2017 IL App (2d) 160606-U
No. 2-16-0606
Order entered August 17, 2017



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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| JOE SPAGNOLI,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>COLLISION CENTERS OF AMERICA, INC.,<br><br>Defendant-Appellee. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Kane County.<br><br>No. 2011-CH-874<br><br>Honorable David R. Akemann, Judge, Presiding. |

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JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Hudson and Justice Spence concurred in the judgment.

**ORDER**

¶ 1 *Held*: Where plaintiff failed to establish that defendant's breach caused a specific portion of the purported lost profits, the trial court's award of damages was not against the manifest weight of the evidence; where plaintiff failed to establish that his damages would have been greater under a negligence claim, the trial court properly dismissed plaintiff's negligence claim; and where plaintiff failed to establish that defendant's alleged unfair conduct was the proximate cause of his damages, the trial court properly dismissed plaintiff's claim under the Consumer Fraud and Deceptive Business Practices Act; trial court is affirmed.

¶ 2 Plaintiff, Joe Spagnoli, appeals from the trial court's order granting a directed finding as to certain counts of plaintiff's complaint in favor of defendant, Collision Centers of America, Inc. (CCA), and awarding plaintiff $10,000 in damages. Plaintiff argues that the trial court

erred (1) in its measure and calculation of damages, (2) by dismissing his negligence claim, and (3) by dismissing his claim under the Consumer Fraud Act. We affirm.

¶ 3 I. BACKGROUND

¶ 4 This case involves a 1966 Pontiac GTO that plaintiff bought on eBay in 2006 for $32,657.02 for the purpose of restoration. When plaintiff received the car he discovered unexpected structural damage, and he received a partial refund from eBay. After removing the GTO's engine, transmission, drive train, interior, chrome, bumpers, lights, dashboard, door lock mechanisms and trim, plaintiff took the GTO to defendant for restoration of the GTO's body. While at defendant's shop, the GTO's vehicle identification number (VIN) tags went missing. The GTO parts plaintiff had removed before bringing the car to defendant's shop were either sold by plaintiff's former wife or destroyed in a fire.

¶ 5 On June 29, 2011, plaintiff filed an amended complaint alleging conversion (count I), replevin (count II), violation of the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq*. (2010)) (count III), injunctive relief (count IV), negligence (count V), and damage to property (count VI).

¶ 6 Testimony heard during a bench trial held in February 2016 revealed the following.

¶ 7 Plaintiff testified that in August 2006 he bought a 1966 Pontiac GTO "Tri Power" four-speed convertible (GTO) on eBay, for $32,657.02. Plaintiff bought the GTO with the intention of having it restored to "concourse condition," meaning assembly line condition, to increase its value to approximately $100,000. At the time of the purchase, plaintiff had not seen the GTO but had seen photographs of it. When plaintiff received the GTO, he drove it for a while and then noticed structural problems with the GTO's floorboards, frame, and trunk. The seller refused to take the GTO back so plaintiff filed a claim with eBay, and plaintiff received between $12,000-$14,000 back from eBay.

¶ 8 Plaintiff testified that before he took the GTO to defendant's shop for restoration, he and his mechanic removed "everything" from the GTO, including its engine, transmission, entire interior, chrome, bumpers, lights, dashboard, door lock mechanisms and trim. Then, in November 2006, plaintiff took the body of the GTO to defendant's repair shop in Elburn. Plaintiff testified that in 2013 his former wife sold or destroyed the GTO's engine, drive train, and axle.

¶ 9 Defendant's manager, Conrad Janke, testified that when the body of the GTO was brought to defendant's shop the "floor was held together by roofing tar and two-by-fours[; y]ou could move the [driver's] windshield pillar by leaning on it [and] the quarter panels were very bad." Janke and plaintiff reached an oral agreement on a "time and materials" basis. It was understood that The Parts Place would supply the needed parts. Janke testified that the biggest problem with restoring the GTO was getting the parts, but if defendant had received all the parts, the GTO could have been restored to concourse condition.

¶ 10 When the body of the GTO was brought into defendant's shop, its vehicle identification number (VIN) tags were properly located on the GTO's firewall and A-pillar. But at some point, while the body of the GTO was at defendant's shop, the VIN tags went missing.

¶ 11 Mark Leszcynski, an expert on the restoration and value of 1960s and 1970s American muscle cars, testified on plaintiff's behalf as follows. The value of the GTO in a fully restored state would be $115,000. When Leszcynski saw plaintiff's GTO, "the car was in pieces and a bare shell." He never determined whether it was a numbers matching car. A numbers matching car means that the VIN numbers match the numbers on the car's motor.

¶ 12 At the close of plaintiff's case, defendant moved for a directed finding pursuant to section 2-1110 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1110 (2014)) on the basis that plaintiff presented no evidence to support his claims, the claims were barred under the

*Moorman* or economic loss doctrine,[1] and plaintiff could not support his claims because the GTO could never be a numbers matching car due to plaintiff's wife having sold many of the GTO's parts, including the engine. Plaintiff replied that another engine could have been placed in the GTO to restore it. Plaintiff also stated that he was no longer seeking injunctive relief.

¶ 13 Thomas Papesh, an expert regarding classic car restoration and value testified on behalf of defendant as follows. To bring a car to concourse condition means "the vehicle has to be—make sure you have all the original type equipment that was on the vehicle. *** [E]verything from the frame to the inner trunk, engine should be matching—should be matching numbers,—should be a numbers matching car. And it should look as it rolled off the assembly line or better." The GTO's value was currently $4,000 to $12,000. It could cost about $80,000 to bring the GTO into concourse condition. If someone invested $80,000 to restore the GTO it could sell for $60,000 to $80,000 at auction.

¶ 14 On February 24, 2016, the trial court granted defendant's motion for a directed finding as to count I (conversion), count II (replevin), count III (violation of the Consumer Fraud Act), and count V (negligence). The trial court dismissed count IV (injunctive relief) as moot. The trial court found in favor of plaintiff on count VI (damage to property or breach of

[1] *Moorman Manufacturing Co. v. National Tank Co*, 91 Ill. 2d 69 (1982). The *Moorman* doctrine or economic loss doctrine provides that a plaintiff cannot recover solely economic losses in tort. *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 176 (1982); *Moorman*, 91 Ill. 2d at 86. In *Anderson Electric, Inc. v. Ledbetter Erection Corp.*, 115 Ill. 2d 146 (1986), the supreme court extended the economic loss doctrine to the provision of services.

contract), finding that the parties orally agreed to a bailment relationship, and awarded damages to plaintiff and against defendant in the amount of $10,000.

¶ 15 On March 18, 2016, plaintiff filed a motion to reconsider which the trial court denied on July 15, 2016. Plaintiff filed his notice of appeal on July 28, 2016.

¶ 16 II. ANALYSIS

¶ 17 Plaintiff argues that the trial court erred in its measure and calculation of damages. Where an award of damages is made after a bench trial, the standard of review is whether the trial court's judgment is against the manifest weight of the evidence. *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Ltd. USA*, 384 Ill. App. 3d 849, 859 (2008). A judgment is against the manifest weight of the evidence only if the opposite conclusion is clear or where the trial court's findings appear to be unreasonable, arbitrary, or not based on evidence. *Id.* A reviewing court will not substitute its judgment for that of the trier of fact. *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002). We note, however, that we may affirm a trial court's decision on any basis that appears in the record on appeal, whether or not the trial court relied on that basis, and even if the trial court's reasoning was incorrect. See *Father & Sons Home Improvement II, Inc. v. Stuart*, 2016 IL App (1st) 143666, ¶ 27.

¶ 18 Plaintiff argues that the trial court should have awarded him damages under a contract theory and that under that theory he was entitled to expectation damages or lost profits consistent with the value of the GTO restored to concourse condition.

¶ 19 In a breach of contract action, recovery of lost profits is allowable as an element of damages under certain conditions. The plaintiff must prove the loss with a reasonable degree of certainty; the court must be satisfied that the defendant's wrongful act resulted in the loss, and the profits must have been reasonably within the contemplation of the defendant at the time the contract was entered into. *Spangler v. Holthusen*, 61 Ill. App. 3d 74 (1978).

¶ 20 Because lost profits are prospective, lost profits will, to some extent, be uncertain and incapable of calculation with mathematical precision. *Midland Hotel Corp. v. Reuben R. Donnelley Crop.*, 118 Ill. 2d 306, 315-16 (1987). Therefore, to recover such profits the plaintiff need not prove the amount of loss with absolute certainty. *Id*. at 316. However, "recovery of lost profits cannot be based upon conjecture or sheer speculation." *Id*. The evidence must afford a reasonable basis for the computation of damages and the defendant's breach must be plainly traceable to specific damages. *Id*. Unless the plaintiff proves that the breach was the cause of the lost profits, he is entitled to nominal damages only. *Id*. Since lost profits are often the result of several causes, the plaintiff must show that the defendant's breach caused a specific portion of the lost profits. *Id*.

¶ 21 Here, plaintiff failed to present proof of lost profits with any certainty and failed to prove that any portion of lost profits were caused by defendant's breach. The experts valued the GTO at $80,000 to $115,000 if it were fully restored to concourse condition, which required it to be a numbers matching car. Further, the GTO could never be a numbers matching car without the GTO's engine and matching VIN numbers. Testimony revealed, and the trial court found, that the VIN numbers went missing while the GTO was in defendant's possession. However, the loss of the GTO's engine is another matter. Plaintiff testified that he removed the GTO's engine before delivering the GTO's body to defendant and that plaintiff's ex-wife sold or destroyed the GTO's engine, along with the GTO's other parts. Thus, plaintiff failed to establish that defendant's breach, the loss of the GTO's VIN numbers, caused a specific portion of the lost profits, and therefore, the trial court's decision not to award plaintiff lost profits was not against the manifest weight of the evidence. See *id*.

¶ 22 Next, plaintiff argues that the trial court's award of damages in the amount of $10,000 is arbitrary and not based in fact or reason. Plaintiff contends that the trial court's award of

damages "might be proper under a bailment theory [but here] expectation damages should be allowed under a service contract [theory]." Because we have already determined that plaintiff failed to establish that he was entitled to expectation damages or lost profits, we need not address this argument.

¶ 23 Further, plaintiff's contention that he would have been awarded greater damages under a breach of contract theory rather than a bailment theory is not supported by the record. Under a breach of contract theory, the purpose of damages is to put the injured party in the position he would have been in had the contract been performed, but he may not be placed in a better position. *Stendera v. State Farm Fire & Casualty Co.*, 2012 IL App (1st) 111462, ¶ 18. In a breach of bailment action, the proper measure of damages is the value of the damaged or missing property at the time of the loss. *B & Y Heavy Movers, Inc. v. Fluor Constructors, Inc.*, 211 Ill. App. 3d 975, 986-87 (1991). For recovery under either a breach of contract theory or a bailment theory, it is the plaintiff's burden to establish a reasonable basis for computation of damages, and the plaintiff is not entitled to damages on the basis of conjecture of speculation. *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 107 (2006) (breach of contract theory); *Mueller v. Soffer*, 160 Ill. App. 3d 699, 706 (1987) (bailment theory). Further, if the plaintiff proves his right to damages but fails to provide a proper basis for computing those damages, only nominal damages may be awarded. *Keno & Sons Construction Co. v. LaSalle National Bank*, 214 Ill. App. 3d 310, 312 (1991) (breach of contract).

¶ 24 Here, had the contract been performed, the GTO's body would have been restored and the VIN numbers would be in place. Plaintiff, however, failed to provide a reasonable basis for the computation of damages under a contract theory, that is, how much the restored GTO body was worth without its missing engine and parts that were lost or destroyed. Therefore,

plaintiff was entitled to only nominal damages. Because the trial court awarded $10,000, we affirm the trial court's damage award and determine that it was not contrary to the manifest weight of the evidence.

¶ 25 This brings us to plaintiff's next argument that the trial court erred by granting defendant's motion for a directed finding and dismissing his negligence claim as barred by the *Moorman* or economic loss doctrine. Plaintiff argues that defendant forfeited its argument that his negligence claim was barred under the *Moorman* or economic loss doctrine because defendant failed to raise it as an affirmative defense.

¶ 26 Even if defendant had forfeited the issue and the trial court could have awarded plaintiff damages under a negligence theory, plaintiff has failed to establish that he would have been entitled to more than $10,000 in damages.

¶ 27 In tort, the proper measure of damages for personal property that is destroyed or rendered useless is the reasonable value of the property immediately prior to its destruction. *Benford v. Everett Commons, LLC*, 2014 IL App (1st) 130314, ¶ 30; *Harris v. Peters*, 274 Ill. App. 3d 206, 207 (1991). For injury to repairable personal property, the proper measure of damages is the reasonable cost of repairs. *Beasley v. Pelmore*, 259 Ill. App. 3d 513, 523 (1994). The trial court is not required to calculate the amount of damages at the highest possible cost, but only at a reasonable cost. *Id*. Although the plaintiff need not prove the exact amount of his loss, he must present evidence providing a basis for assessing damages with a fair degree of certainty. *Benford*, 2014 IL App (1st) 130314, ¶ 30.

¶ 28 Here plaintiff fails to establish how, under a negligence theory, his damages would have been greater than $10,000. There was no evidence regarding the value of the GTO, as it was delivered to defendant with all of its parts removed. Plaintiff also failed to present any evidence regarding the cost of repair or replacement of the VIN numbers and cowl tags.

Thus, plaintiff failed to present sufficient evidence to establish the fair market value of plaintiff's damaged property at the time of loss. Because plaintiff failed to establish that he would have been awarded more than $10,000 in damages based on his negligence claim, he has failed to establish that he was prejudiced by the dismissal of his negligence claim. Thus, plaintiff's argument fails.

¶ 29 Plaintiff also argues that the trial court erred by granting defendant's motion for a directed finding brought under section 2-1110 of the Code and dismissing its claim under the Consumer Fraud Act. Section 2-1110 of the Code provides:

> "Motion in non-jury case to find for defendant at close of plaintiff's evidence. In all cases tried without a jury, defendant may, at the close of plaintiff's case, move for a finding or judgment in his or her favor. In ruling on the motion the court shall weigh the evidence, considering the credibility of the witnesses and the weight and quality of the evidence. If the ruling on the motion is favorable to the defendant, a judgment dismissing the action shall be entered." 735 ILCS 5/2-1110 (West 2016).

¶ 30 A trial court must perform a two-step analysis in ruling on a section 2-1110 motion. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 275 (2003). First, the court must determine whether, as a matter of law, the plaintiff has presented a *prima facie* case by presenting "at least 'some evidence on every element essential to [the plaintiff's underlying] cause of action.' " *Id*. quoting *Kokinis v. Kotrich,* 81 Ill. 2d 151, 154 (1980). A trial court's holding that a plaintiff has failed to present a *prima facie* case is reviewed *de novo. People ex rel. Sherman,* 203 Ill. 2d at 275.

¶ 31 To establish a claim under the Consumer Fraud Act a plaintiff must prove: (1) a deceptive act or unfair practice occurred, (2) the defendant intended for the plaintiff to rely on the deception, (3) the deception occurred in the course of conduct involving trade or

commerce, (4) the plaintiff sustained actual damages, and (5) such damages were proximately cause by the defendant's deceptive act or unfair conduct. *Fogt v. 1-800-Pack-Rat, LLC*, 2017 IL App (1st) 150383, ¶ 56.

¶ 32 Here, plaintiffs essentially argue that the trial court erred in determining that plaintiff failed to present a *prima facie* case under the Consumer Fraud Act because there was insufficient evidence of defendant's intentional removal or destruction of the VIN tags. Plaintiff argues that a violation of the Consumer Fraud Act may be based on innocent or negligent acts as well as intentional acts. Plaintiff cites *Rubin v. Marshall Fields & Co.*, 232 Ill. App. 3d 522 (1992), and *Carl Sandburg Village v. First Condominium Development Co.*, 197 Ill. App. 3d 948 (1990), to support his argument. Both cases state that that a violation of the Consumer Fraud Act may be based on an innocent or negligent misrepresentation. *Rubin*, 232 Ill. App. 3d at 533; *Carl Sandburg Village*, 197 Ill. App. 3d at 953. *Carl Sandburg Village* points out that "to establish a violation of the Consumer Fraud Act a party must show a deceptive act or practice [and] an intent by the defendant that the plaintiff *rely on the deception*." (Emphasis in original.) Here, plaintiff presented no evidence of a misrepresentation by defendant. Further, plaintiff presented no evidence that defendant intended plaintiff to rely on any deception or misrepresentation, regardless of intent or lack thereof. Thus, plaintiff did not establish a prima facie case of a violation of the Consumer Fraud Act under the theory of a deceptive act or practice.

¶ 33 Plaintiff also contends that defendant's acts of removing the GTO's VIN tags violated the Consumer Fraud Act because such acts were unfair. Whether conduct is unfair under the Consumer Fraud Act is determined on a case-by-case basis. *Fogt*, 2017 IL App (1st) 150383, ¶ 58. Conduct is unfair if: (1) the practice offends public policy; (2) it is oppressive; and (3) it causes consumers substantial injury. *Id.* A plaintiff need not establish all three criteria to

prove that a practice is unfair. *Id*. "Rather, a practice may be unfair because of the degree to which it meets one of the criteria or because it meets all three of the criteria to a lesser extent. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 418 (2002).

¶ 34 Plaintiff argues that defendant offended public policy by removing the GTO's VIN tags outside of the presence of the Illinois Secretary of State police in violation of industry standards as codified in section 4-103(a)(1) of the Illinois Vehicle Code (625 ILCS 5/4-103(a)(1) (West 2014)). Nothing in section 4-103(a)(1 of the Vehicle Code required defendant to secure the presence of the Illinois Secretary of State to, as plaintiff contends, "ensure the tag was removed and replaced properly." [2]

¶ 35 We recognize that defendant may not have complied in all respects with all the requirements of section 4-103(a)(1)(a-1) of the Vehicle Code, for example, the requirement of "keep[ing] a record regarding the status and location of the identification number plate

[2] We note that plaintiff contends that industry standards for the removal of a VIN tag requires the presence of the Illinois Secretary of State police to ensure the tag was removed properly and that this practice is "codified" in section 4-103(a)(1) of the Illinois Vehicle Code. Section 4-103(a)(1) of the Illinois Vehicle Code contains no such requirement. However, section 4-103(a-1) requires notification to the Illinois Secretary of State when a VIN tag is reaffixed on a vehicle on a new dashboard, and the "person also must keep a record regarding the status and location of the identification number plate removed from the replacement dashboard." Further, section 4-103(b) requires the "*owner* of a vehicle" that has been repaired and has had its VIN numbers removed and reaffixed to "contact an officer of the Illinois State Police Vehicle Inspection Bureau and arrange for inspection of the vehicle" within 90 days of repair. (Emphasis added.) 625 ILCS 5/4-103(b) (West 2014).

removed from the replacement dashboard. However, in order to recover on his claim, plaintiff had to establish that defendant's actions proximately caused his injury. See *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 203 (2005) (claimant failed to prove a private right of action under the Consumer Fraud Act where he suffered no damage and failed to establish proximate causation). In the present case, even if defendant's failure to comply with the Vehicle Code's record keeping requirement was an unfair business practice, it was not the proximate cause of the plaintiff's injuries. Since, as a matter of law, defendant's business practices were not the proximate cause of plaintiff's injuries, the trial court properly granted defendant's motion for a directed finding and dismissed plaintiff's Consumer Fraud Act claim.

¶ 36 Plaintiff also argues that the trial court's reference to defendant's expert's undisclosed opinion of the restored GTO's value was improper. Defendant's expert testified that the value of the GTO was $60,000-80,000. Plaintiff objected because this opinion was not disclosed prior to trial. The trial court overruled plaintiff's objection. Because we have determined that the trial court's award of damages was not against the weight of the evidence and that plaintiff was not entitled to expectation damages or loss profits, this issue is, at best, harmless error.

¶ 37 III. CONCLUSION

¶ 38 The judgment of the circuit court of Kane County is affirmed.

¶ 39 Affirmed.