

No. 1-12-2872

**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  
FIRST JUDICIAL DISTRICT

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CLARA WONJUNG LEE, DDS, LTD., an Illinois Corporation, and CLARA LEE,	)	Appeal from the
	)	Circuit Court of
	)	Cook County.
Plaintiffs-Appellees,	)	
	)	No. 07 L 9389,
v.	)	consolidated with
	)	No. 10 M1 712974
ROSALINA R. ROBLES, DMD, LTD., an Illinois Corporation, and ROSALINA R. ROBLES,	)	
	)	Honorable
	)	James D. Egan,
Defendants-Appellants.	)	Judge Presiding.

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JUSTICE LIU delivered the judgment of the court.  
Presiding Justice Harris and Justice Simon concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court's finding that defendants fraudulently concealed material information from plaintiffs in violation of a purchase agreement for the acquisition of a dental practice was proper and not against the manifest weight of the evidence adduced at trial. Furthermore, the court's award of rescission of the agreement and money judgment against defendants was not unreasonable or arbitrary, given the evidence presented on damages. Defendants did not raise any challenge based on the unclean hands doctrine at trial, and therefore, the issue is waived and this court will not consider it.

¶ 2

## INTRODUCTION

¶ 3 Defendants, Rosalina R. Robles, DMD, Ltd. and Rosalina R. Robles appeal from the circuit court's judgment in favor of plaintiffs, following a bench trial, in which the court awarded plaintiffs rescission of a purchase agreement entered into with defendants for a dental practice. In their lawsuit, plaintiffs claimed that, subsequent to the execution of the purchase agreement and prior to the transfer of the practice assets, defendants intentionally withheld material information from plaintiffs that adversely impacted the desirability and economic value of the practice. Specifically, plaintiffs alleged that defendants knew that a former dentist at the practice had used the office to treat underage prostitutes who were victims of violence, and that defendants deliberately concealed such information from plaintiffs prior to the closing of the sale. Following a bench trial, the circuit court entered judgment in favor of plaintiffs and against defendants. The court awarded rescission of the agreement and ordered defendants to pay damages based on the purchase price paid to defendants, less rent payments owed by plaintiffs and a portion of the income received by plaintiffs during their ownership of the practice.

¶ 4 On appeal, defendants contend that judgment should be reversed because the trial court erred in finding that the evidence established a violation of the purchase agreement on which to justify a judgment order of rescission and damages. Defendants argue that the trial evidence did not support the court's findings and judgment. Defendants also seek reversal of the judgment on the grounds that plaintiffs are barred from recovery under the unclean hands doctrine because they failed to pay the rents owed defendants under the lease agreement that was part of the purchase transaction. Finally, defendants contend that the court's entry of money judgment against defendants was erroneous because plaintiffs suffered no economic loss during its ownership of the practice.

¶ 5

## BACKGROUND

¶ 6 This controversy arose out of an August 2006 sale of a dental practice located at 2525 West Montrose Avenue, Chicago, Illinois. On or about August 23, 2006, Rosalina R. Robles, D.M.D., Ltd., as seller, and Rosalina R. Robles, D.M.D. (Dr. Robles), as personal guarantor of the warranties and covenants, entered into the Agreement for the Transfer of Dental Practice (Purchase Agreement) with plaintiff, Clara Lee, D.D.S. (Dr. Lee) for the purchase price of \$267,000, of which \$133,500 was allocated to corporate goodwill. Pursuant to the terms of the Purchase Agreement, Dr. Lee and R. Robles Family Limited Partnership (Robles Family Ltd. Partnership) also entered into a separate lease arrangement on August 24, 2006, for use of the practice premises under the Office Lease Agreement and Right of First Refusal (Lease Agreement). The Purchase Agreement provided for the transfer of the dental practice assets on September 1, 2006. Dr. Lee took out a loan for the purchase price of practice and an additional \$20,000 as working capital.

¶ 7 Shortly after acquiring the practice, Dr. Lee learned that a former dentist at the practice, Dr. Kimmel, was indicted for criminal activities involving underage prostitutes. Specifically, the Dr. Kimmel, who had worked with Dr. Robles at the West Montrose Avenue office, was accused of rendering dental care services to underage prostitutes who were victims of violence allegedly at the hands of their pimps, and for providing other services to the pimps, during after-hours at the practice for a period of time. Dr. Lee purportedly found out about Dr. Kimmel's activities and the federal investigation surrounding Dr. Kimmel and the practice through various radio, media and industry sources, including an October 2006 *Chicago Magazine* article titled "The Strange Case of the Dentist and Pimps" which included references to an interview with Dr. Robles and staff from the West Montrose Avenue practice. After learning of Dr. Kimmel's use

of the dental practice and the criminal investigation related to these activities, Dr. Lee attempted to rescind the Purchase Agreement but the parties were unable to reach a resolution.

¶ 8 On September 6, 2007, plaintiffs filed a complaint alleging various claims against defendants and other parties involved in the purchase transaction. The original 2007 complaint and subsequent amended complaints sought relief for breach of contract, common law fraud, consumer fraud, tortious interference with business, and rescission of contract based on fraudulent inducement. In June 2010, R. Robles Family Ltd. Partnership brought a forcible detainer action against Dr. Lee for failure to pay rent owed under the Lease Agreement. Dr. Lee does not dispute her failure to pay the rent due under the Lease Agreement. In the rescission suit, they asserted that they are not liable for the unpaid rent because of the alleged fraud committed by Dr. Robles, and asked that the Lease Agreement also be rescinded. On September 27, 2010, both actions were consolidated.<sup>1</sup> All of the counts except for Count IV, the rescission claim, were voluntarily dismissed on May 18, 2011.

¶ 9 A bench trial proceeded on the rescission claim on July 17, 2012. During two days of testimony, plaintiffs presented witnesses to establish that Dr. Robles knew about Dr. Kimmel's illicit activities at the practice; that she was aware of the federal investigation into his activities; that she had a duty under the Purchase Agreement to disclose this knowledge, and that she intentionally withheld the information from Dr. Lee prior to the closing.

¶ 10 At trial, Dr. Lee testified that she first learned about Dr. Kimmel's criminal activities from the *Chicago Magazine* article shortly after she purchased the practice. She stated that she then confronted Dr. Robles, who indicated that she had been advised by her broker, Wendy Pasavento, to "not tell [Dr. Lee] anything." Dr. Lee stated that she would never have purchased

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<sup>1</sup> The court record does not contain any other substantive documents from R. Robles Family Limited Partnership's forcible detainer action (2010 MI 712974) other than the complaint, Dr. Lee's motion to consolidate and the court's order allowing consolidation with Dr. Lee's complaint for rescission (07 L 009389).

the practice had she known about its history concerning the illegal activities. She also testified that she would not have undertaken the loan necessary to acquire the practice.

¶ 11 Bryan Smith, author of the *Chicago Magazine* article, testified that he had interviewed Dr. Robles at the West Montrose office during the summer of 2006 prior to the publication of the article. He also interviewed the office manager Idalia Rose (also known as Idalia Merlor). He testified that the statements attributed to Dr. Robles and Ms. Rose in the article were made by them personally. He said that Dr. Robles told him she learned about the after-hours appointments from the office manager and that "she grew increasing[ly] uncomfortable."

¶ 12 Plaintiffs also presented expert witness testimony to establish that the information concerning Dr. Kimmel's activities was material to Dr. Lee's decision purchase the practice. Bruce Lowery, an appraiser, opined that Dr. Kimmel's indictment on January 18, 2006 for treating prostitutes at the practice "is a material fact because it has a potential influence on the character of the practice, of the reputation of the practice \*\*\* people's opinions would be swayed as to the honesty or the integrity of the providers in that particular practice. It could very likely impact a patient's decision to remain in that practice." He testified that a reasonable dentist in Dr. Lee's situation would find the information material to a decision to purchase the practice. Mr. Lowery stated that when he heard about the indictment prior to being retained as an expert, his thought was, "that practice is dead."

¶ 13 Dr. Robles testified that she had no knowledge that prostitutes were being treated at the practice, that she did not give an interview to Smith, and that Smith made up the quotes used in the *Chicago Magazine* article. She denied saying any of the things attributed to her in the article. She denied that Dr. Kimmel was indicted in 2005 and testified that he was indicted in October of 2006. She denied having knowledge of, or being told by the office manager about, scantily

dressed girls showing up at the practice after regular office hours for treatment. She admitted that the FBI had interviewed her about her ownership of the Marina Tower apartment units that she co-owned with Dr. Kimmel, but that she did not know that they were being rented out for prostitution use until after Dr. Kimmel's indictment. She testified that she never told her sales broker about Dr. Kimmel's activities because they were not related to the value of the practice.

¶ 14 Following the bench trial, the circuit court ruled that there was sufficient evidence warranting judgment in favor of plaintiffs, and awarded rescission of the Purchase Agreement. The court found Dr. Robles' testimony to be "incredible," and concluded that she knew about Dr. Kimmel's activities at the practice and the FBI raid at the premises. The court further held that she had a duty, under section 6 of the Purchase Agreement, to disclose this information to Dr. Lee before the Purchase Agreement was signed. Additionally, the court found that although plaintiffs generated substantial revenue from the acquired practice, the income was due in large part to the Invis-a-line orthodontic services that Dr. Lee introduced to the practice and her marketing efforts.

¶ 15 The court determined that in order to restore the parties to their precontractual status through rescission, the proper reimbursement due plaintiffs was return of the purchase price of \$267,000, less (i) \$90,000 in rent owed by plaintiffs to Defendants and (ii) \$91,200, which represented 10% of the total gross income generated by the practice during plaintiffs' ownership. On September 14, 2012, final judgment was entered in favor of plaintiffs and against defendants rescinding the contract for the sale of the dental practice and a money judgment for \$86,800.<sup>2</sup> Defendants filed a timely notice of appeal on October 1, 2012. Ill. S. Ct. R. 303 (a)(1) (eff. June 4, 2008).

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<sup>2</sup> There appears to be either scrivener's error or a computational error in the final amount of the judgment. The \$267,000 sales price minus the \$90,000 in rent, minus the \$91,200 in gross profits actually comes to \$85,800.

¶ 16

## ANALYSIS

¶ 17 Defendants raise two arguments on appeal. First, they contend that the rescission claim is barred by the doctrine of unclean hands because plaintiffs failed to pay rents owed under a Lease Agreement. Second, they argue that the court erred in entering judgment against defendants, because the evidence at trial did not support a finding that defendants engaged in conduct that violated article 9, section 6 of the Purchase Agreement.

¶ 18

### a) Standard of Review

¶ 19 We will reverse the circuit court's findings following a bench trial only if they are against the manifest weight of the evidence. *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002). This is because the trial judge, as the finder of fact, is in the best position to assess the credibility of witnesses and resolve conflicts in testimony. *Id.* Findings of fact reached by the judge in a bench trial are against the manifest weight of the evidence only when the opposite conclusion is clear or if the circuit court's findings are unreasonable, arbitrary, or not based on the admitted evidence. *Id.* Similarly, the standard of review of the court's award of damages following the trial is whether the judgment is against the manifest weight of the evidence. *1472 N. Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121191, ¶ 13. An award of damages is not against the manifest weight or manifestly erroneous if there is adequate basis in the record to support the trial court's determination of damages. *Id.*

¶ 20

### b) Defendants Waived Their Argument of Unclean Hands

¶ 21 It is axiomatic that an appellant has the burden to present a sufficiently complete record of the proceedings from the circuit court to support a claim of error or a request for reversal in a court of review. *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984). In the absence of a complete record

on appeal, it will be presumed that the order entered by the circuit court conformed to the law and had a sufficient factual basis. *Id.* Any doubts which may arise from the incompleteness of the record will be resolved against the appellant. *Id.*

¶ 22 This court has reviewed the record on appeal, despite the fact that Defendants do not cite to any references in the record to demonstrate a prior assertion of unclean hands. In examining the record, it also appears that defendants never raised the issue of unclean hands as an affirmative defense or bar to the claims. This court finds no evidence from the record of the trial transcript provided on appeal that defendants made any argument regarding unclean hands. The only reference to unclean hands that is discernible from the record is defense counsel's cursory mention of plaintiffs' failure to pay rent during his opening statement. That is insufficient for purposes of preserving the argument for appeal. Therefore, defendants have waived this argument on appeal because it was not raised properly in the trial court. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996) (issues not raised before the court below cannot be raised for the first time on appeal).

¶ 23 Furthermore, defendants' statement of facts contained in the opening brief must have appropriate references to the pages of the record on appeal relevant to the issue being briefed. Ill. S. Ct. R. 341 ((h) (6) (eff. July 1, 2008). At a minimum, appellant should pinpoint in the record where an issue was raised and the ruling. Defendants failed to comply with this requirement regarding their argument that plaintiffs had unclean hands and are, therefore, barred from seeking reversal of the court's ruling on this issue. This is an additional reason for this court to not consider this argument.

¶ 24 c) The Court's Findings were not against the Manifest Weight of the Evidence

¶ 25 The elements of an equitable claim for rescission based on fraud or misrepresentation are:

a representation of a material fact, made to induce the other party to act; the statement is false and known by the party making it to be false; and the party to whom it is made is ignorant of its falsity, must reasonably believe it to be true, and must act thereon to his damage. *Peddinghaus v. Peddinghaus*, 295 Ill. App. 3d 943, 948 (1998); *Chapman v. Hosek*, 131 Ill. App. 3d 180, 186 (1985). Concealment of a material fact is actionable where employed as a device to mislead. *Id.* In order to be material, the concealed fact must be such that had the other party been aware of it, he would have acted differently. *Id.* (citing *Perlman v. Time, Inc.*, 64 Ill. App. 3d 190, 195) (1975).

¶ 26 Fraudulent inducement is sufficient reason for a court to invalidate a contract. See *General Electric Credit Auto Lease, Inc. v. Jankuski*, 177 Ill. App. 3d 380, 383 (1988); *Ainsworth Corp. v. Cenco Inc.*, 107 Ill. App. 3d 435 (1982). This court has previously held that "fraud [ ] may consist of the intentional omission or concealment of a material fact under circumstances creating an opportunity and duty to speak." (Internal quotation marks omitted.) *Janowiak v. Tiesi*, 402 Ill. App. 3d 997, 1006 (2010) (quoting *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 25 (2003)), (quoting *H.K. Warner v. Lucas*, 185 Ill. App. 3d 351, 354 (1989)). "Such fraud may consist of either an untrue statement or the concealment of a material fact. The concealment may not be a mere passive omission of facts during the business transaction but must have been done with the intent to deceive under circumstances creating an opportunity and a duty to speak." *Chapman*, 131 Ill. App. 3d at 186 (citing *Allensworth v. Ben Franklin Savings and Loan Association*, 71 Ill. App. 3d 1041, 1044 (1979)).

¶ 27 " 'Rescission [of a contract] is an equitable remedy, the application of which is left largely to the discretion of the trial court.' " *Newton v. Aitken*, 260 Ill. App. 3d 717, 719 (1994) (quoting *Klucznik v. Nikitopoulos*, 152 Ill. App. 3d 323, 327 (1987)). One of the bases a court

may use to order the rescission of a contract is fraud. *Id.* A reviewing court will not reverse a circuit court's decision on rescission of a contract unless it finds that the circuit court abused its discretion. *23-25 Building Partnership v. Testa Produce, Inc.*, 381 Ill. App. 3d 751, 757 (2008).

¶ 28 Section 6 of the Purchase Agreement required that Dr. Robles, as "[s]eller, shall disclose to [Dr. Lee], any material or significant information and/or charges that have occurred in the practice, (including but not limited to any pending litigation, actions, threatened actions by the Illinois State Board of Dental Examiners, or from any other governmental agency that materially alter the desirability or economic potential of the assets) up to the time of the date of transfer."

The question then was whether Dr. Robles had a duty to disclose the information she had about Dr. Kimmel's activities and the federal investigation to Dr. Lee. Defendants offered no evidence to rebut the testimony of both Dr. Lee and her expert, who indicated that such information would have been material to a reasonable dentist's decision to purchase the practice. Based on such evidence, we agree with the trial court's holding that information about Dr. Kimmel's activities and his association with the practice was material to Dr. Lee's decision to acquire the practice and to enter into the loan, and that Dr. Robles had a duty to disclose it to Dr. Lee under section 6 of the Purchase Agreement.

¶ 29 Despite the clarity of Dr. Robles' obligation, she testified that such information had nothing to do with the value of the practice, and she did not rebut testimony indicating that she either told, or was told by, her broker to withhold such information. The circuit court, as the fact finder, was entitled to draw reasonable inferences from the testimony and evidence presented during trial. *County of Cook v. Industrial Comm'n*, 69 Ill. 2d 10, 19 (1977). We will not disregard those inferences merely because other inferences could have been drawn. *Id.* (citing *Beloit Foundry v. Industrial Comm'n*, 62 Ill. 2d 535, 538-39 (1976)). Defendants' actions were

purposeful and not the result of any mistake or accident. Dr. Robles' nondisclosure was designed to prevent plaintiffs from gaining relevant information that may have caused them to not proceed with the sale transaction.

¶ 30 The trial judge, as the trier of fact, is in the "superior position to determine the credibility of the witnesses and the weight to be given their testimony." *Aetna Insurance Co. v. Amelio Brothers Meat Co.*, 183 Ill. App. 3d 863, 865 (1989). Here, the trial judge had the opportunity to assess the credibility of the witnesses and to weigh the evidence presented at trial. In doing so, he concluded that Dr. Robles had knowledge of the investigations involving Dr. Kimmel's illicit use of the dental practice and that she deliberately withheld the information from Dr. Lee. Despite evidence that she had been interviewed by the FBI and by *Chicago Magazine* about Dr. Kimmel's activities, Dr. Robles testified that she was unaware of the nature of such activities. The circuit court characterized Dr. Robles' testimony as "incredible." We hold that no opposite conclusion is clearly evident from the record. *Id.*; *Best v. Best*, 223 Ill. 2d 342, 350 (2006).

¶ 31 Accordingly, we find that the circuit court's judgment was consistent with the manifest weight of the evidence presented at trial.

¶ 32 d) The Circuit Court's Determination of Damages Was Proper

¶ 33 The remedy of rescission involves voiding the contract as if the parties had never entered into the contract. In fashioning a remedy, the court must attempt, as best as possible, to return the parties to their precontractual status. Generally, the remedy requires each party to return to the other the benefits received under the contract. *Newton v. Aitken*, 260 Ill. App. 3d 717, 719-20 (1994). It is well established that "[w]here rescission is awarded then, the proper measure of recovery is restitution of the consideration and other benefits received by the parties under the contract." (Internal quotation marks omitted.) (Emphasis omitted). *Hassan v. Yusuf*, 408 Ill. App.

3d 327, 357 (2011) (quoting *Puskar v. Hughes*, 179 Ill. App. 3d 522, 528-29 (1989)). This rule of recovery is applied even when the party against whom rescission is sought committed fraud. *Puskar*, 179 Ill. App. 3d at 528(1989) (counter-plaintiffs ordered to return the rental value of the company's premises and equipment, which were benefits he had received); see also *Felde v. Chrysler Credit Corp.*, 219 Ill. App. 3d 530, 541-42 (1991) (setoff ordered against plaintiff's award for benefit of driving purchased car after sales contract rescinded).

¶ 34 We find that the circuit court did not err in calculating the damages related to the rescission of the Purchase Agreement. The trial court considered the testimony and weighed the evidence presented at trial regarding the purchase price of the practice, the amount of expense and professional effort the plaintiffs committed to improving the dental practice, the income generated from the practice during Dr. Lee's ownership of it, and the rent owed to defendants. *1472 N. Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121191, ¶ 13. It is apparent from the record that the court's method for calculating the damages was based on the proof admitted during trial and, therefore, no basis exists for holding that its award was against the manifest weight of the evidence. Defendants have the burden on appeal of establishing that the circuit court's computational components and calculations to effectuate a proper and fair rescission of the contract were either unfair or unreasonable. Defendants failed to do so.

¶ 35 CONCLUSION

¶ 36 For all the foregoing reasons, and aside from either a scrivener's error or slight math mistake which we refer to in footnote 2, *supra*, the circuit court's final judgment is affirmed with directions to correct the amount defendants owes the plaintiffs to \$85,800.

¶ 37 Affirmed, with directions to correct the final monetary judgment to \$85,800.