

2016 IL App (1st) 142397-U
No. 1-14-2397
January 26, 2016

SECOND DIVISION

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).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

| | | |
|---|---|-------------------------------|
| ROBIN ZAHRAN and KAREN ZAHRAN, |) | Appeal from the Circuit Court |
| |) | Of Cook County. |
| Plaintiffs-Appellees/Cross-Appellants, |) | |
| |) | |
| v. |) | No. 05 L 8967 |
| |) | |
| HARSHA SUD, HARSHA SUD, MD SC, |) | The Honorable |
| HARSHA SUD MD SC PENSION PLAN, |) | Joan Powell, |
| <i>et al.</i> , |) | Judge Presiding. |
| |) | |
| Defendants-Appellants/Cross-Appellees.) |) | |

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Pierce and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held:* Appellants forfeit appellate review of all arguments for which they fail to cite pertinent authority. When the trial court holds that a judgment lacks *res judicata* effect because of fraud, and the record supports a finding of fraud, an appellant who fails to cite pertinent authority concerning fraud has forfeited his argument that the prior judgment bars the lawsuit.

¶ 2 Robin and Karen Zahran filed a complaint in Cook County against Harsha Sud and others, alleging that Harsha fraudulently induced Robin to sign a settlement agreement that

resolved separate litigation in DuPage County. The complaint also included causes of action for slander of title and defamation. Harsha moved to dismiss the complaint as *res judicata*, and the Cook County court denied the motion because of the allegations of fraud. After a bench trial, the court awarded Robin and Karen a judgment that included awards for work done before Robin signed the settlement, slander of title, and defamation. Harsha appeals and Robin cross-appeals.

¶ 3 In his brief on appeal, Harsha argues primarily that the *res judicata* effect of the DuPage County judgment bars Robin's lawsuit. But in the brief, Harsha cites no authorities addressing the issue of fraud and whether a party fraudulently induced to enter into a contract escapes the *res judicata* effect of a judgment that enforces the contract. We find Harsha's principal argument forfeited by the failure to cite pertinent authority. We also find that Harsha failed to show that the manifest weight of the evidence requires reversal of the award of damages. Robin similarly forfeited his arguments on the cross-appeal by failing to cite pertinent authority. Accordingly, we affirm the trial court's judgment.

¶ 4 **BACKGROUND**

¶ 5 In 1982, Dr. Harsha Sud and his wife, Dr. Madhupa Sud, hired Robin Zahran to provide accounting services and financial advice for Harsha, Madhupa, the corporation named Harsha Sud MD SC, and the Harsha Sud MD SC Pension Plan. The relationship worked well for ten years, but around 1992, Harsha started to fall behind in his payments to Robin. The Suds' income declined sharply in 1997, due largely to illnesses. Robin later complained about the Suds' failure to pay him for his work.

¶ 6 In 2002, Harsha instructed Robin to take some Pension Plan funds out of one investment and invest them elsewhere. Harsha said that he would pay Robin all amounts he owed Robin out of the Pension Plan funds. Harsha asked Robin to hold the funds in the business account of the financial services firm Robin ran. Harsha eventually agreed that the funds, amounting to nearly \$500,000, should go into an account at American Equity, once Harsha paid all that he owed Robin.

¶ 7 In May 2003, the Pension Plan filed a complaint against Robin in DuPage County, alleging that Robin wrongfully refused to transfer the funds to American Equity. Robin countered that Harsha and the Pension Plan had failed to pay him the fees they owed him.

¶ 8 Robin, acting *pro se*, entered into a settlement agreement with the Pension Plan in November 2003. According to the agreement, both parties released all claims they had against each other as of November 2003. Robin agreed to transfer "to the Pension Plan's account at American Equity" the sum of \$494,297.51, and Sud agreed to send Robin \$20,000 for his unpaid fees. The agreement continued:

"If Zahran shall fail to wire, transfer or deposit for the benefit of the Pension Plan the \$494,297.51 to the aforementioned American Equity account so that it is received by 4:00 p.m. on November 25, 2003 *** then the Pension Plan shall be entitled to entry of judgment against Zahran *** for \$494,297.51 less any payments received, plus 5% interest on any unpaid balance from the date the funds were to be deposited with American Equity, plus attorneys fees."

¶ 9 Robin did not successfully transfer the agreed amount to American Equity by November 25, 2003, and the Pension Plan filed a motion for entry of judgment against Robin in accord

with the settlement agreement's penalty provision. The DuPage County court apparently entered a judgment in favor of the Pension Plan on January 27, 2004.

¶ 10 Harsha and the other appellants have not included that judgment in the record on appeal. They include Robin's motion to reconsider the judgment. In the motion to reconsider, Robin alleged that Harsha had agreed to allow Robin to transfer the funds to an account at American Equity so that Robin could earn a commission of about \$75,000 on the transfer. Harsha had failed to sign the applications needed for American Equity to set up the account. Robin alleged that Harsha "placed all the obstacles [to the transaction] in order to change the provisions of the settlement agreement and to deprive [Robin] of commission." Robin asked the DuPage County court to enter an order requiring Harsha to comply with the settlement agreement.

¶ 11 At the oral argument on the motion, held May 11, 2004, Robin sought to "pursue the fraudulent conduct that occurred between [the Pension Plan's attorney, Harsha,] and American Equity, within the context of this alleged settlement agreement." The DuPage County court found the penalty provision enforceable as written. On June 25, 2004, Robin argued at a further hearing that he needed discovery concerning "secret communications" between Harsha and American Equity. Robin said "American Equity ha[d] no trust" into which he could deposit the money, "because [Harsha] did not want to pay for the trust." Robin added that Harsha and the Pension Plan's attorney "were less than candid" with the court because they did not disclose their communications with American Equity designed to deprive Robin of his right to a commission on the transfer of funds to American Equity. Robin said:

"So, my issue here is there was a fraud. They didn't tell the Court everything. And, I don't want to get into more of the facts. The deal was that Robin Zahran does not get commission."

¶ 12 The court denied Robin's motion for discovery, and then said, "You haven't shown me by the required clear and convincing evidence that there was fraud." The court entered an order in which it said, "For the reasons stated of record, Robin Zahran's motion to vacate judgment based on fraud upon the court is denied. *** For the reasons stated of record, Robin Zahran's motion for granting order to transfer and tender funds is denied." Harsha filed the DuPage County court's judgment as a lien against two parcels of real estate owned by Robin and his wife, Karen.

¶ 13 Robin appealed the judgment which enforced the settlement agreement. In November 2004, while the appeal remained pending, Robin paid the Pension Plan the entire amount of the judgment. The Pension Plan refused to release its liens on the real estate. Robin applied to the DuPage County court for a Release and Satisfaction of Judgment, but the court found it had lost jurisdiction due to the appeal.

¶ 14 In the appeal from the DuPage County court's judgment, Robin argued primarily that because Harsha did not sign the settlement agreement promptly, the circuit court should not have enforced the agreement. The appellate court found the agreement, with its penalty provision, fully enforceable. *Harsha K. Sud M.D. S.C., Pension Plan v. Zahran*, No. 2-04-0556 (unpublished order under Supreme Court Rule 23). The Pension Plan refused to release its liens, even after the appellate court issued its mandate affirming the DuPage County

court's judgment. The Pension Plan finally released its liens on the Zahrans' properties in August 2008, following further proceedings in DuPage County.

¶ 15 In August 2005, Robin and Karen filed a complaint in Cook County, and that complaint initiated the litigation now on appeal to this court. Robin and Karen named as defendants Harsha, Madhupa, Harsha Sud MD SC, and the Pension Plan, along with several other defendants not involved in this appeal. In the complaint as amended, Robin and Karen charged Harsha and Madhupa with fraud, defamation, and breach of contract, and they charged the Pension Plan with slander of title and breach of contract.

¶ 16 The Cook County court found that the DuPage County court did not hear evidence concerning fraud, and therefore the Cook County court denied the defendants' motion to dismiss the case as *res judicata*. The bench trial began on November 14, 2011. No court reporter transcribed the testimony. The trial judge typed up her extensive notes of the testimony presented at trial, and those typed notes form the record of the trial.

¶ 17 Karen testified that she and Robin paid \$7,535.23 in legal fees for the work needed to get the liens removed. She also testified that the liens cost her and Robin thousands of dollars due to the higher interest rates she and Robin needed to pay for their mortgage and increased interest on other bank loans.

¶ 18 Harsha admitted that he contacted the Illinois Attorney General, the Department of Insurance Licensing, the Internal Revenue Service, the Federal Bureau of Investigation, and local police, and told all of them that Robin had stolen money from the Pension Plan. Harsha did not tell them that he had authorized the transfer of the Pension Plan's funds to the bank account for Robin's business. Harsha admitted that even after signing the settlement

agreement, he continued to tell friends, business associates, and insurance companies that Robin stole his money. Harsha, on the witness stand, added, "I will still disparage so they won't do business with you." Harsha admitted that "[a]ll along" he continued to tell people Robin stole his money.

¶ 19 Harsha admitted that he knew Robin expected to receive a commission of about \$70,000 for the transfer of funds into the American Equity account, as described in the settlement agreement. But Harsha testified that he called American Equity and "told them not to accept any money from Zahran in the pension plan." Harsha added that he "was not going to let any money go to [Robin's] account."

¶ 20 Robin testified that the unpaid bills to Harsha, Madhupa and the Pension Plan for financial services came to about \$150,000 by the time Harsha fired him in 2003.

¶ 21 The trial court found that Harsha and the Pension Plan fraudulently induced Robin to sign the settlement agreement, when they made compliance with a material term of the agreement impossible by instructing American Equity not to accept money from Robin. The trial court entered a judgment against Harsha and the Pension Plan for \$150,000, subsequently reduced to \$75,000, for financial services, using the amount of the commission anticipated in the settlement agreement as the measure for the award.

¶ 22 Because Harsha and the Pension Plan chose not to remove the liens when Robin paid the DuPage County judgment, the trial court entered a judgment in favor of Karen and Robin and against Harsha and the Pension Plan in the amount of \$7,535.23. The trial court also found that Harsha defamed Robin after November 2003, and the court awarded Robin \$175,000 in damages for the defamation. Harsha and the Pension Plan appeal, and Robin cross-appeals.

¶ 23

ANALYSIS

¶ 24

We note at the outset that "Supreme Court Rule 341 [Ill. S. Ct. R. 341 (eff. Jan. 1, 2016)] requires that the appellant clearly set out the issues raised and the legal support therefore with relevant authority." *U.S. Bank v. Lindsey*, 397 Ill. App. 3d 437, 459 (2009). "A reviewing court is entitled to have issues clearly defined with pertinent authority cited ***, and it is not a repository into which an appellant may foist the burden of argument and research." *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993)). Rule 341 determines the outcome for most of the arguments on the appeal and the cross-appeal.

¶ 25

Harsha argues that *res judicata* bars the recovery for financial services and defamation, and that the manifest weight of the evidence requires reversal of all of the awards of damages.

¶ 26

Res Judicata

¶ 27

Res judicata is an equitable doctrine which "should only be applied where fairness and justice require." *Vole, Inc. v. Georgacopoulos*, 181 Ill. App. 3d 1012, 1017 (1989); see *Dookeran v. County of Cook*, 2013 IL App (1st) 111095, ¶¶ 15, 43.

¶ 28

The DuPage County court entered a judgment in favor of the Pension Plan in the Pension Plan's lawsuit to enforce the settlement agreement. Our research uncovered several authorities that appear to apply here. In *Charles E. Harding Co. v. Harding*, 352 Ill. 417 (1933), *abrogated on other grounds*, *Herzog v. Lexington Township*, 167 Ill. 2d 288, 295 (1995), our supreme court held that a final judgment in a lawsuit involving a contract did not foreclose a later suit for fraud in the inducement to enter into the contract. See also *Schoenbrod v. Rosenthal*, 36 Ill. App. 2d 112, 117-19 (1962). When, in discovery, a party

conceals evidence of fraud, and the parties reach a settlement without the fraud coming to light, that conduct "represents a wrong not only as to the releasing party but to the court as well." *E.I. DuPont de Nemours & Co. v. Florida Evergreen Foliage*, 744 A.2d 457, 461 (Del. 1999). "The maxim that fraud vitiates every transaction into which it enters applies to judgments as well as to contracts and other transactions. A court of equity has always the power to grant relief against judgments and decrees obtained by fraud, and this power will be exercised to prevent the enforcement of a judgment or decree which is against conscience, or where a party had no opportunity to defend, or was prevented by *** the fraud or improper management of the opposite party." *Moore v. Sievers*, 336 Ill. 316, 322 (1929).

¶ 29 Harsha admitted that he deliberately deceived Robin to get Robin to sign the settlement agreement. Harsha led Robin to believe that if he signed the agreement, he would receive a commission of about \$70,000 on the transfer of funds to American Equity. But Harsha instructed American Equity not to accept the transfer from Robin, so he knew Robin could not collect his commission.

¶ 30 In this appeal, Harsha relies on cases that restate general principles of *res judicata*. But the cited cases do not involve fraud. See *Vole*, 181 Ill. App. 3d 1012; *Dookeran*, 2013 IL App (1st) 111095 (causes of action for retaliatory discharge, breach of contract and defamation barred by prior proceeding); *Lane v. Kalcheim*, 394 Ill. App. 3d 324 (2009) (legal malpractice action barred by prior proceeding); *Goodman v. Hanson*, 408 Ill. App. 3d 285 (2011) (in legal malpractice action court held that a settlement is not a judgment on the merits); *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290 (1998) (actions for breach of implied contract and tortious interference barred by prior judgment); *Keim v. Kalbfleisch*,

57 Ill. App. 3d 621 (1978) (will contest, no allegation of fraud). Harsha cited only one case in which we found any mention of fraud. In that case, *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 2014 IL App (1st) 111290, ¶ 102, the court specifically pointed out that the plaintiff had not shown fraud, and still the court held that *res judicata* did not bar the lawsuit.

¶ 31 Due to the failure to cite any authority that addresses the principal basis for the trial court's holding on the issue of the *res judicata* effect of the DuPage County court's judgment, we make no pronouncement on the application of *Harding* and *Moore* to this case, and we do not adopt *Florida Evergreen* as Illinois law. We hold only that where an appellant seeks to rely on the preclusive effect of a judgment based on a settlement contract obtained by fraud, the appellant must cite and discuss authority concerning the effect of fraud on the validity of the judgment. Despite the trial court's explicit reliance on the fraud as grounds for denying preclusive effect to the DuPage County judgment, Harsha failed to cite any authority concerning the effect of fraud on the *res judicata* effect of a judgment. Because Harsha failed to cite pertinent authority in support of his primary argument for reversal, we affirm the trial court's ruling that the *res judicata* effect of the DuPage County court's judgment did not bar Robin's lawsuit insofar as Robin sought to recover for financial services he provided. See *U.S. Bank*, 397 Ill. App. 3d at 459.

¶ 32 Harsha also claims that *res judicata* barred recovery for defamation due to statements he made before the settlement. The trial court awarded damages only for the defamatory statements made after the settlement, so the argument provides no grounds for disturbing the judgment.

¶ 33

Defamation

¶ 34

Harsha next argues that the finding that he defamed Robin after entering the settlement is contrary to the manifest weight of the evidence. Harsha contends that the evidence showed he only told the truth about Robin. The trial court's notes show that Harsha admitted that after the settlement, he told friends, business associates, and insurance companies that Robin stole his money. The trial court also found, in accord with the testimony from Robin and Harsha, that Harsha approved the transfer of pension funds into Robin's business account, and Harsha promised to pay Robin past due fees from those funds. Harsha did not pay the past due fees when he insisted on transfer of the funds to a new account. The testimony supports the trial court's finding that Robin did not steal the money, especially because Robin always intended to return the funds once Harsha paid his fees. See *People v. McCarty*, 94 Ill. 2d 28, 33 (1983). We find that the evidence supports the trial court's finding that Harsha defamed Robin.

¶ 35

Damages

¶ 36

The trial court awarded Robin and Karen \$75,000 for financial services, \$175,000 for defamation, and \$7,535.23 for slander of title. In his argument concerning defamation, Harsha includes a single paragraph in which he argues that the evidence did not support the award of damages. Harsha cites no authority in support of the argument. We affirm the award of damages for defamation due to the lack of citation to pertinent authority. See *U.S. Bank*, 397 Ill. App. 3d at 459.

¶ 37

Harsha also claims that Robin did not present sufficient evidence to warrant the judgment for \$75,000 for financial services. The single authority Harsha cites, *Avenaim v. Lubecke*,

347 Ill. App. 3d 855, 861 (2004), did not involve damages. Robin testified that Harsha's unpaid fees for Robin's financial services reached \$150,000 by 2003. The trial court initially awarded Robin the full \$150,000, but reduced the award to \$75,000 when Harsha pointed out that in the DuPage County litigation, Robin had sought only \$75,000. Robin would have received about \$90,000 (\$70,000 commission + \$20,000 directly from Harsha) in the settlement in the DuPage County litigation if Harsha had permitted American Equity to accept the payment from Robin so that Robin could receive his commission. We cannot say that the manifest weight of the evidence requires a further reduction in Robin's recovery for his financial services.

¶ 38 Finally, Harsha contends that the evidence does not support the award of \$7,535.23 for fees expended in getting Harsha to remove the lien filed against the Zahrans' real estate. Karen testified that she and Robin spent that sum in legal fees to get the lien removed. She presented two invoices, totaling \$7,535.23, and the invoices, from a law firm, described the work done as "General Representation." Harsha cites no authority for his argument that the court must reject Karen's testimony that the law firm charged that sum for its work to get the liens removed. Again, due to Harsha's failure to cite pertinent authority, we affirm the award.

¶ 39 Cross-Appeal

¶ 40 In his cross-appeal, Robin argues that the trial court erred (1) by dismissing all of his claims against Madhupa; (2) by failing to award interest; (3) by reducing the amounts of damages awarded; (4) by denying his claim for emotional distress; (5) by failing to compensate him for time he lost due to Harsha's fraud; (6) by awarding insufficient damages

for getting the lien removed; and (7) by refusing to impose sanctions on Harsha for violations of discovery rules. For all but one of the arguments, Robin cites no authority at all. For the last argument, Robin cites only Supreme Court Rule 219(c) (Ill. S. Ct. R. 219(c) (eff. July 1, 2002) and *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 120 (1998).

¶ 41 Rule 219(c) empowers the trial court to impose sanctions on a party who violates discovery rules. *Shimanovsky*, 181 Ill. 2d at 120. Only a clear abuse of discretion justifies reversal of the trial court's decision on a motion for discovery sanctions. *Shimanovsky*, 181 Ill. 2d at 120. In *Shimanovsky*, our supreme court held that the trial court did not abuse its discretion when it dismissed a lawsuit as a sanction against the plaintiffs for destructive testing of evidence essential to the defense.

¶ 42 Here, Robin sought discovery of financial documents for Harsha, Madhupa, and the Pension Plan. In his brief on appeal, Robin says he sought tax returns and records of bills Robin sent to the Suds, and records of their payments. Robin filed a "Motion[] for Judgment on the Pleadings for Abuse of Discovery." The trial court denied the motion. Robin does not explain why the alleged discovery violations here warrant the extreme measure of granting judgment on the pleadings. "Sanctions *** should be imposed to promote discovery, not to punish the noncomplying party. [Citation.] Thus the entry of a default or dismissal under Rule 219(c) should be employed as a last resort." *Humboldt-Armitage Corp. v. Illinois Fair Plan Ass'n*, 86 Ill. App. 3d 888, 890-91 (1980). We cannot say that the trial court abused its discretion when it denied the motion for judgment on the pleadings as a sanction for discovery violations.

¶ 43 We find all of Robin's other arguments on the cross-appeal forfeited due to his failure to cite pertinent authority. See *U.S. Bank*, 397 Ill. App. 3d at 459.

¶ 44 CONCLUSION

¶ 45 Harsha fraudulently induced Robin to sign a settlement agreement, and Harsha obtained a judgment in DuPage County enforcing the settlement agreement. Although Harsha argues that the prior judgment bars this lawsuit, he cites no authority to support his claim that the DuPage County judgment bars this case despite his fraud. We find that by failing to cite pertinent authority involving fraud, Harsha forfeited his argument based on *res judicata*. Harsha has not shown that the manifest weight of the evidence requires reversal of the award of damages.

¶ 46 Robin did not show that the trial court abused its discretion when it denied his motion for judgment on the pleadings as a sanction for discovery violations. Robin forfeited all of his other arguments on the cross-appeal by failing to cite pertinent authority. Accordingly, we affirm the trial court's judgment.

¶ 47 Affirmed.