumbing-related issues, as well as records reflecting her inability to live in the home. She stated: "I never received any invoice from my counsel regarding the review or any other activity relative to these records and for such damage reflected therein." Similarly, Stephenson stated in his affidavit: "At no time since my retention in this matter, did I spend any time, nor did I bill my client, for the pursuit of damages relating to raccoon, water or other damage to the home, or on theories relative to my client's inability to live in the home or related health issues."

¶ 18 The trial court denied both of plaintiff's motions for reconsideration. The court ruled that monetary damages of \$3,600 provided plaintiff with an adequate remedy, making rescission inappropriate. The court further ruled that its \$5,016 award of attorney fees was reasonable based on the incomplete documentation of attorney fees plaintiff presented to the court, her hiring of two attorneys to handle her case, and her "pursuing theories relating to raccoons, water damage, and \*\*\* not-credible claims that she could not inhabit the home." The court disregarded plaintiff's documentation supporting an additional \$4,575 in attorney fees.

¶ 19 I. Rescission

¶ 20 Plaintiff first argues that the trial court abused its discretion in awarding her monetary damages instead of rescinding the real estate contract.

¶ 21 Rescission is an "extraordinary remedy." *Finke v. Woodard*, 122 Ill. App. 3d 911, 916 (1984). Rescission refers to cancellation of a contract to restore the parties to the status quo *ante*, their status before they entered into the contract. *Hassan v. Yusuf*, 408 Ill. App. 3d 327, 353

(2011). An innocent party may prevent enforcement of a contract induced by fraud by seeking rescission promptly after learning of the fraud. *Id.*

¶ 22 A court may award rescission of a contract where there has been some fraud in the making of a contract, such as an untrue statement or the concealment of a material fact. *Illinois State Bar Ass'n Mutual Insurance Co. v. Coregis Insurance Co.*, 355 Ill. App. 3d 156, 165 (2004). However, a court may not order rescission where the plaintiff has an adequate remedy at law. *Newton v. Aitken*, 260 Ill. App. 3d 717, 720 (1994).

¶ 23 Rescission is an equitable remedy, the application of which is left largely to the discretion of the trial court. *Hassan*, 408 Ill. App. 3d at 353. A reviewing court will not disturb the trial court's decision granting or denying rescission of a contract unless it resulted from an abuse of discretion. *Id.*

¶ 24 Here, plaintiff failed to prove that monetary damages were an inadequate remedy for defendant's misconduct. Plaintiff's own entomologist expert stated that the carpenter ants could be eradicated at a cost of \$3,600 or less. Money damages put plaintiff in the same position she would have been in absent defendant's misrepresentation. Thus, the trial court did not abuse its discretion in denying plaintiff's request for rescission.

¶ 25 II. Attorney Fees

¶ 26 Plaintiff also argues that the trial court abused its discretion in awarding her only \$5,016 of the \$21,913 in attorney fees she requested.

¶ 27 Section 55 of the Residential Real Property Disclosure Act states: "the court may award reasonable attorney fees incurred by the prevailing party." 765 ILCS 77/55 (West 2012). Additionally, actions for common law fraud provide for the award of attorney fees. *Father & Sons, Inc. v. Taylor*, 301 Ill. App. 3d 448, 455 (1998). The award of attorney fees is not

mandatory but lies within the sound discretion of the trial court. *Miller v. Bizzell*, 311 Ill. App. 3d 971, 976 (2000).

¶ 28 A trial court has broad discretionary powers in awarding attorney fees. *In re Estate of Callahan*, 144 Ill. 2d 32, 43-44 (1991). However, the trial court's discretion is not unchecked. *Advocate Health & Hospital Corp. v. Heber*, 355 Ill. App. 3d 1076, 1079 (2005). A trial court may not arbitrarily reduce an attorney fee award. *Id.* When a trial court awards inadequate attorney fees, it abuses its discretion, and its fee award will be modified on appeal. See *In re Estate of Johnson*, 219 Ill. App. 3d 962, 967 (1991). Pursuant to Supreme Court Rule 366, a reviewing court may modify an attorney fee award to conform to the evidence presented. See *In re Marriage of Gocal*, 216 Ill. App. 3d 221, 225 (1991); Ill. S. Ct. R. 366(a)(5) (eff. Feb. 1, 1994).

¶ 29 The burden of proof is on the attorney to establish the value of his services in a petition for fees. *Callahan*, 144 Ill. 2d at 43. The attorney must present sufficient evidence from which the trial court can render a decision as to their reasonableness. *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 983 (1987). To justify a fee, an attorney must present the court with more “than a mere compilation of hours multiplied by a fixed hourly rate or bills issued to the client [citation] since this type of data, without more, does not provide the court with sufficient information as to their reasonableness.” *Id.* at 984. The petition for fees must specify the services performed, the time expended thereon and the hourly rate charged. *Id.* “[I]t is incumbent upon the petitioner to present detailed records maintained during the course of the litigation containing facts and computations upon which the charges are predicated.” *Id.*

¶ 30 Once presented with the necessary documentation, the trial court should consider these additional factors in determining the amount of fees to award: (1) the skill and standing of the attorney, (2) the nature of the case, (3) the novelty and difficulty of the questions in issue, (4) the



amount and importance of the subject matter, (5) the degree of responsibility, (6) the usual and customary charges, and (7) the benefits resulting to the client. *Callahan*, 144 Ill. 2d at 44; Ill. Rules of Prof. Conduct 1.5(a) (eff. Aug. 1, 1990).

¶ 31 Here, plaintiff presented the court with documentation supporting \$15,712.50 in attorney fees. The trial court reduced the fees to \$5,016. In reaching its decision, the court deducted \$4,000 in fees for time spent by plaintiff's attorney pursuing damages that were not recoverable or not supported by the evidence, including raccoon and water damage, as well as plaintiff's alleged inability to live in the house. However, the record is devoid of any evidence that plaintiff's attorney spent time or billed fees for pursuing such damages. None of the time entries and invoices from plaintiff's attorney contain descriptions of work performed or time spent pursuing these damages. Additionally, affidavits filed by both plaintiff and her attorney indicate that counsel did not spend any time or bill plaintiff any fees for pursuing claims against defendant relating to raccoon, water or other damage to the home, or plaintiff's health issues related to the home. The only evidence at trial regarding such damages came from plaintiff, who provided the court with all of the bills she has incurred related to the house since she has owned it. Based on our review of the record, the trial court was unjustified in reducing plaintiff's attorney fees by \$4,000.

¶ 32 Additionally, the trial court improperly disregarded documentation supporting \$4,575 in fees for work performed by plaintiff's attorney to prove defendant's wrongdoing. This was not a simple breach of contract case. Plaintiff also alleged that defendant committed fraud and violated the Disclosure Act. In order to recover on her fraud claim, plaintiff had to prove that defendant knowingly made a misrepresentation to her that she relied on to her detriment. See *Siegel v. Levy Organization Development Co., Inc.*, 153 Ill. 2d 534, 542-43 (1992). To recover under the Disclosure Act, plaintiff had to prove knowing misconduct by defendant. See *Miller*,

311 Ill. App. 3d at 976. In disregarding a large portion of plaintiff's attorney fees, the trial court failed to consider the time and labor involved in this case and the results obtained by counsel. Plaintiff's attorneys were successful in proving each count against defendant and are entitled to the additional \$4,575 in fees.

¶ 33 For the reasons set forth above, the trial court's award of \$5,016 in attorney fees was inadequate and an abuse of discretion. Pursuant to Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we modify the trial court's award of attorney fees to include an additional \$8,575 in fees, for a total of \$13,591.

¶ 34 The judgment of the circuit court of Will County is affirmed in part and modified in part.

¶ 35 Affirmed in part; modified in part.