2012 IL App (2d) 110616-U
No. 2-11-0616
Order filed May 4, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CHARLES A. BRAHOS, individually and on behalf of North Shore Auto Group, LLC, Plaintiff-Appellee, v. CAREY CHICKERNEO, CARL RITZ, STEVEN GOODMAN and NORTH SHORE AUTO GROUP, LLC, Defendants-Appellants.	)	Appeal from the Circuit Court of Lake County. No. 09-L-556 Honorable Margaret J. Mullen, Judge, Presiding.

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

ORDER

Held: Jury's and trial court's determinations on claims asserting fraud in the inducement and breach of fiduciary duty affirmed, where (1) the plaintiff did not have a preexisting obligation under an earlier operating agreement to make a capital contribution to the limited liability company; (2) the trial court did not err in admitting plaintiff's expert's testimony where (a) defendants' argument that the damages award was speculative is forfeited because it was not raised during trial and (b) the damages award was supported by the evidence; (3) defendants' argument that the damages jury instruction was misleading is forfeited because they did not object to it on this basis at trial and offered no competing instruction; and (4) trial court ruled on all of the arguments presented during trial on defendants' counterclaim.

¶ 1 Following a jury trial on plaintiff's, Charles A. Brahos', fraud-in-the-inducement claim against defendants, Carey Chickerneo, Carl Ritz, Steven Goodman, and North Shore Auto Group, LLC, and a bench trial on Brahos' claim of breach of fiduciary duty against the same defendants, both of which resulted in favorable resolutions for Brahos, the trial court entered judgment in Brahos' favor and awarded him $1,544,303.80 in compensatory damages and $800,000 in punitive damages. Defendants appeal, arguing that: (1) the court erred in determining that, under an earlier operating agreement, Brahos did not have a preexisting obligation to make a capital contribution to the group's entity; (2) the damages award was speculative and not supported by the evidence; (3) the damages jury instruction was misleading and resulted in an excessive award; and (4) the court erred in rejecting defendants' counterclaim. We affirm.

¶ 2 I. BACKGROUND

¶ 3 In 2006, Chickerneo and Ritz sought to purchase an automobile dealership at 1350 Park Avenue West in Highland Park. They intended to form an entity that would own and operate an automobile dealership and auto franchises for Volkswagon, Subaru, and Nissan and to rent the real estate upon which the dealership would operate. They paid $100,000 in earnest money to the seller, but needed more capital to purchase the business and, therefore, sought additional investors. They, along with their friend Goodman, discussed the purchase with their acquaintances, Nicholas Gouletas and his friend, Brahos.

¶ 4 Brahos had worked in the real estate industry for Gouletas's company, doing condominium conversions. Chickerneo, an attorney, worked as general counsel to companies that owned automobile dealerships. Ritz worked as a general manager of an automobile dealership and had been

in the car business for over 30 years. Goodman worked in the home construction industry. Thus, Ritz and Chickerneo were the only parties who had previously worked in the automobile business.

¶ 5 Shortly after Gouletas presented the business opportunity to Brahos during the summer of 2006, Brahos met with Chickerneo. In July 2006, Brahos, Gouletas, and defendants met several times to discuss the venture.

¶ 6 On August 3, 2006, Ritz, Chickerneo, Goodman, Gouletas, and Brahos executed an operating agreement to govern the new dealership business, named North Shore Auto Group, LLC. On August 22, 2006, the parties executed a superseding operating agreement, which is one of the agreements at issue in this appeal. It provides, in relevant parts:

> "2.1 Initial Members. The names and addresses of the Members of the Company, the amounts of their initial Ownership Interests are:
>
> | Name and Address | Ownership Share [of 1,000 shares] |
> |---|---|
> | Carey Chickerneo | 220 |
> | Carl R. Ritz | 330 |
> | Steven Goodman | 220 |
> | Nicholas V. Gouletas | 130 |
> | Charles A. Brahos | 100 |
>
> *Any* initial capital contribution of a Member will be paid to the Company, in cash, promptly following the full execution of this agreement.
>
> 2.2 Initial Capital Contributions. *The* Initial capital contributions must be paid to the Company, in cash, immediately after all parties have signed this agreement, or a reasonable time after the request of the Managers.

* * *

11.1 Amendment. The Members may amend or repeal all or part of this agreement by unanimous written agreement. This agreement may not be amended or repealed by oral agreement of the Members." (Emphases added.)

¶ 7 North Shore's articles of incorporation were filed with the Secretary of State on August 22, 2006. Also in August 2006, Chickerneo, in his capacity as North Shore's attorney, prepared automobile franchise applications to be submitted to Nissan, Volkswagon, and Subaru. On Brahos' applications, which he signed, Chickerneo noted that Brahos' capital contribution would equal $750,000. Chickerneo testified that, in August 2006, the members discussed the amount everyone was going to invest in the project. Brahos testified that he did not believe that his representations in these documents concerning his capital contribution committed him to investing that amount. In bank loan applications submitted in August 2006, Brahos stated that he could contribute $750,000 towards the business (comprised of a $500,000 line of credit at Highland Park Bank and Trust; $137,000 from a home equity line of credit at the same bank; and $113,000 from his AG Edwards portfolio). Gouletas' contribution would also be $750,000, and Ritz, Chickerneo, and Goodman would each contribute $167,000 (totaling, as rounded in the record, $2 million).

¶ 8 The August 22, 2006, operating agreement specified that Chickerneo, Ritz, and Goodman would be manager-members of the venture, and Gouletas and Brahos would be non-managing members, with Brahos having a 10% interest in the business. Also, pursuant to separate employment contracts, Chickerneo and Ritz would work at the dealership as full-time, salaried employees, each earning $200,000 per year.

¶ 9 The business plan for the venture called for the previously-mentioned $2 million in member contributions, plus a $1.35 million loan (in the form of a 10-year note) from AMCORE Bank N.A. (Amcore) to purchase the dealership, and two lines of credit from the bank (totaling $2 million) for operating capital. Further, each of the members was to execute a guaranty, under which he would be liable to Amcore if North Shore did not repay its loans. Consistent with Amcore's financing commitment, the members agreed that all of their capital contributions would be made in cash and that no part of Amcore's loan to North Shore could be used as a source of the members' capital contributions. With the $1.35 million Amcore loan and the $2 million from the five members, North Shore had sufficient funds to purchase the dealership.

¶ 10 In October 2006, the three automobile franchisors approved the applications (they had preliminarily approved the applications in September 2006). On October 10 and 13, 2006, Amcore sent financing commitment letters to fund the venture. A November 6, 2006, date was set for the loan and dealership closings. Amcore required that certain documents be executed for the loan, including an operating agreement for North Shore (to be signed by all five members).

¶ 11 Brahos testified that, even in August 2006, it did not appear that the deal would go through because it was viewed as being too highly leveraged (*i.e.*, little or no cash investment by the investors and no real property that was part of the purchase). However, by the next month, as the investors offered to invest certain cash amounts, the deal appeared to be imminent. Brahos testified that it was not until September 2006 that he knew what his specific capital contribution would be. In September 2006, Chickerneo submitted the August 22, 2006, operating agreement to Amcore, Nissan, Subaru, and Volkswagon.

¶ 12 From time to time, Gouletas and Brahos consulted with Victoria Gouletas, an attorney and Nicholas' sister. In late October 2006, after receiving the financing commitment from Amcore and after it appeared that the franchisors would also give their approval, Victoria recommended that Nicholas and Brahos seek attorney Kenneth Bloom's assistance. They spoke with Bloom, who prepared a revised operating agreement (the November agreement), which is also at issue in this appeal. The revised agreement contained new sections (paragraphs 4.4 and 5.1) that added provisions for repayment of capital contributions and addressed the consequences of nonpayment of capital contributions (specifically, managers' salary reductions and management shifting to Brahos and Gouletas). A distribution schedule was drafted, showing when the members would be repaid their contributions. It provided that, if Brahos and Gouletas were not repaid $666,500 of their capital contributions within 24 months, the managers' (*i.e.*, Chickerneo's and Ritz's) compensation would be reduced by 50% until the monies were repaid. If Brahos and Gouletas were not repaid the foregoing sum within 30 months, the managers' compensation would be reduced by 75% until repaid; if not repaid within 36 months, the compensation would be reduced by 100% until repaid. If Brahos and Gouletas were not repaid within 42 months, they would become managing members and, if not repaid within 48 months, would become the only manager-members (and Ritz, Chickerneo, and Goodman would become nonvoting members). In a revision that is relevant to this appeal and upon which Brahos later relies, the new agreement also provided that, if 85% (or $637,000) of Brahos' and Gouletas' capital contributions were not repaid within 24 months, then Brahos and Gouletas would become managing members and a unanimous vote of all five members would be required for all management decisions. Chickerneo, Ritz, and Goodman expressed

displeasure with the revisions, but agreed to sign the agreement. Accordingly, Chickerneo added Bloom's revisions to the document.

¶ 13 On November 2, 2006, a meeting was held to review the new terms of the revised operating agreement. Brahos and Chickerneo were present, and Nicholas and Victoria participated telephonically. Brahos alleged that Ritz and Goodman also were present and participated, a point that defendants disputed. During the meeting, Bloom's changes were presented. Chickerneo, Ritz, Gouletas, and Brahos verbally agreed to the revisions. Because unanimous written consent was necessary to revise the operating agreement, Chickerneo incorporated the changes and prepared a revised agreement for all of the members to sign. Sections 2.1 and 2.2 of the November 2, 2006, operating agreement are identical to those in the August 22, 2006, agreement. However, the November agreement has an attached distribution schedule (Schedule A), which lists each member's initial capital investment. Specifically, it notes that Brahos' investment is $750,000 and that he would own 10% of the entity.[1]

¶ 14 On November 3, 2006, Chickerneo had arranged for each of the four members to come at different times to his office to sign all of the closing documents, including the revised operating agreement. Ritz arrived first and signed the agreement. Brahos signed next, and he checked to ensure that Bloom's revisions had been added (which they were) and noted that the agreement had already been signed by Goodman and Ritz. After he signed the document, Brahos did not receive a copy, as Chickerneo told him that he would receive a copy in a closing book in a few weeks.

[1]Ritz would own 33%, Chickerneo and Goodman would each own 22%, and Gouletas would own 13%.

Gouletas signed next. However, Goodman was unavailable at his scheduled time and did not sign the agreement, a fact of which only Chickerneo was aware.

¶ 15 On November 6, 2006, Goodman arrived at Amcore to sign the closing documents for North Shore's bank loan. One of the documents that Chickerneo gave Goodman to sign was the November operating agreement. Chickerneo began instructing Goodman, but, according to Chickerneo, Goodman declined help. In reviewing the documents, Goodman came upon the November operating agreement and believed it was the same agreement he had executed on August 22, 2006; thus, he did not sign it. Defendants alleged that Goodman did not tell any of the other members of his failure to sign. Goodman testified that he did not become aware of the November agreement until about two years after the closing (about July 2008). Similarly, Chickerneo testified that he did not discover Goodman's failure to sign until the summer of 2008.

¶ 16 The testimony concerning the events after the closing conflicted. Goodman, Ritz, and Chickerneo testified that Goodman did not go to the dealership after the closing. However, Brahos testified that he went to the dealership for the closing and Goodman was present and told him that he had signed the revised operating agreement. According to Brahos, Ritz and Chickerneo were also present and confirmed that Goodman had signed. Brahos stated that, based on Goodman's representations, he then tendered to North Shore his $750,000 capital contribution and signed the personal guaranty.

¶ 17 About two weeks after the loan and dealership closings, Brahos discovered that Goodman had not signed the November operating agreement contained in the binder that Chickerneo had provided to each member. Brahos informed Chickerneo of this, and they both assumed that a fully-executed agreement existed; thus, neither party attempted to confirm whether Goodman actually

signed the document. Chickerneo testified that, when he assembled the closing book, he did not notice that Goodman had not signed the November agreement. He was upset that, on the eve of the closing, a revised agreement was presented to the members.

¶ 18 Chickerneo prepared on the members' behalf an opinion letter to Amcore, dated November 6, 2006, in which he, in his capacity as counsel for North Shore in connection with the loan, assured the lender that all of the loan documents, including the operating agreement, were in order. He claimed that the operating agreement referred to in the letter was the August 22, 2006, agreement, and he testified that he never provided the bank with the November agreement because "The bank already had an Operating Agreement." Also, he did not send a copy to the franchisors.

¶ 19 On August 16, 2007, Chickerneo, Ritz, and Goodman signed a resolution that modified the terms of the November operating agreement. Specifically, it provided that Chickerneo's and Ritz's salaries would *not* be reduced until November 2010, regardless of whether Brahos was repaid by November 2008, as previously agreed. The members did not give Brahos a copy of the resolution. Chickerneo testified that Goodman signed the resolution and did not notify the others at this time that he had never signed the November agreement.

¶ 20 By October 2007, Brahos had not been repaid any of his money, and the personal loan he took out to make his capital contribution was about to become due. To repay this loan, Brahos took out a loan from Amcore for $750,000, secured by real estate he owned. The new loan's term was for one year (*i.e.*, October/November 2008), which was the date by which Brahos was to have been repaid his entire capital contribution (pursuant to the November operating agreement). In the summer of 2008, Brahos still had not been repaid any funds, so, he requested from North Shore certain financial documents. He intended to assume management responsibilities in November 2008

(pursuant to the November operating agreement). Chickerneo and Ritz refused to give Brahos the records he requested.

¶ 21 At an October 17, 2008, member meeting at Marshall Abbey's (North Shore's new attorney's) office, a resolution was passed by majority vote (with Brahos and Gouletas voting against adoption) to expel Brahos from North Shore.[2] Amcore arranged the meeting after Brahos informed it that he was not repaid and intended to exercise his managerial rights under the November agreement, of which Amcore reported it was unaware. Brahos had no advance notice of the meeting's agenda, but attended the meeting and stated he had no opportunity to respond to the allegations against him, which included that he had falsely told third parties and company employees that the company would soon be out of business. At a November 13, 2008, member meeting, which Brahos also attended, Ritz and Chickerneo stated (for the first time) that Goodman had not signed the November operating agreement and that they believed it was not enforceable.

¶ 22 Brahos's 2007 Amcore loan became due in October 2008. He did not pay back Amcore because he had not been repaid his capital contribution from North Shore. He testified that Amcore instituted foreclosure proceedings on the loan.

¶ 23 Brahos was never repaid any of his capital contribution, Ritz's and Chickerneo's salaries were never reduced, and Brahos never assumed any management responsibilities. Ritz testified that, from 2008 to 2010, North Shore was profitable. Its profit in 2010 was $89,000, and its 2009 profit

[2]Chickerneo testified that, when a member is expelled, he or she gets back his or her interest in the company, not his or her capital contribution. Thus, Brahos was entitled to receive back only his 10% interest in North Shore, not his $750,000 capital contribution, which presumably exceeded the value of his 10% interest.

was $131,000. Chickerneo testified that Brahos has in his possession a North Shore vehicle. North Shore has demanded that he return it, but he has not done so. However, Chickerneo conceded that, if Brahos was not properly expelled, then he is entitled to drive the vehicle because each member of North Shore it entitled to a vehicle.

¶ 24 On June 11, 2009, Brahos sued North Shore, Chickerneo, Ritz, and Goodman, alleging fraud, conspiracy to commit fraud, and breach of fiduciary duty and sought an accounting and the member-defendants' expulsion from North Shore; he also alleged that Chickerneo and Ritz breached their employment agreements. In his fraud-in-the-inducement claim, which is at issue in this appeal, Brahos alleged that Chickerneo, Ritz, and Goodman owed him a fiduciary duty, but that they fraudulently induced him to sign the November operating agreement and to make his capital contribution. He further alleged that the member defendants did not inform him that Goodman never signed the agreement and that he relied on their representations in making his contribution, which he would not have made had he known Goodman did not sign the agreement. In his breach-of-fiduciary-duty claim, which is also at issue in this appeal, Brahos alleged that defendants used loan proceeds for their personal benefit, including to make their capital contributions to North Shore. He also alleged that they breached their duty to him by refusing to allow him access to North Shore's books and records, by failing to comply with employment agreements by taking more compensation than was allowed, contriving false reasons for Brahos' expulsion, and by purporting to expel him from the venture. Defendants filed counterclaims, asserting breach of fiduciary duty, defamation, intentional interference with economic expectancy, and replevin; they also sought a declaration of the rights and legal relations of the members of North Shore and an appraisal of Brahos' interest in the venture.

¶ 25 On January 26, 2011, a five-day jury trial commenced on Brahos' fraud-in-the-inducement claim, and a bench trial commenced on his claim of breach of fiduciary duty and defendants' declaratory judgment and replevin counterclaims.

¶ 26 Jason Tolmaire, Brahos' damages expert and a certified public accountant, testified that the most reasonable method of analysis as to Brahos' fraud claim was to put Brahos in the financial position that he would have been in had he never invested in North Shore (*i.e.*, rescission). Accordingly, Tolmaire opined that Brahos' damages totaled $1,544,303.80. They consisted of the following elements: (1) the $750,000 capital contribution; (2) the $200,554.81 in interest, based on figures from Amcore, Brahos paid on the $750,000 he borrowed; (3) 20% of the risk (taking a conservative approach) on the personal guaranty, or $593,748.99, on North Shore's indebtedness to Amcore Bank ($2,968,744.95). As to the members' guarantees, Tolmaire testified that he reviewed correspondence from Amcore in April 2009, wherein the bank stated that it was going to institute proceedings against North Shore's members to collect on the loan and two lines of credit.

¶ 27 In rebuttal to Tolmaire, Martin Terpstra, an accountant, testified on defendants' behalf. He reviewed Tolmaire's calculations and testified that he would characterize Brahos's $750,000 capital contribution as an investment upon which there would be no return until and unless rescission were granted in relief. As to interest on Brahos' borrowings, Terpstra stated that Brahos was not entitled to interest because the decision to borrow was a personal decision and "not anybody else's fault." As to the possible contingency if the dealership were to fail to pay back their loans (a reference to the personal guaranty), he noted that the loans were being paid on a monthly basis and "have not been called."

¶ 28 On February 1, 2011, following two hours of deliberations, the jury returned a verdict in Brahos' favor on his fraud-in-the-inducement claim, awarding him (in accordance with Tolmaire's tesitmony) $1,544,303.80 in compensatory damages and $800,000 in punitive damages ($500,000 against Chickerneo, $200,000 against Goodman, and $100,000 against Ritz). The court entered judgment on the jury's verdict.

¶ 29 On March 11, 2011, the trial court issued extensive findings as to Brahos' breach-of-fiduciary-duty claim. Based in part on its findings that defendants' testimonies were "remarkably incredible" or "impeached" and that Brahos's was "highly credible," the trial court found in Brahos' favor on his breach-of-fiduciary-duty claim and ruled against defendants on their counterclaim. The court found that the August 22, 2006, operating agreement did not specify the capital contribution that any member was required to make and did not obligate Brahos to fund the venture. The court implicitly found the agreement was unambiguous on this point, and specifically noted that it did not consider any parol evidence on the issue. It also determined that the new provisions in the November operating agreement were material to Brahos' decision to join North Shore and that Brahos would not have made his capital contribution but for the addition of the provisions. The court found that Brahos was credible in testifying as to the dispute over Goodman's and Ritz's presence at the November 2, 2006, meeting, finding that both were physically present and that all five members orally agreed to the changes that Bloom had recommended. The court found that Goodman did not sign the agreement, that Chickerneo failed to ensure that he signed it, and that Goodman told Brahos that he had signed the agreement (at which point Brahos handed Goodman his $750,000 check). The trial court determined that Goodman's failure to sign the November agreement was highly material and that, had Brahos been aware of this, he would not have made his

contribution or signed any other loan documents, including the personal guaranty. It also found that Chickerneo and Ritz did not provide the November agreement to Amcore or the franchisors, as they were required to do, but that the closing book provided to Brahos contained that agreement, not the August agreement. Also, at this point, Chickerneo assured Brahos that Goodman had signed the November operating agreement.

¶ 30 The trial court found that the business did not thrive, but Chickerneo and Ritz drew significant salaries and, in August 2007, Chickerneo, Ritz, and Goodman passed a resolution that locked in Chickerneo's and Ritz's salaries until 2010, regardless of whether Brahos was repaid, as set forth in the November operating agreement. The court found that this resolution contradicted and purported to override the terms of the November agreement and that Brahos was not informed of the resolution, nor asked to vote on it. Further, Brahos made repeated requests for the entity's financial records, as he was within his rights to do. Addressing Brahos' October 17, 2008, expulsion, the court found that the purported reasons were not supported by the evidence and that the action was in bad faith, as Brahos did not engage in wrongful conduct that adversely and materially affected the business.

¶ 31 The court also found that, in the mid-November 2008 meeting at Abbey's office, defendants took the position, for the first time, that the November agreement was never effective. The trial court further found that Brahos was never repaid any of his capital contribution, that he never became a manager of North Shore, that he paid interest in 2007 and 2008 on loans he took out to fund his capital contributions, and that Amcore began foreclosure proceedings in November 2008 when Brahos was unable to pay off his loan.

¶ 32 The trial court's determinations on the legal issues were as follows. By virtue of signing the August 2006 operating agreement, Chickerneo, Ritz and Goodman owed Brahos a fiduciary duty because, under the agreement, they were managing members of North Shore. Chickerneo also owed an additional duty to Brahos because he acted as his attorney with respect to the closing and the loan transaction with Amcore. The court found that defendants breached their various duties by: failing to ensure that the operating agreement was signed by all members (Chickerneo), failing to provide the bank with a copy of the November agreement (Chickerneo), passing a resolution concerning salaries without notice (Chickerneo, Ritz, and Goodman), voting to expel Brahos on the eve of what he believed was the trigger for his protective mechanisms under the November agreement (Chickerneo, Ritz, and Goodman) (and further finding that the expulsion was without cause), and telling Brahos that Goodman had signed the November agreement when he had not signed it (Goodman).

¶ 33 As to damages, the court found that, had Brahos known of Goodman's failure to sign the November agreement, he would not have invested in the entity or executed a guaranty. The court found Tolmaire credible and "well-qualified." Accordingly, the court adopted the jury's damages determination, awarding Brahos the same damages. It rejected defendants' counterclaim for declaratory judgment and replevin and entered judgment for Brahos.

¶ 34 The trial court subsequently denied defendants' posttrial motion. Defendants appeal.

¶ 35 II. ANALYSIS

¶ 36 A. Contract Issue

¶ 37 Defendants argue first that the trial court erred in finding that, prior to November 2006, Brahos did not have a preexisting legal obligation to make his capital contribution to North Shore.

¶ 38 Construction of a contract presents a question of law subject to *de novo* review. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 129 (2005). Neither a finding on a fraud count nor a breach of fiduciary duty count will be reversed on appeal unless it is against the manifest weight of the evidence. *Hassan v. Yusuf*, 408 Ill. App. 3d 327, 343, 345 (2011).

¶ 39 In order to constitute fraud in the inducement, the defendants must have made a false representation of a material fact, knowing or believing it to be false and doing it for the purpose of inducing the plaintiff to act. *Id.* at 343. To establish a claim for breach of fiduciary duty, a plaintiff must prove: (1) a fiduciary duty on the part of the defendants; (2) a breach of that duty; (3) damages; and (4) a proximate cause between the breach and the damages. *Alpha School Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 747 (2009). The Limited Liability Company Act provides that a manager in a manager-managed LLC owes the fiduciary duties of loyalty and care to the company and other members and must discharge his or her duties "consistent with the obligation of good faith and fair dealing." 805 ILCS 180/15-3 (West 2010).

¶ 40 Defendants argue that, by virtue of the August 22, 2006, operating agreement, Brahos was already a member of North Shore and, thereby, already obligated to make his initial capital contribution. Thus, resolution of his fraud claims required a threshold determination that should have been made by the trial court, not the jury: whether, prior to the alleged misrepresentations (*i.e.*, defendants' statements in November 2006 that they agreed to Bloom's revisions and had executed the November agreement, which fraudulently induced him to become a member and make his $750,000 capital contribution), he had this existing obligation. Defendants contend that the August 22, 2006, agreement unambiguously established that Brahos was required to make a capital contribution to North Shore and, thus, it was improper (1) to admit parol evidence regarding that

obligation; and (2) to allow the legal issue of Brahos' obligation to be decided by the jury. Alternatively, defendants assert that, at most, the trial court could have found only that the amount of Brahos' contribution was not determinable from the face of the August 22, 2006, agreement, such that parol evidence could be considered to determine that amount. If Brahos was already contractually obligated to make an initial contribution based on his execution of the August agreement, then representations by defendants after that date could not have caused Brahos the damages he alleged.

¶ 41 We reject defendant's claim that the August agreement unambiguously obligated Brahos to make an initial capital contribution. The relevant language of that agreement is as follows:

> "2.1 Initial Members. The names and addresses of the Members of the Company, the amounts of their initial Ownership Interests are:
>
> | Name and Address | Ownership Share |
> |---|---|
> | Carey Chickerneo | 220 |
> | Carl R. Ritz | 330 |
> | Steven Goodman | 220 |
> | Nicholas V. Gouletas | 130 |
> | Charles A. Brahos | 100 |
>
> *Any* initial capital contribution of a Member will be paid to the Company, in cash, promptly following the full execution of this agreement.
>
> 2.2 Initial Capital Contributions. *The* Initial capital contributions must be paid to the Company, in cash, immediately after all parties have signed this agreement, or a reasonable time after the request of the Managers." (Emphases added.)

The foregoing provisions list the members' ownership percentages and make reference to the fact that "Any" or "The" capital contributions must be promptly paid to North Shore in cash. They do not in any way bind the members to make a capital contribution and certainly not in any specified amount. The inclusion of the term "Any initial capital contribution" reflects that such contributions were not required. We further note that no schedule, such as the one prepared for the November agreement and listing each member's contribution, was attached to the August agreement.

¶ 42 We further reject defendants' challenge to the jury's and trial court's factual findings on causation, *i.e.*, that defendants' misrepresentations induced Brahos to become a member of North Shore and make a capital contribution. Defendants argue that Brahos' allegation that defendants had misrepresented to him during the November 2, 2006, meeting that they all agreed to Bloom's revisions pertained to a future event and was not actionable. We disagree, as this was but one part of the scheme perpetrated against Brahos. Although the testimony conflicted as to whether all of the members were present and agreed to the changes, it was within the jury's and trial court's provinces, as triers of fact, to resolve the conflicts and assess witness credibility (*In re Marriage of Ackerley*, 333 Ill. App. 3d 382, 391 (2002)). Indeed, here, the trial court's credibility findings were strongly worded. It found that Brahos was "highly credible" and that defendants were "remarkably incredible" or even "impeached." We cannot conclude that these (and the jury's implicit) findings were unreasonable. Defendants also argue that Goodman's statement that he signed the November agreement was made *after* Brahos had signed it and, therefore, could not have induced Brahos to sign the agreement. However, the statement, as Brahos alleged, induced him to *pay* his $750,000 capital contribution, a finding that was not unreasonable given the court's explicit (and the jury's implicit) credibility findings. Finally, the fact that this allegation did not arise until Brahos' cross-examination

does not on its own warrant reversal. Accordingly, we cannot conclude that the trial court's or the jury's findings on the sufficiency of the misrepresentation/causation evidence were unreasonable.

¶ 43 B. Damages

¶ 44 Next, defendants argue that the damages evidence, which essentially consisted of Tolmaire's testimony, was speculative and that the damages award was not supported by the evidence. In response to defendants' argument that it was speculative, Brahos urges that the argument is forfeited because defendants failed to object to Tolmaire's testimony during trial. We agree.

¶ 45 Where the trial court makes its rulings before trial pursuant to the parties' motions *in limine*, the rulings are interlocutory and remain subject to reconsideration by the court throughout the trial. *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 40 (2010). Thus, the denial of a complaining party's pretrial motion to exclude evidence is not sufficient to preserve the issue for appeal; the party must also make a contemporaneous objection at trial when the evidence is introduced (not merely cross-examine the witness, as defendants here suggest) to allow the court the opportunity to revisit its earlier ruling. *Simmons v. Garces*, 198 Ill. 2d 541, 569 (2002); *Spurgeon v. Mruz*, 358 Ill. App. 3d 358, 360-61 (2005) ("A party who, prior to trial, unsuccessfully moves to bar certain evidence, must object again to the evidence when it is offered"). Failure to object at trial results in forfeiture of the issue on appeal. *Simmons*, 198 Ill. 2d at 569; *Illinois State Toll Highway Authority v. Heritage Standard Bank & Trust Co.*, 163 Ill. 2d 498, 502 (1994).

¶ 46 Defendants initially objected to Tolmaire's testimony through a motion *in limine*, which the trial court "denied without prejudice to bring objections." However, defendants did not renew their objection during Tolmaire's testimony. Because defendants failed to renew their objection at the

time of Tolmaire's testimony, they have forfeited consideration of their argument that his testimony was speculative.

¶ 47 Turning to defendants' argument that the evidence did not support the court's and jury's damages findings (and excluding, as best we can, arguments that Tolmaire's testimony was speculative), defendants argue that: (1) the interest, fees, and expenses award of $200,554.81 was contrary to restitutionary principles because the portion consisting of interest paid on his initial and second loans was caused by Brahos' unwise financial planning and because the portion calculated as unpaid interest was based on Amcore bank's calculations, which Tolmaire did not verify; (2) the $593,748.99 award relating to Brahos' risk on the personal guaranty was erroneous because he will likely never have to pay it as no evidence was presented that Amcore had taken steps to collect thereunder, because Ritz testified that North Shore was current in making its loan payments, and because Tolmaire's calculations were based on figures only through December 2009 (whereas the trial occurred in early 2011); (3) the punitive damages award was excessive because it exceeded the degree of each defendant's respective culpability and failed to consider the factors that support entry of such damages, where the evidence did not support a finding that defendants' conduct was anything more than negligent and where there was no evidence of their financial status. For the following reasons, we reject defendants' claims.

¶ 48 Rescission of a contract refers to cancellation of that contract, so as to restore the parties to the status *quo ante*, the status before they entered into the contract. *Newton v. Aitken*, 260 Ill. App. 3d 717, 719 (1994). " 'Rescission is an equitable remedy, the application of which is left largely to the discretion of the trial court.' [Citation.]" *Id.* Rescission of a contract may be awarded where there was material breach, fraud, or mutual agreement. *Id.* On appeal, we will not disturb the trial

court's decision granting or denying rescission of a contract unless it resulted from an abuse of discretion. *23–25 Building Partnership v. Testa Produce, Inc.*, 381 Ill. App. 3d 751, 757 (2008). Similarly, we review for an abuse of discretion a punitive damages award. *Lawlor v. North American Corporation of Illinois*, 409 Ill. App. 3d 149, 166 (2011).

¶ 49 As to the interest award, we conclude that the jury and trial court could have reasonably found that Brahos paid certain amounts in interest to Amcore in connection with the loans he took out to fund his capital contribution and that Amcore actively attempted to collect these amounts. They further could have reasonably found that, had Brahos not invested in North Shore, he would not owe the interest, fees, and expenses. Brahos testified that he did not pay back his Amcore loan (because he had not been repaid his capital contribution from North Shore) and that Amcore instituted foreclosure proceedings on the loan. Although Terpstra testified that an interest award would be improper because Brahos' decision to borrow funds was "not anybody else's fault," the jury and trial court could have reasonably discounted this testimony and further adopted Brahos' and Tolmaire's testimony that the monies were paid and that the loan was being foreclosed. Finally, we find no error with Tolmaire's use of Amcore's calculations, as it was the lender.

¶ 50 Similarly, as to the award related to the personal guaranty, we conclude that the jury and trial court could have reasonably found that Brahos' exposure was $593,748 (or one-fifth of North Shore's outstanding $2,968,744.95 loan) and awarded him that amount. Defendants' primary complaint is that Amcore had not pursued the guarantors for its loan to North Shore and, therefore, the award was speculative and improper. This point is not well taken. First, any argument that it is speculative is forfeited, as previously noted. Next, we note that all damages, present as well as future, must be considered at trial. *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 502 (2002). "A

plaintiff can obtain compensation for a future injury that is not reasonably certain to occur, but the compensation would reflect the low probability of occurrence." *Id.* at 504. Tolmaire testified that he reviewed correspondence from Amcore in April 2009, wherein the bank stated that it was going to institute proceedings against North Shore's members to collect on the loan and two lines of credit. He also noted that bank correspondence from 2008 and 2009 reflected that Amcore did not believe that it could collect from North Shore itself on the balances due because the company had few assets. Tolmaire further stated that his calculation was conservative: the estimate represented one-fifth of North Shore's outstanding debt, even though Brahos (or any other member) could be responsible for the entire amount. Defendants point to Ritz's testimony that North Shore was making regular payments to Amcore and that Amcore had taken no steps to collect on the loans. They urge that the triers of fact should have found Ritz's testimony credible. We cannot conclude that the jury's and trial court's credibility assessments were unreasonable. Accordingly, the damages award related to the guaranty was not erroneous.

¶ 51 Finally, as to the punitive damages award, which equaled about one-half of the compensatory damages award, defendants argue that it was excessive because their conduct failed to meet the standard for entry of such damages. The amount of a punitive damages award should reflect the factfinder's "determination as to the degree of maliciousness evidenced by defendants' actions." *Tully v. McLean*, 409 Ill. App. 3d 659, 673 (2011). Defendants assert that Chickerneo, although possibly negligent, and the other defendants did not each make a conscious decision that Goodman should not sign the November operating agreement or act to undermine the agreement by, for example, hiding Goodman's failure to sign. They point to: (1) the August 16, 2007, resolution that maintained Chickerneo's and Ritz's salaries, arguing that this attempt to avoid the salary-reduction

provisions of the November agreement shows that they believed it was in force; (2) Chickerneo's statement in 2008, when it was discovered that Goodman had not signed the agreement, that he would recognize it as the controlling document; (3) Goodman's testimony that he did not sign the November agreement because he believed it was a copy of the August 22, 2006, agreement (although acknowledging that Goodman's statement to Brahos that he had signed the November agreement was contested); (4) the only evidence against Ritz was that he failed to confirm that Goodman signed the November agreement; and (5) the fact that defendants' financial status was not sufficiently considered.

¶ 52 We conclude that the triers of fact did not err in awarding Brahos $800,000 in punitive damages. It was not erroneous for the trial court to explicitly (and the jury to implicitly) find that Goodman did tell Brahos that he had signed the November agreement. This intentional act served to further defendants' scheme to induce Brahos to invest in North Shore by falsely representing to him that the protective provisions he desired be incorporated in the entity's governing document were indeed included therein. The evidence further reflected that defendants did not forward copies of the November agreement to Amcore or the franchisors, which tends to show that they desired to hide it. Contrary to defendants' claim, the import of the resolution overriding the agreement's salary-reduction provisions was not that it evidenced defendants' belief that the agreement was operative, but that it highlighted their intent to avoid its provisions (as did their actions to conceal it from Amcore and the franchisors). Similarly, the actions taken to expel Brahos (and their announcement that the agreement was not effective because Goodman did not sign it) reflect that they wished to prevent him from exercising his rights under the agreement, as the actions were taken near the time the protective provisions would have become effective. Finally, the trial court *did*

consider each defendants' financial status. It specifically found that there was no evidence of their "great wealth," but it found that Chickerneo and Ritz had "received substantial salaries" from North Shore.

¶ 53 C. Jury Instruction and Prejudice

¶ 54 Next defendants argue that the jury instruction on damages inaccurately related the categories of damages and lacked an instruction on the alleged benefits Brahos received. For the following reasons, this argument is forfeited.

¶ 55 The jury instructions at issue were pattern instructions on damages recoverable for fraud and deceit and identified three components of damages: Brahos' investment; his interest expenses on money borrowed to pay the investment; and his exposure as a guarantor of North Shore's debt. See Illinois Pattern Jury Instructions, Civil, No. 800.05 (2006) (Fraud and Deceit—Measure of Damages). Defendants argue that the instructions were misleading and led the jury to believe that Brahos could recover not only the value of the benefits conferred on defendants, but also consequential and speculative damages (and that an excessive award resulted). They complain that the jury did not determine the value Brahos conferred on North Shore and then reduce this value by the amount North Shore conferred on him. As an example, they assert that Brahos received the use of a company automobile for several years, the value of which should have been deducted from his award. According to defendants, the misleading instruction allowed Brahos to receive a verdict under two distinct theories of recovery: consequential and in restitution. Brahos' claim, however, was only for rescission.

¶ 56 Defendants argue that they objected to the instruction. However, the record reflects that their objection to Brahos' instruction no. 8 was "that the detail that was listed there was not sustained by

the facts that [were] laid out in this case." The court allowed the instruction, noting that "no competing instruction" was offered and that the "facts were as testified to by" Brahos' witness, which the jury could accept or reject. Further, the court determined that Brahos' instruction did not misstate the law and was not prejudicial. Also, defendants did not object to the Verdict Form A, which repeated the categories of damages listed in Brahos' instruction. "A party forfeits the right to challenge a jury instruction that was given at trial unless it makes a timely and specific objection to the instruction and tenders an alternative, remedial instruction to the trial court." *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 557 (2008). Based on defendants' failure to raise at the jury instruction conference the specific objection they raise on appeal and based on their failure to tender an alternative instruction, they have forfeited this argument.

¶ 57 Forfeiture aside, the instructions were proper. Brahos' fraud-in-the-inducement claim sought rescission of the contract. Rescission returns the parties to their precontract status. "The remedy of rescission contemplates voiding the contract as if it had never existed, returning the parties to the status *quo ante*, their precontract status, and generally requires each party to return to the other the benefits received under the contract." *Hassan*, 408 Ill. App. 3d at 356. "[A] remedy based on rescission is inconsistent with a remedy of damages, which arises out of the enforcement of the contract, and the award of both is, therefore, inappropriate." *Id.* Here, the award to Brahos consisted of the value of his capital contribution, the interest on the monies borrowed to make the contribution, and his share of the value of the members' personal guaranty. These elements returned Brahos to the position he was in before he entered into the contract with defendants, and the jury instructions at issue, which listed these elements, properly stated the law.

¶ 58 Defendants further argue that the trial court improperly hastened the jury's decision, where it commented several times during trial about a February 1, 2011, blizzard approaching the Chicagoland area. In defendants' view, the jury "almost undoubtedly shortened its deliberations" as a result. They note that the trial spanned five days and that the jury returned its verdict after less than two hours of deliberations. Defendants argue that, given the nature of the case and the amount of evidence to consider, a reasonable jury could not reach a fair and reliable verdict in such a short period. We disagree. As Brahos notes, the trial judge commented that she was "going to watch the snow" and let the jury go once the snow started. The record does not reflect that the court in any way pressured the jury to return a verdict before it had completed its deliberations.

¶ 59 D. Counterclaim

¶ 60 Defendants' final argument is that the trial court erred in disposing of its counterclaim. Defendants assert that they sought below a declaration of the parties' legal relations, including their relationship to North Shore following Brahos' expulsion and a determination of the value of Brahos' shares in the company (to comply with the operating agreement's requirement of compensation for Brahos' shares). We reject this claim because, as defendant notes, although defendants raised these claims in their pleadings, they did not pursue them at trial.

¶ 61 In the trial court, in their proposed findings of fact and conclusions of law, defendant sought a ruling on two issues: declaratory judgment and replevin. Specifically, that: (1) Brahos failed to establish a breach of fiduciary duty; and (2) North Shore is entitled to a return of the vehicle because Brahos was properly expelled from the company. We find no error with the court's assessment of the issues. The trial court found that Brahos' expulsion from North Shore was in bad faith and improper. Accordingly, as to the replevin count, it found that North Shore was not entitled to a

return of the vehicle because all members were given vehicles to use. Indeed, Chickerneo conceded that, if Brahos was not properly expelled, then he was entitled to drive the vehicle because each member of North Shore was entitled to a vehicle.

¶ 62 III. CONCLUSION

¶ 63 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 64 Affirmed.