2015 IL App (2d) 150005-U
No. 2-15-0005
Order filed December 15, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JEFFREY HARTNEY,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 12-AR-1766
	)	
ROBERT BEVIS,	)	Honorable
	)	James D. Orel,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: On appeal from a judgment finding fraud in defendant's sale of stock to plaintiff, there was no jurisdiction to review the trial court's conditional grant of defendant's motion for leave to file a counterclaim. There was sufficient evidence to sustain the finding of fraud and the rejection of defendant's affirmative defenses.

¶ 2 Defendant, Robert Bevis, appeals the judgment in favor of plaintiff, Jeffrey Hartney, on his complaint for fraudulent misrepresentation in a sale of stock. Defendant asserts that the court erred by (1) attaching unreasonable conditions to its grant of defendant's motion for leave to file a counterclaim; (2) considering, as proof of fraud, defendant's oral statements to plaintiff

predating the stock purchase; and (3) rejecting defendant's various affirmative defenses. For the following reasons, we affirm.

I. BACKGROUND

¶ 3 This proceeding is one of three lawsuits involving the same parties and arising from the same transaction, namely plaintiff's purchase of stock in a company named Tooth Bright, of which defendant was president and part owner.

¶ 4 The first suit, No. 09-L-1073, was filed by plaintiff in August 2009. The case was assigned to Judge Dorothy French. In his complaint, plaintiff sought to enforce a promissory note (Note) from defendant to plaintiff for $131,200. The note was dated July 3, 2009. Prior to the bench trial in that case, the court struck defendant's affirmative defense that there was no consideration for the Note. The remaining affirmative defense was that defendant signed the Note under duress. Plaintiff's case-in-chief at the bench trial was brief; he simply introduced the Note into evidence and testified that he witnessed defendant sign the Note in the presence of a notary. In his case-in-chief, defendant's attempt to expand the scope of the evidence prompted an objection by plaintiff, as we noted in our disposition on appeal in the case:

> "At trial, defendant offered evidence of financial dealings between the parties that predated the Note. When asked the relevance of this evidence, defendant stated that he aimed to establish that the debt plaintiff was seeking to collect was in fact nonexistent. Defendant was attempting this through negative proof; he was eliminating potential candidates for the debt by showing that plaintiff received value for the monies transferred. Plaintiff objected, noting that lack of consideration was no longer an affirmative defense. The trial court ruled that it would only consider the evidence for

how it explained the decline of the parties' relationship." *Hartney v. Bevis*, 2013 IL App (2d) 120118-U, ¶ 39 (unpublished order under Supreme Court Rule 23).

¶ 5 One such prior financial dealing of which defendant was allowed to adduce proof was plaintiff's purchase of stock. Defendant introduced into evidence a "Stock Purchase Agreement" (Stock Agreement) signed by plaintiff and defendant on February 22, 2006. The Stock Agreement was for plaintiff's purchase of 5% of Tooth Bright stock from defendant. The stated purchase price was $50,000. In his testimony, plaintiff acknowledged signing the Stock Agreement and claimed that he later discovered the transaction was a "sham" because the purported stock never existed. According to plaintiff, the Note was a consolidation of outstanding debts that defendant owed plaintiff.

¶ 6 In January 2012, the trial court issued its written memorandum ruling for defendant. Despite the fact that it had stricken the defense of lack of consideration, the court found that defendant's evidence that, at the time he signed the Note, he had no existing debt to plaintiff supported the defense of duress, as defendant would not have falsely acknowledged a debt unless he was coerced. Plaintiff appealed, and on May 2, 2013, we issued our disposition holding that the trial court erred by failing to provide plaintiff notice that the court was resurrecting the issue of lack of consideration for the Note. *Hartney*, 2013 IL App (2d) 120118-U, ¶¶ 40-41. We reversed and remanded. *Id.* ¶ 44.

¶ 7 On remand, No. 09-L-1073 proceeded to another bench trial before Judge French. Now defendant was permitted to assert both lack of consideration and duress as affirmative defenses. In September 2014, the court ruled again in favor of defendant, finding that there was consideration for the Note but that defendant signed the Note under duress. The court's written memorandum of decision, which defendant submitted in the present case in a posttrial motion,

stated that the parties incorporated by stipulation the evidence from the first trial and also presented additional evidence on the issue of consideration.

¶ 8 Plaintiff filed a notice of appeal from the September 2014 order, and the appeal was docketed as No. 2-14-1028. Plaintiff later moved for a voluntary dismissal, which this court granted on November 24, 2014.

¶ 9 Plaintiff filed the present action, No. 12-AR-1766, in August 2012 while No. 2-12-0118 was pending in this court. The case was assigned to Judge James Orel. Plaintiff's complaint alleged fraud in defendant's sale to him of Tooth Bright stock and sought recoupment of the $50,000 he paid for the shares. Plaintiff alleged that he purchased the stock based on defendant's knowingly false representations about Tooth Bright. Plaintiff alleged, *inter alia*, that, in April 2011, the Illinois Secretary of State (Secretary) issued an order permanently prohibiting defendant from selling any securities in Illinois, because he had sold Tooth Bright stock without having registered it with the Secretary. Plaintiff alleged that defendant knew at the time of the stock purchase that Tooth Bright's stock was not registered with the Secretary.

¶ 10 Defendant filed two successive, but unsuccessful, motions to dismiss the present case based on the concurrent proceedings in No. 09-L-1073 (which was then on appeal). In his first motion, filed in October 2012, defendant argued for dismissal under section 2-619(a)(3) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(3) (West 2014)), which provides for dismissal on the ground that there is "another action pending between the same parties for the same cause." In resolving the motion, the trial court compared the complaints in the two cases. Seeing that the complaint in No. 09-L-1073 did not mention the purchase of Tooth Bright stock, the court found "no connection" between the cases.

¶ 11 In his later motion to dismiss, filed in February 2013, defendant cited section 2-619(a)(4) of the Code (735 ILCS 5/2-619(a)(4) (West 2014)) which provides for dismissal on the basis that "the cause of action is barred by a prior judgment." Defendant claimed the present case was barred because the trial court in No. 09-L-1073 had issued its final ruling. The court denied this motion also, citing plaintiff's allegation in the present case that it was not until the issuance of the Secretary's order in April 2011 that he first discovered that the stock purchase was tainted by fraud. The court reasoned that, because plaintiff lacked sufficient knowledge, when he filed No. 09-L-1073, to raise a claim of fraud in the sale of Tooth Bright stock, the trial court's judgment in No. 09-L-1073 did not, and could not, concern potential fraud in the stock sale. Consequently, that judgment had no preclusive effect on this, the later fraud case.

¶ 12 In August 2013, while motion practice was still underway in the current case, and while No. 09-L-1073 was on remand from our decision in No. 2-12-0118, defendant initiated No. 13-L-0706. The case was assigned to Judge Kenneth Popejoy. Defendant brought three counts against plaintiff. Count I alleged that plaintiff breached a confidentiality agreement (Confidentiality Agreement) that plaintiff signed contemporaneously with the Stock Agreement. Defendant attached a copy of the document, which prohibits plaintiff from disclosing "Confidential Information," defined as

> "any information or material which is proprietary to Tooth Bright, Inc., whether or not owned or developed by Tooth Bright, Inc., which is not generally known other than by Tooth Bright, Inc., and which [plaintiff] may obtain through any direct or indirect contact with Tooth Bright, Inc., [i]ts owners, employees or clients. Confidential Information includes without limitation: patents, product, service, strategies, goals, techniques, business records, plans, and all other proprietary information."

¶ 13 Count II of defendant's complaint alleged breach of an oral agreement that the parties purportedly made in connection with the Stock Agreement. Count III alleged that plaintiff's filing of No. 12-AR-1766 violated a hold-harmless provision in the Stock Agreement.

¶ 14 In December 2013, the trial court granted plaintiff's motion in No. 13-L-0706 to dismiss all three counts of defendant's complaint. The court dismissed counts II and III with prejudice, but count I without prejudice. The court stated that if plaintiff wished to re-file count I he must do so in the form of a counterclaim in No. 12-AR-1766 (the present case).

¶ 15 Meanwhile, the present case proceeded to arbitration. In February 2014, a panel of three arbitrators found against plaintiff on his complaint. Plaintiff rejected the award. In March 2014, defendant moved in the present case for leave to file a counterclaim for breach of the Confidentiality Agreement. The counterclaim alleged that plaintiff violated the Confidentiality Agreement by "copy[ing], modify[ing] and/or disclos[ing] confidential information to other persons *** including (but may not be limited to): Karen Montgomery, Scott Hartney, and other unknown persons." On May 23, 2014, the trial court, finding that defendant lacked an excuse for failing to file the counterclaim previously, ruled that it would permit the claim only if defendant paid the arbitration rejection fee and reimbursed plaintiff for four hours of time in connection with the arbitration. Defendant elected not to file the counterclaim.

¶ 16 The present case proceeded to a bench trial on July 29, 2014. Defendant raised four affirmative defenses. First, defendant asserted that the limitations period for fraud had lapsed. Second, defendant invoked judicial estoppel, claiming that plaintiff's position in No. 09-L-1073, that the $50,000 was a loan to defendant, barred him from asserting in the present case that the $50,000 was in fact payment for stock. Notably, defendant submitted the transcripts from the

original trial in No. 09-L-1073 but did not submit any of the additional evidence received from the court at the trial on remand in that case.

¶ 17 Defendant's third and fourth affirmatives defenses were based on due-diligence and hold-harmless provisions in the Stock Agreement.

¶ 18 Plaintiff and defendant were the sole witnesses at trial. Plaintiff introduced into evidence the Stock Agreement. He testified that he signed the agreement based on a conversation with defendant a few months before. During that conversation, defendant mentioned that he had formed a company named Tooth Bright to promote a new kind of toothbrush. Specifically, defendant said that he "had invented a toothbrush with patents which use blue light technology to fight germs and whiten teeth, and that he was moving along, moving ahead to manufacture it." Defendant claimed that "he already had some investors, that the patents were secured, that a prototype ha[d] been prepared, and they were going [*sic*] look into launching to manufacturing and sale." Defendant showed plaintiff a prototype of the toothbrush. Defendant did not claim that he had developed multiple prototypes. Plaintiff testified that, at that point in their discussions, he

> "understood that everything was ready to go. Like I mentioned, the patents, the prototype. [Defendant] had people in place, he told me, to put it together, to build it and he just needed the infusion of money to manufacture."

¶ 19 Plaintiff testified that he agreed to purchase from defendant $50,000 worth of stock that he personally owned in Tooth Bright. He understood that defendant "was the sole owner of the stock and that he was duly authorized to sell the stock." In February 2006, he and defendant signed the Stock Agreement. According to plaintiff, defendant said that plaintiff's $50,000 "was to be used strictly for manufacturing." Plaintiff believed at the time of purchase that Tooth

Bright had a considerable chance of success. He based this belief on the "[t]he things [he] was told as far as having the patent and [*sic*] ready to go, that there were other investors involved and that they were ready for manufacturing." Plaintiff believed at the time that defendant's representations were truthful and so did not perform any independent research before deciding to invest. According to plaintiff, it was important to this decision to invest in Tooth Bright that (1) defendant was authorized to sell the stock; (2) patents had been approved for the toothbrush technology; and (3) Tooth Bright had other capital investors. On the issue of investors, however, plaintiff admitted that, in their conversation about Tooth Bright prior to plaintiff's purchase, defendant did not "indicate *** the status of the company in terms of capital funding or what the capital base of the company was." Asked if defendant "ever indicate[d] to [plaintiff] at any time that [he] [was] the only shareholder who had ever paid money for Tooth Bright stock," plaintiff said yes (but did not say when defendant made this declaration).

¶ 20 Plaintiff testified that he never received from Tooth Bright a stock certificate, dividend payment, tax document, or any kind of corporate document. When time passed without plaintiff hearing from defendant about Tooth Bright's progress, he sought to contact defendant. He was unsuccessful until he "tracked [defendant] down in 2009." Plaintiff had a conversation with defendant in his home. Plaintiff's daughter was present. Plaintiff expressed concern that he "hadn't seen any paperwork or records of anything going forward on [*sic*] seen anything going forward." Plaintiff said he wanted his $50,000 investment returned, and defendant consented. Plaintiff explained to defendant that he "would take that $50,000 investment, and *** would incorporate it with other monies he owed me and put it all into a promissory note." Defendant agreed to this proposal and signed a document prepared by plaintiff, which was the Note.

¶ 21 Having received no payments under the Note, plaintiff eventually filed No. 09-L-1073. Plaintiff acknowledged that both No. 09–L-1073 and the present case were attempts to recoup the same $50,000 he paid for Tooth Bright stock.

¶ 22 Plaintiff testified that Tooth Bright was dissolved in 2007 but that he did not discover this until afterwards. In 2011, plaintiff became aware that defendant had sold Tooth Bright stock without registering it with the State. Plaintiff introduced into evidence an "Order of Prohibition" from the Secretary. In the order, dated April 11, 2011, the Secretary found that defendant failed to register Tooth Bright stock according to the requirements of the Illinois Securities Law (815 ILCS 5/1 *et seq.* (West 2014)) before offering it for sale. As a sanction, the order permanently prohibits defendant from offering or selling any securities in this State. Plaintiff's testimony was unclear whether he became aware of this sanction in April or September 2011.

¶ 23 Defendant testified that he has been a firearms instructor and gunsmith since 2011. He has no formal training in dentistry, dental hygiene, or any type of engineering. In 2005, Tooth Bright was incorporated and defendant became its president. According to defendant, "the concept of Tooth Bright was to develop a toothbrush that would kill germs and whiten teeth with some blue light technology." Defendant did not develop blue light technology and was not involved in the engineering of the toothbrush. With the help of an electrical engineer, defendant developed four series of prototypes for the toothbrush. The development took place in the garages of his and the engineer's homes. The business end of Tooth Bright was operated from the home of William Flotow, one of the company's investors. According to defendant, Tooth Bright had five shareholders including plaintiff, but only plaintiff paid money for his shares. The rest invested "sweat equity."

¶ 24 Defendant testified that, when he first informed plaintiff about the concept for the toothbrush, plaintiff said he wanted to invest a million dollars in Tooth Bright. When defendant informed plaintiff that most of Tooth Bright's stock had been sold to defendant and others, plaintiff offered to purchase defendant's stock. Defendant agreed to sell plaintiff some of his stock, and together he and plaintiff prepared the Stock Agreement from a template defendant obtained from the Internet. They signed the agreement in February 2006. At the time of the purchase, defendant had not registered the stock of Tooth Bright with the Secretary. Prior to the purchase, defendant showed plaintiff one of the prototypes for the toothbrush.

¶ 25 Defendant testified that when he received plaintiff's $50,000 check for the stock, he deposited it into his personal account. Defendant used about half of the money to pay personal bills. He used the remainder "in the business in paying the bills and buying things for the development of the toothbrush." Defendant was unable to produce records of how he spent this half of the money. He explained that Flotow possessed most of the company records for Tooth Bright and had them in storage in Buffalo Grove or Palatine. On one occasion, defendant asked Flotow to retrieve the records, but he refused because it was winter and the storage unit was unheated.

¶ 26 According to defendant, Tooth Bright's shareholders and others involved in the company ultimately determined that manufacture of the toothbrush would cost millions of dollars. For this and other reasons, Tooth Bright ceased operations in 2007.

¶ 27 At several points in his testimony, defendant addressed the subject of patents for the toothbrush. In one instance, he testified at follows:

> "Q. [I]t's your understanding that Tooth Bright had applied for patents for the toothbrush?

A. Yes.

Q. And those patents, though, were never obtained, correct?

A. Only provisional patents were obtained.

* * *

Q. Provisional patents, the patents was [*sic*] not approved for the Tooth Bright toothbrush, correct?

A. Well, the provisional patent was accepted, and you have a certain amount of time during provisional status to put patent pending on your product.

***

Q. My question was that there was never a patent approved for the Tooth Bright toothbrush, correct?

A. There was no patent number issued, no, correct."

¶ 28 Elsewhere, defendant testified that, at the time plaintiff signed the Stock Agreement, the shareholders had sent a proposed patent to a patent lawyer for review. No patent had been approved for the toothbrush at that time.

¶ 29 Defendant was asked what representations he made to plaintiff about Tooth Bright prior to the stock sale. Defendant testified that he explained to plaintiff the technology utilized in the toothbrush and showed him the prototypes. Defendant denied that he told plaintiff that Tooth Bright had other investors who paid money for their shares. Defendant made no "representations to [plaintiff] with regard to capital contributions into the company." Defendant had no conversations with plaintiff about whether defendant was authorized to sell stock in Tooth Bright. Also, defendant never told plaintiff prior to the stock purchase that patents for the toothbrush had been approved or that Tooth Bright was "in the process" of having them

approved. Plaintiff had no questions for defendant about "manufacturing the product or selling the product," and defendant never told plaintiff how his $50,000 would be spent. Defendant testified further on that subject:

> Q. *** [I]f [plaintiff] is testifying that prior to buying the shares of stock, that the money that he was going to pay was going to go to launching the manufacture of the prototype, the toothbrush, that was all that was needed, then was he mistaken on that point ***?
>
> A. He absolutely was. He knows exactly that he was going to incorporate—infuse a million dollars into the company. Buying the stock was to hold his position so that he would have some ownership of the company, that after his divorce, he would infuse $1 million into the company to move it forward. So absolutely."

¶ 30 On August 26, 2014, the court issued an oral ruling in favor of plaintiff. The court applied the elements of fraud, which are (1) a false statement of material fact; (2) knowledge or belief of the falsity by the person making it; (3) intention to induce the other party to act; (4) action by the other party in reliance on the truth of the statements; and (5) damage to the other party resulting from such reliance. *Jane Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶ 28.

¶ 31 The court found that defendant made the following material statements of fact to plaintiff: (1) there were investors in Tooth Bright other than plaintiff: (2) patents had been obtained; and (3) "manufacture was in place" and "the purpose of the $50,000 was to begin manufacturing of this product, the toothbrush." The statements were false, found the court, because "no patent was ever pending," "there were no other investors," and "[t]here was no possibility of manufacturing [the toothbrush]." The court found that defendant, aware of their

falsity, made the statements to induce plaintiff to invest in Tooth Bright, and that plaintiff relied on those statements to his detriment, as the stock of Tooth Bright was "basically worthless." The court stated further:

> "There was no viable corporation at any point. No bank records. No tax records. No profit or loss statements. No shareholder meetings. The shares weren't registered with the Secretary of State, and the business ceased in 2007."

¶ 32 The court rejected defendant's affirmatives defenses. Regarding the defense of judicial estoppel, the court said:

> "[F]rom what has been presented to this Court both in testimony and in documents that were presented of the prior proceedings and prior trial, the $50,000 eventually was included in [the Note], as I understand it. But there has been no testimony whatsoever that the $50,000 purchase of stock was ever a loan.
>
> It was testified by both parties that it was for the purchase of stock."

The court also held that the due-diligence and hold-harmless provisions in the Stock Agreement did not "shield [defendant] from liability and fraud." The court did not expressly address the statute-of-limitations defense.

¶ 33 Defendant filed a motion to reconsider. To rebut the court's finding that there was "no viable corporation at any point," defendant attached corporate records that he had obtained from Flotow. Defendant included an affidavit from Flotow explaining why defendant was unable to obtain the records from Flotow earlier. By order dated December 3, 2014, the trial court denied the motion to reconsider.

¶ 34 Defendant filed this timely appeal.

¶ 35 II. ANALYSIS

¶ 36 Defendant raises several contentions on appeal. We turn first to a jurisdictional question raised by plaintiff.

¶ 37 A. Jurisdiction

¶ 38 Defendant challenges the trial court's May 23, 2014, order conditionally granting his motion for leave to file a counterclaim for breach of the Confidentiality Agreement. Plaintiff asserts that we lack jurisdiction over that judgment because it is not specified in the notice of appeal.

¶ 39 Defendant's notice of appeal states in pertinent part:

> "The Defendant, Robert Bevis, hereby appeals the findings and judgment order entered August 26, 2014 against the Defendant following a bench trial and the subsequent denial of Defendant's Motion to Reconsider [*sic*] December 3, 2014."

The prior judgment entered on May 23, 2014, is not mentioned. "A notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts of judgments specified in the notice of appeal." *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 176 (2011). The exception to this rule is that a court has jurisdiction over an unspecified judgment if it is " 'a step in the procedural progression leading' to [a] judgment specified in the notice of appeal." *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 435 (1979) (quoting *Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252, 1254 (3d Cir. 1977)). "Procedural progression" means more than temporal succession. "It is not enough merely that the unspecified order precedes the specified order." *McGath v. Price*, 342 Ill. App. 3d 19, 34 (2003). In testing the existence of "procedural progression," courts have employed various terminology, such as whether the unspecified order is "sufficiently intertwined" with the later specified order (*id.*), whether the later order "directly relates back" to the earlier order (*Burtell*, 76 Ill. 2d at 435), and whether the

earlier order was "necessary" to the later order (*Edward Gillen Co. v. City of Lake Forest*, 221 Ill. App. 3d 5, 11 (1991)).

¶ 40 We compare *Burtell*, *McGath*, *Edward Gillen*, and a fourth case, *McGill v. Garza*, 378 Ill. App. 3d 73 (2007), in order to illustrate the concept of procedural progression.

¶ 41 In *Burtell*, the plaintiff filed a complaint alleging the existence of a joint venture and seeking an accounting. Subsequently, in December 1975, the trial court entered a judgment finding the existence of a joint venture and ordering the defendant to provide a statement of account. In June 1976, following a hearing on the statement of account, the court entered a monetary judgment for the plaintiff. The defendant's notice of appeal specified the June 1976 judgment but did not mention the December 1975 judgment. The supreme court, however, held that it had jurisdiction to consider both judgments. The court reasoned:

> "Th[e] decree finding the existence of a joint venture was but a preliminary determination necessary to the ultimate relief sought by the plaintiff, a money judgment based on an accounting. It was not separately appealable and, though not specifically designated in the notice of appeal, it was sufficiently closely related to the judgment of June 1, 1976, so that the notice of appeal specifying the June 1 judgment conferred jurisdiction on the appellate court to consider the prior decree, which was but a 'step in the procedural progression leading' to the judgment of June 1, 1976." *Burtell*, 76 Ill. 2d at 436.

¶ 42 In *McGill*, a law firm was permitted to withdraw as counsel for the plaintiff during pretrial proceedings. Subsequently, the law firm sought to collect fees on a *quantum meruit* basis. In May 2006, the trial court found that the law firm had good cause to withdraw as counsel because the plaintiff had filed an ethics complaint against the law firm. On August 2006, the court awarded the law firm fees and costs. On appeal, the plaintiff challenged both the

May and August 2006 judgments but specified only the latter judgment in the notice of appeal. The appellate court nonetheless found that it had jurisdiction over the May 2006 judgment because "[t]he good-cause finding [in the May 2006 judgment] was a necessary prerequisite to awarding [the law firm] fees and costs in *quantum meruit*." *McGill*, 378 Ill. App. 3d at 75.

¶ 43 In *McGath*, the plaintiff was injured when the vehicle he was driving was struck by a vehicle driven by Kimberly Price, who had borrowed the car from her mother, Gladys Griffin, who in turn had rented it from Enterprise Leasing. The plaintiff brought claims against Price, Griffin, and Enterprise. One count against Griffin was "predicated on the theory of vicarious liability alleging that that she had an agency relationship with Price," and the other was "predicated on the theory of direct liability alleging that she negligently entrusted the vehicle to Price." *McGath*, 342 Ill. App. 3d at 23. After plaintiff settled his claims against Price and Enterprise, Griffin moved for summary judgment on the vicarious liability count against Griffin, and the court granted the motion by order dated August 8, 2001. The court reasoned that, since the count was predicated entirely on Price's wrongdoing, the settlement with Price necessitated summary judgment for Griffin. Subsequently, on June 12, 2002, the court granted summary judgment for Griffin on the negligent entrustment count, finding no basis under the undisputed facts for a claim of negligent entrustment. *Id.* at 24-25.

¶ 44 Plaintiff's notice of appeal mentioned the June 2002 judgment but not the August 2001 judgment. The appellate court determined that it had no jurisdiction over the August 2001 judgment because it was not in the procedural progression leading to the June 2002 judgment:

> "Clearly, the subject matter of the two orders was not related: the question of Griffin's vicarious liability and alleged agency relationship with Price was independent of a determination as to whether Griffin knew or should have known that Price was a reckless

driver before entrusting the vehicle to her. The trial court's ruling on the former in the August 8, 2001, order did not represent a determination in any respect to any question bearing on its ruling in the latter June 12, 2002, order. Thus, it cannot be said that plaintiff's reference in his notice of appeal to the June 12, 2002, order addressing Griffin's negligent entrustment would have alerted defendants to his intent to seek relief from the unspecified August 8, 2001, order addressing Griffin's vicarious liability." *Id.* at 35-36.

¶ 45 In *Edward E. Gillen*, the plaintiff, a marine contractor, agreed to construct a breakwater for Lake Forest. The project was protracted because Lake Forest's stone supplier provided nonconforming stone. In the course of construction, the plaintiff's tugboat sank from rough seas. After the project was completed, the plaintiff sued Lake Forest and the stone supplier. Six counts were directed at Lake Forest. One count was an unjust enrichment claim seeking additional costs for work performed on the breakwater. Other counts sought compensation for the sunken tugboat, which the plaintiff attributed to the project having been protracted into the fall storm season. On March 9, 1990, pursuant to Lake Forest's motion, the unjust enrichment count was dismissed for failure to state a cause of action. Later, Lake Forest filed another motion against the pleadings. The court initially decided the motion on October 19, 1990, but on November 2, 1990 entered an amended order granting the motion only as to damages that the plaintiff was seeking for the sunken tugboat. *Edward E. Gillen*, 221 Ill. App. 3d at 8-9.

¶ 46 After voluntarily dismissing the remainder of its claims against Lake Forest, the plaintiff appealed, seeking to challenge the court's rulings on both the claim for unjust enrichment and the counts seeking damages for the sunken tugboat. However, the plaintiff's notice of appeal specified the October 19 and November 2 judgments but not the March 9 judgment. The appellate court held that it had no jurisdiction to consider the March 9 judgment, because it was

not in the procedural progression leading to the latter judgments. Specifically, "[i]t was not necessary for the court to have entered the order dismissing [the unjust-enrichment count] for it to subsequently grant judgment on the pleadings as to all counts concerning damages relating to the sinking of [the] tugboat." *Id.* at 11.

¶ 47 The present case is closer to *McGath* and *Edward E. Gillen* than to *Burtell* and *McGill*. The court's May 23, 2014, judgment conditionally granting defendant leave to file his counterclaim alleging breach of the Confidentiality Agreement was based on particular considerations about the timing of defendant's motion. The judgment had no substantive connection to the later adjudication of the remaining claims and defenses, leading to the August and December 2014 judgments specified in the notice of appeal. In the language of *Edward E. Gillen*, the conditional granting of the motion for leave to file the counterclaim was not "necessary" to how the court ruled as it did after trial. As the May 23 judgment was not in the procedural progression leading to the later judgments, we lack jurisdiction over that earlier judgment.

¶ 48 B. Statute of Limitations

¶ 49 Defendant asserts that the evidence at trial established that the limitations period for plaintiff's fraud claim had expired. The limitations period for common law fraud is five years. See 735 ILCS 5/13-205 (West 2014). Defendant submits that the limitations period commenced with the signing of the Stock Agreement on February 22, 2006, because there was no evidence at trial of any representations that defendant made to plaintiff after that date. Defendant is correct that, if the statutory term began to run on February 22, 2006, then the present action, which was commenced in August 2012, would be barred.

¶ 50 Defendant, however, cites no legal authority for when a limitation period commences. Therefore, his contention is forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (points lacking citation to legal authority are waived). Even if we took notice of the appropriate authority, defendant's contention would still fail. "For most torts, the cause of action usually accrues when the plaintiff suffers injury." *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 77 (1995). An important qualification to this principle is the discovery rule, which suspends the commencement of the applicable limitations period until the plaintiff knows or reasonably should know that he has been injured and that his injury was wrongfully caused. *Id.*

¶ 51 Under the discovery rule, it begs the question for defendant to assert that the limitations commenced in February 2006 because all the wrongful conduct occurred on or before that date. The question begged is whether plaintiff knew or reasonably should have known on or before that date and he was injured and injured wrongfully.

¶ 52 Only in the following paragraph does defendant acknowledge plaintiff's position at trial that he did not discover the fraud until years after he signed the Stock Agreement:

> "[T]he prohibition order by the Secretary of State *** is a red herring because the prohibition order has no relevance to the sale of personal stock by an individual investor in a small mom and pop corporation. The [Stock Agreement] specifically states that [defendant] is selling his personal stock and [p]laintiff acknowledged at trial that he was purchasing the personal stock of [defendant]. The Secretary of State prohibition order does not apply and the trial court erred in its applicability to this case as a matter of law."

Defendant cites no authority in asserting that the prohibition order has no pertinence to his sale of Tooth Bright stock to plaintiff. Consequently, even if we overlooked his failure to cite the discovery rule, defendant would still not prevail on this issue.

¶ 53 C. Judicial Estoppel

¶ 54 Defendant contends that that the doctrine of judicial estoppel bars plaintiff from seeking in this action to recoup the $50,000 on the theory that he paid it in a fraudulent stock transaction. According to defendant, plaintiff is bound by his previous characterization, in No. 09-L-1073, of the $50,000 as a loan to defendant.

¶ 55 Judicial estoppel is an equitable doctrine designed to prevent a party who takes a certain position in a legal proceeding from taking the contrary position in a subsequent legal proceeding. *Construction Systems. Inc. v. FagelHaber, LLC*, 2015 IL App (1st) 141700, ¶ 37. The following elements are required for the doctrine to apply: (1) a party must have taken two positions; (2) the positions must have been taken in judicial proceedings; (3) the positions must be given under oath; (4) the party must have successfully maintained the first position and obtained some benefit thereby; and (5) the two positions must be completely inconsistent. *Id.* We employ an abuse-of-discretion standard in reviewing a trial court's decision whether to apply judicial estoppel. *Id.* ¶ 39.

¶ 56 Defendant claims that plaintiff took the following stances: (1) in No. 09-L-1073, that the $50,000 was a loan to defendant; and (2) in the present case, that the $50,000 was paid to defendant for stock in Tooth Bright. Defendant's claim fails, however, because he has not established the position that plaintiff took in No. 09-L-1073 with respect to the $50,000. There were two trials in that case; the second followed our remand in No. 2-12-0118. In the second trial, the parties incorporated the evidence from the original trial and submitted additional evidence on defendant's affirmative defense of lack of consideration. In the court below, defendant submitted the transcript of the original trial but none of the supplemental evidence from the second trial. "[A]n appellant has 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, 391-392 (1984). "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Id.* at 392.

¶ 57 Defendant claims that, at the first trial in No. 09-L-1073, plaintiff testified (in defendant's words) that he "specifically 'converted' the purchase of stock into [the Note], which was a loan." However, defendant does not cite the page of the transcript where he claims plaintiff so testified. See Ill S. Ct. R. 351(h)(7) (eff. Feb. 6, 2013) (a party's contentions must be supported by citation to the pages of the record relied on). Defendant relies instead on the trial court's recapitulation of the evidence in its September 2014 written decision following the second trial. Even if we considered this a proper substitute for a reference to the evidence itself, we would not find the inconsistency necessary for application of judicial estoppel. The court said in its written decision:

> "[Plaintiff] testified that [the Note] consisted of the following financial transactions:
>
> 1) $50,000 paid to [defendant] on 2/22/06 for purchase of stock in Toothbrite [*sic*];
>
> 2) $50,000 loaned to [defendant] personally on May 15, 2006 as evidenced by the Promissory Note signed by [defendant] for IIRS, Inc. which required a $60,000 repayment (Def. Exh. B-3);
>
> 3) $12,000 loan to [defendant] on June 10, 2008 to get his family on their feet;
>
> 4) $8,200 loan to [defendant] on January 8, 2008 to pay for medical expenses for his son;

> 5) $1,000 paid to [defendant's] accountant on or About 5, 2008, when [defendant] did not pay his bill.
>
> These financial transactions total $131,200. [Plaintiff] denied that he did anything to coerce [defendant] into signing the Note. He testified that he called [defendant] the day before July 3, 2009 to ask to come to his house so that [defendant] could sign a Promissory Note consolidating all the money that [plaintiff] had loaned to [defendant]. [Defendant] said he could come over. [Plaintiff] met with [defendant] at his home on July 3, 2009. [Plaintiff's] 12-year-old daughter was with him. [Plaintiff] testified that he listed the loans included in [the Note] on a separate piece of paper. He showed this list to [defendant]. He told [defendant] that he wanted to consolidate all the loans into one promissory note. [Plaintiff] additionally testified that he told [defendant] that he was 'converting' the stock purchase into a loan. [Defendant] was 'ok with that.' "

If plaintiff testified as described here, then his position at that proceeding was demonstrably *not* that the $50,000 was a loan. Rather, plaintiff distinguished between the sums he considered loans to defendant and the sum he paid defendant for (purported) stock in Tooth Bright. Plaintiff, disaffected with his purchase, asked defendant to repay the $50,000. Defendant agreed, and the Note was plaintiff's attempt to memorialize and enforce defendant's promise to repay. Plaintiff did not assert that the $50,000 was originally, or later became, a loan.

¶ 58 Not only has defendant failed to establish that plaintiff characterized the $50,000 inconsistently between No. 09-L-1073 and the present case, defendant has also failed to establish how plaintiff benefitted from his position in No. 09-L-1073. Defendant submits that plaintiff derived a benefit when he prevailed on appeal in No. 2-12-0118. Defendant, however, cites no authority for why our "benefit" analysis should focus on that outcome and ignore the subsequent

history of the case. This court remanded No. 09-L-1073 for further proceedings, and in September 2014 the trial court ruled in favor of *defendant* on the merits.

¶ 59 For the foregoing reasons, we hold that defendant failed to satisfy the elements of judicial estoppel.

¶ 60

¶ 61 D. Fraudulent Misrepresentation

¶ 62 Defendant contends that plaintiff failed to prove fraudulent misrepresentation. The elements of that tort are: (1) a false statement of material fact; (2) knowledge or belief of the falsity by the person making it; (3) intention to induce the other party to act; (4) action by the other party in reliance on the truth of the statements; and (5) damage to the other party resulting from such reliance. *Jane Doe-3*, 2012 IL 112479, ¶ 28.

¶ 63 Defendant's first contention in this respect is that the court erred by considering oral representations that defendant made to plaintiff concerning Tooth Bright. Defendant claims such proof was barred by paragraph 4(a) and a certain portion of paragraph 3(e) of the Stock Agreement. We place in context and emphasize the pertinent language:

> "**3. REPRESENTATIONS AND WARRANTIES OF SELLER**. Seller hereby warrants and represents:
>
> a. Seller is the lawful owner of the Stock, free and clear of all security interests, liens, encumbrances, equities and other charges.
>
> b. There are no existing warrants, options, and stock purchase agreements, redemption agreements, of any nature, calls or rights to subscribe of any character relating to the stock owned by the Seller.

d.[1] The buyer is aware that the company is in existence at the time of this agreement and has investigated to his satisfaction the possibilities of the ventures [*sic*] success.

e. *The seller makes no representations*, and Buyer agrees to hold harmless the seller from any and all claims, court actions regarding the sale, viability of the stock or the company success.

4. **GENERAL PROVISIONS**

(a) *This Agreement (including the exhibits hereto and any written amendments hereof executed by the parties) constitutes the entire Agreement and supersedes all prior agreements and understandings, oral and written, between the parties hereto with respect to the subject matter hereof.* (Emphasis added.)."

¶ 64 Neither the parol evidence rule nor the presence of an integration clause in a contract (such as paragraph 4(a) of the Stock Agreement) bars extrinsic proof that the contract was procured by fraud. See *General Casualty Co. of Illinois v. Carroll Tiling Service, Inc.*, 342 Ill. App. 3d 883, 892 (2003) (parol evidence rule); *W.W. Vincent & Co. v. First Colony Life Insurance Co.*, 351 Ill. App. 3d 752, 760 (2004) (integration clause). The court in *W.W. Vincent* quoted the Seventh Circuit Court of Appeals as to why neither the parol evidence rule nor an integration clause bars extrinsic proof of fraud:

"[F]raud is a tort, and the parol evidence rule is not a doctrine of tort law and so an integration clause does not bar a claim of fraud based on statements not contained in the contract. Doctrine aside, all an integration clause does is limit the evidence available to the parties should a dispute arise over the meaning of the contract. It has nothing to do

[1] There is no paragraph 3(c).

> with whether the contract was induced *** by fraud." *Vigortone AG Products, Inc. v. PM AG Products, Inc.*, 316 F.3d 641, 644 (7th Cir.2002).

¶ 65 There is case law, however, suggesting that the presence of a clause stating that the parties are not relying on representations outside the written agreement—a so-called "non-reliance" clause—will operate to render a party's reliance on extrinsic material unreasonable. See, *e.g.*, *Tirapelli v. Advanced Equities, Inc.*, 351 Ill. App. 3d 450, 457 (2004); *Vigortone*, 316 F.3d at 644-45. Defendant claims that the statement in paragraph 3(e) of the Stock Agreement that "[t]he seller makes no representations" constitutes a non-reliance clause.

¶ 66 Defendant, however, failed to make a timely objection to the oral representations that plaintiff described in his testimony. Defendant made no motion *in limine* to exclude the evidence. In his opening statement, defendant asserted that the court should limit itself to the Stock Agreement in ascertaining the terms of the stock purchase:

> "Your Honor, there are certain allegations that are made in the complaint of 'misrepresentations' that were made by [defendant] prior to the parties entering into [the Stock Agreement]. *** But all the negotiations and the statements that occurred prior to entering into that agreement merged into the document, and there's actually language within the document that says that all prior negotiations, all prior statements, all prior consideration between the parties are not part of this stock transfer action."

However, at none of the multiple points where plaintiff testified to defendant's oral representations did defendant object that the evidence was barred by the Stock Agreement. As with other kinds of evidence, parol evidence may be considered by a trial court in the absence of a timely objection. *Wheeler-Dealer, Ltd. v. Christ*, 379 Ill. App. 3d 864, 870 (2008). An objection is timely when it is made at the time the evidence is offered. *Id.* Failure to make a

timely objection results in forfeiture of a challenge to the admissibility of the evidence. *Id.* As defendant did not object to the extrinsic evidence when it was offered, he forfeited his objection.

¶ 67 While defendant challenges the admissibility of the extrinsic evidence, he adds an alternative argument on the substance of the evidence. His argument, however, is concerned exclusively with whether he made the oral representations in question and whether they were false. Importantly, he does not question the materiality of the statements or offer argument on the remaining elements of fraud, namely (1) knowledge of falsity; (2) intent to induce reliance; (3) reliance; and (4) injury. The elements of common law fraud must be proved by clear and convincing evidence. *All American Roofing, Inc. v. Zurich American Insurance Co.*, 404 Ill. App. 3d 438, 451 (2010). A reviewing court will not disturb a trial court's findings on a claim of fraud unless they are against the manifest weight of the evidence. *Hassan v. Yusuf*, 408 Ill. App. 3d 327, 343 (2011).

¶ 68 The trial court found that defendant made the following false material statements of fact to plaintiff: (1) there were investors in Tooth Bright other than plaintiff: (2) patents had been obtained; and (3) "manufacture was in place" and "the purpose of the $50,000 was to begin manufacturing of this product, the toothbrush."

¶ 69 As for finding (1), it is not clear if the court considered the statement untrue because Tooth Bright had no other capital investors (like plaintiff) or because Tooth Bright had no other investors of any kind. The court did not specify. Plaintiff testified that defendant told him that Tooth Bright had other "investors," but plaintiff did not specify whether defendant said those investors had contributed capital. Defendant, for his part, did not deny telling plaintiff that there were other investors in Tooth Bright, but only that there were other *capital* investors. According to defendant, Tooth Bright had individuals with "sweat equity" in the company. We need not

ponder what the court meant in finding (1), however, because the two other findings are sufficient to sustain the finding of fraud.

¶ 70 Finding (2) is supported by the evidence. The court's finding that defendant made the statement regarding patents is supported by plaintiff's testimony that defendant told him prior to the stock purchase that patents for the toothbrush had been secured. Defendant gave a contrary account of what he told plaintiff regarding patents, but this inconsistency was for the trial court to resolve as fact finder. See *Szafranski v. Dunston*, 2015 IL App (1st) 122975-B, ¶ 80. The court's finding that the statement defendant made regarding patents was false is supported by defendant's acknowledgement at trial that in fact no patents had been secured as of the stock purchase.

¶ 71 Defendant claims, however, that the documents he submitted with his motion to reconsider "lay the foundation for the admission of the provisional patent application dated 2006 for the Tooth Bright toothbrush." We do not see a patent application among the materials submitted with the motion to reconsider. Even if it was there, we would not be persuaded of any error in the denial of the motion to reconsider, for defendant fails to cite authority governing such motions. "The purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence that was not available at the time of the original hearing, changes in existing law, or errors in the court's application of the law." *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 36. As defendant fails to cite pertinent authority, he forfeits this point. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (points lacking citation to legal authority are waived).

¶ 72 As for finding (3), defendant claims that the court distorted how plaintiff characterized defendant's representations to him about Tooth Bright's readiness to manufacture the toothbrush. Defendant points to plaintiff's testimony that defendant told him prior to the purchase that "the

patents were secured, that a prototype ha[d] been prepared, and they were going [*sic*] *look into* launching to manufacturing and sale." (Emphasis added.) According to defendant, this testimony was consistent with his own testimony that manufacture of the toothbrush was not imminent when plaintiff purchased the stock because much more capital was needed than plaintiff's $50,000. Defendant, however, overlooks the other testimony that plaintiff gave regarding his conversation with defendant. Plaintiff testified that defendant said he was "moving along, moving ahead to manufacture [the toothbrush]," that he "had people in place *** to put [the toothbrush] together, to build it and he just needed the infusion of money to manufacture," and that he was "ready for manufacturing." Even if defendant has identified an inconsistency in plaintiff's testimony, it is not sufficient for us to overturn the court's finding. It is the trial court's province to resolve such inconsistencies. *Szafranski*, 2015 IL App (1st) 122975-B, ¶ 80. The record is sufficient to sustain finding (3).

¶ 73 E. The Hold-Harmless and Due-Diligence Clauses

¶ 74 Defendant cites further language in the Stock Agreement that he believes insulates him from liability on plaintiff's claim. First, he cites paragraph 3(d), which states: "The buyer is aware that the company is in existence at the time of this agreement and has investigated to his satisfaction the possibilities of the ventures [*sic*] success." This provision does not control here. The fraudulent statements found by the trial court concerned discrete factual matters about Tooth Bright's capital structure and preparedness to manufacture the toothbrush. They did not concern the subject of the company's likelihood of success or the basic matter of the company's existence.

¶ 75 Defendant also cites the latter portion of paragraph 3(e), which we set forth and emphasize as follows: "The seller makes no representations, *and Buyer agrees to hold harmless*

the seller from any and all claims, court actions regarding the sale, viability of the stock or the company success" (emphasis added). Defendant construes this to be what Illinois courts characterize as an exculpatory clause. While such clauses are enforceable in some circumstances, a party cannot (unsurprisingly) cite one to insulate him from the very fraud employed to procure it. See *Hawkins v. Capital Fitness, Inc.*, 2015 IL App (1st) 133716, ¶ 18 ("Absent fraud or willful and wanton negligence, a contract's exculpatory clause will be valid and enforceable unless (1) the bargaining position of the parties reflects a substantial disparity, (2) enforcement violates public policy, or (3) the social relationship between the parties militates against upholding the clause."); *Jackson v. First National Bank of Lake Forest*, 415 Ill. 453, 459 (1953) (exculpatory clause enforceable only where, *inter alia*, "the contract has been freely entered into and is not tainted with fraud"). The exculpatory clause in paragraph 3(e) has no pertinence to plaintiff's fraud claim.

¶ 76 III. CONCLUSION

¶ 77 For the foregoing reasons, we affirm the judgment of the circuit court of Du Page County.

¶ 78 Affirmed.