

2015 IL App (2d) 140825-U  
No. 2-14-0825  
Order filed October 15, 2015

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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BEA INDUSTRIES, INC.,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 11-L-920
	)	
PARVIZ ZARGARPOOR	)	
INTERNATIONAL INC.,	)	
	)	
Defendant	)	Honorable
	)	Michael J. Fusz,
(Parviz Zargarpoor, Defendant-Appellant).	)	Presiding.

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JUSTICE JORGENSEN delivered the judgment of the court.  
Justices McLaren and Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court properly found, in light of its underlying factual findings (which we could not disturb in the absence of a complete record), that defendant committed constructive fraud, which, despite defendant's assertions, did not require a misrepresentation directly to plaintiff or a fiduciary duty to plaintiff.

¶ 2 Defendant Parviz Zargarpoor (defendant) appeals the trial court's judgment finding him personally liable to plaintiff, BEA Industries, Inc., for fraud based on defendant's acquisition of money from a title company when the money rightfully belonged to plaintiff. Defendant contends that plaintiff failed to plead and prove fraud when the misrepresentations were made to

the title company instead of to plaintiff and when he had no fiduciary duty to plaintiff. We affirm.

¶ 3

### I. BACKGROUND

¶ 4 This appeal arises out of a contract between plaintiff and defendant under which plaintiff agreed to do cabinetry work for a residence being built by defendant Parviz Zargarpoor International Inc. (PZI) as a general contractor. On November 17, 2011, plaintiff filed a complaint against defendant and PZI, seeking recovery for breach of contract, account stated, and fraud, based on nonpayment.

¶ 5 Only the fraud count is at issue on appeal. As to that issue, plaintiff alleged that defendant submitted waivers of liens to Chicago Title Company, intentionally misrepresenting that PZI was the contractor who performed the cabinetry work and thus obtaining money that rightfully belonged to plaintiff. In June 2014, a bench trial was held.

¶ 6 Defendant has not provided a transcript or a substitute of the trial. The trial court provided a detailed written order finding that the parties entered into an agreement under which plaintiff would perform cabinetry work. The parties agreed that all payments would be placed in escrow at Chicago Title Company. Although plaintiff performed the work as promised, defendant paid only a portion of the amount due. Defendant obtained the remainder of the money by submitting waivers of liens and sworn contractor statements to Chicago Title falsely indicating that PZI had performed all of the cabinetry work. Chicago Title then released the funds to PZI, and defendant used the money for his own purposes. Defendant denied that he intended to defraud anyone. He said that his statements were meant to show that PZI “furnished” or “provided” the work, not that it had done the work itself. He claimed that,

because of cost overruns, he put his own money into completing the project. He also noted that he had health problems.

¶ 7 During the pendency of the action, defendant filed for bankruptcy. As part of those proceedings, the bankruptcy court specifically found that defendant submitted false documents under oath. The bankruptcy court further found that, although the misrepresentations were made to Chicago Title instead of to plaintiff, the act of submitting the false documents constituted actual fraud and rendered plaintiff's claim nondischargeable in bankruptcy.

¶ 8 The trial court entered judgment against PZI for breach of contract, but declined to pierce the corporate veil to make defendant personally liable. The court found that the claim for an account stated had been abandoned. On the fraud count, the court discussed actual and constructive fraud, noting that generally actual fraud would be shown though a misrepresentation made to, and relied on by, the plaintiff. That was not present, as the misrepresentations were made to Chicago Title. However, the court stated that the misrepresentations were clearly intended to be relied on by Chicago Title to the detriment of plaintiff and that defendant's failure to tell plaintiff what he was doing and use of the funds for his own purposes was "nothing less than stealing through fraud."

¶ 9 The court also discussed constructive fraud, which did not require a misrepresentation directly to the plaintiff. The court noted that normally such a finding would require a fiduciary duty, which it did not find was present in the case. However, applying *In re Estate of Neprozatis*, 62 Ill. App. 3d 563 (1978), the court found that constructive fraud could be found in the absence of a fiduciary duty. Ultimately, the court stated that, whether defendant committed actual fraud or constructive fraud, plaintiff met its burden of proving it. The court entered

judgment against defendant personally and awarded punitive damages and attorney fees. Defendant appeals.

¶ 10

## II. ANALYSIS

¶ 11 In a rambling and unfocused argument, defendant contends that plaintiff failed to properly plead and prove fraud because the misrepresentations were made to Chicago Title instead of to plaintiff and because he did not owe a fiduciary duty to plaintiff. He then discusses factual issues, such as the existence of other contractors, cost overruns, and his health issues, indicating that he did not personally profit from the project or take the money for his own purposes.

¶ 12 We note that defendant has not provided a report of proceedings or a substitute. “[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant.” *Foutch v. O’Bryant*, 99 Ill. 2d 389, 391-92 (1984). Notwithstanding *Foutch*, a record of the proceedings in the lower court might be unnecessary when an appeal raises solely a question of law, which we review *de novo*. *Gonella Baking Co. v. Clara’s Pasta di Casa, Ltd.*, 337 Ill. App. 3d 385, 388 (2003). Here, without a report of proceedings or a substitute, we must assume that the trial court had a sufficient basis for its factual findings. However, we may address defendant’s argument that those findings fail to establish fraud as a matter of law.

¶ 13 Generally, fraud means “anything calculated to deceive, including all acts, omissions and concealments involving a breach of legal or equitable duty, trust or confidence resulting in

damage to another.” *Majewski v. Gallina*, 17 Ill. 2d 92, 99 (1959). Whether fraud exists depends upon the facts of the particular case. *Id.*

¶ 14 “Actual fraud is an intentional misrepresentation or intentional concealment, by one party, of a material fact which is relied on to the detriment of another party.” *Obermaier v. Obermaier*, 128 Ill. App. 3d 602, 606 (1984). “The inaccurate or concealed information must be such that if the party had been aware of it he would have acted differently.” *Id.*

¶ 15 “However, fraud can also be inferred from the relationship of the parties or from the surrounding circumstances regardless of any actual dishonesty of purpose.” *Neproztis*, 62 Ill. App. 3d at 568. It can also be found without a misrepresentation made directly to the plaintiff. See *Lohmann Golf Designs, Inc. v. Keisler*, 260 Ill. App. 3d 886, 891-93 (1994). “This type, which is called ‘constructive fraud,’ is defined as any act, statement or omission which amounts to positive fraud or which is construed as a fraud by the courts because of its detrimental effect upon public interests and public or private confidence.” *Neproztis*, 62 Ill. App. 3d at 568. “It requires neither actual dishonesty nor intent to deceive, being a breach of legal or equitable duty which, irrespective of the moral guilt of the wrongdoer, the law declares fraudulent because of its tendency to deceive others.” *Id.* “In a fiduciary relationship, where there is a breach of a legal or equitable duty, a presumption of fraud arises.” *Obermaier*, 128 Ill. App. 3d at 607. But constructive fraud can exist in the absence of a fiduciary relationship. See *Lohmann*, 260 Ill. App. 3d at 892-93; *In re Neproztis*, 62 Ill. App. 3d at 569. For example, constructive fraud has been found in the absence of a fiduciary relationship when a contractor overcharged an elderly woman (*Neproztis*, 62 Ill. App. 3d at 569-70) and when a contractor knowingly filed liens in excess of the amount that he was entitled to (*Lohmann*, 260 Ill. App. 3d at 893).

¶ 16 Here, while the misrepresentations were made to Chicago Title instead of to plaintiff, under *Lohmann* that fact did not preclude a finding of constructive fraud. Further, under *Neproztis* and *Lohmann* constructive fraud may be found in the absence of a fiduciary duty. Defendant does not discuss *Neproztis* or *Lohmann* or argue that those cases do not apply. An appellant is obligated to define issues clearly, cite pertinent authority, and present a cohesive legal argument. *Gandy v. Kimbrough*, 406 Ill. App. 3d 867, 875 (2010). Given that defendant has not presented a cogent argument as to why *Neproztis* and *Lohmann* do not apply, we agree that constructive fraud was sufficiently pleaded and proved. The remainder of defendant's arguments concern the trial court's factual findings. As previously noted, in the absence of a trial transcript or substitute, we assume that the trial court had a sufficient basis for those findings. Accordingly, we affirm.

¶ 17

### III. CONCLUSION

¶ 18 The trial court properly found constructive fraud, and we assume that the trial court had a sufficient basis for its underlying factual findings. Accordingly, the judgment of the circuit court of Lake County is affirmed.

¶ 19 Affirmed.