

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Arthur Small and Executives,
LLC,
Appellants-Defendants,

v.

Benjamin Osborne,
Appellee-Plaintiff.

August 31, 2022

Court of Appeals Case No.
21A-PL-2568

Appeal from the Marion Superior
Court

The Honorable Marc T.
Rothenberg, Judge

Trial Court Cause No.
49D07-1410-PL-34320

Altice, Judge.

Case Summary

[1] Following a bench trial, the trial court entered judgment in favor of Benjamin Osborne on his claims of fraud and constructive fraud against Arthur Small. The court also imposed a constructive trust against Executives, LLC (Executives). Small and Executives appeal the trial court's judgment, presenting the following restated issues for our review:

1. Does the evidence support the trial court's findings and do those findings support the trial court's conclusion that Small materially misrepresented his interest in a real estate transaction?
2. Did the trial court err in concluding that Small's alleged misrepresentation was the proximate cause of the damage claimed by Osborne?
3. Did the trial court err in imposing a constructive trust against Executives?

[2] We affirm in part, reverse in part, and remand.

Facts & Procedural History

[3] In the fall of 2013, Osborne wanted to sell an investment property (the Property) located in Indianapolis.¹ Through an internet search, Osborne found

¹ The investment property is a residential dwelling.

the website HouseBuyerNetwork.com,² called the number provided, and was directed to Small. Small is a real estate agent with fifty years of experience, and he is a member-owner with a thirty-five percent interest in Results, LLC,³ which has a registered assumed business name of We Buy Houses (Results).

[4] Osborne met with Small at the Property and permitted Small to inspect it. During this meeting Osborne informed Small that his current mortgage balance on the property was \$57,000, and they discussed the type of offer Osborne might expect from the company Small “represented.” *Transcript Vol. 2* at 25. Thereafter, Osborne and Small talked on the phone several times before Osborne received an “official offer” letter from “We Buy Houses/House Buyer Network” on November 22, 2013.⁴ *Id.*; *Exhibits* at 89. The offer letter provided as follows:

A corporate buyer, doing business as We Buy Houses, will purchase your house as a FOR SALE BY OWNER as follows: our offer to buy is for \$38,000 based upon the purchase price being \$19,000 under your current loan balance ... [y]ou will need to bring \$19,000 to closing. . . . Your loan balance is to be paid by us via conditional sales contract at the same terms as your

² Small described HouseBuyerNetwork.com as “an independent internet website” that “brings sellers and buyers together regarding real estate.” *Appellants’ Appendix Vol. III* at 19. Small paid a fee to receive leads in the real estate market from HouseBuyerNetwork.com.

³ The remaining ownership interest in Results is divided as follows: Lynette Small (Small’s wife) is a thirty-five percent owner; Serina Burkhart (Small’s daughter) and her husband, Dustin Burkhart, each own ten percent; and another individual, Josh Bailey, owns ten percent.

⁴ Small admitted that he “drafted or typed or caused [the offer letter]. . . to be typed.” *Id.* at 77.

current loan. Upon your verbal acceptance, we will generate a purchase agreement, a conditional sales contract and title work.

Exhibits at 89. The letter stated that the “real estate market is very poor today” and that “[a]ll facts considered, we feel this is a fair offer for your house.” *Id.* The letter concludes with “Cordially, We Buy Houses/House Buyer Network” and a phone number. *Id.* No individual person’s signature appears on the offer letter. Osborne called the number and talked with Small, who held himself out as a representative of the buyer. Osborne and Small discussed the terms set out in the offer letter, and Small reiterated that the low offer was due to potential rehab costs and poor market conditions.

[5] On December 3, 2013, Osborne was presented with a Purchase Agreement for the Property in which the buyer was specifically identified as Results. The buyer’s signature line is signed by Small as “agent” for Results. *Appellants’ Appendix Vol. III* at 21. In the Purchase Agreement, there is a provision in which “Buyer [i.e., Results] discloses to Seller that Buyer” holds an Indiana real estate license. *Id.* at 30. Under the section “Further Conditions,” it is noted “Real estate agent Art Small *represents corporate buyer.*” *Id.* (emphasis supplied). Osborne accepted the offer by signing and returning the Purchase Agreement on December 10, 2013. The purchase proceeded to closing on December 20, 2013. Prior to closing, Osborne asked if he needed to bring his real estate agent with him and was told that Small could “essentially facilitate [the transaction] for both parties.” *Transcript Vol. 2* at 33.

[6] As instructed by Small, Osborne brought to closing a check in the amount of \$18,708.17 made payable to Results. At that time, Osborne was presented with a Conditional Sales Contract (the Contract). Like the Purchase Agreement, the Contract identified the Buyer as Results. The Contract also provided that Osborne would execute a quitclaim deed and that such deed would be held in escrow by Realty Executives 100% Success, LLC (Realty Executives).⁵ As pertains to Small, the Contract provided:

4. It is specifically understood and acknowledged by the parties herein that Art Small is the real estate agent representing the Buyer in this transaction and that he and/or family members have an interest in the Company purchasing the real estate herein and has made full disclosure thereof.

Appellants' Appendix Vol. III at 39. The final paragraph of the Contract provided: "The undersigned person executing this [Contract] on behalf of [Results] represents and certifies that he/she is a duly elected managing member of Buyer." *Id.* Small signed on behalf of Results and next to his signature he wrote "Agent." *Id.* at 40. Small explained to Osborne that he was signing as an agent of Buyer because the Buyer was out of town. In addition to the escrow agreement and the Contract, Osborne was presented with and signed a special power of attorney authorizing Small to act on his behalf for the limited purpose of communicating and dealing with the holder of Osborne's mortgage.

⁵ Small is the owner of Realty Executives. At no time did Small inform Osborne of his ownership interest therein.

- [7] Results took possession of the property and began making monthly mortgage payments on January 1, 2014. Results incurred costs of \$313 to clean out the Property before it could be rented or sold. Small then secured a tenant for the Property and the tenant was given an option to purchase. After several months, the tenant moved out and did not exercise the option to purchase. Results then defaulted on the Contract by failing to make mortgage payments pursuant to the terms thereof.
- [8] Osborne was notified by his mortgage company that payments were not being made. Osborne attempted to contact Results by telephone and ended up speaking with Small. Small told Osborne that Results would catch up on the payments once another renter was secured, as Results depended on the rental income to make those payments. At some point in the fall of 2014, the deed to the Property was returned to Osborne. Osborne regained possession of the Property and retained the tenants then living there for four to five months. Osborne then sold the Property for \$60,000.
- [9] On October 16, 2014, Osborne filed his first complaint, after which the parties engaged in brief settlement negotiations. On November 18, 2014, a default judgment was entered against Results. In January 2015, Results filed for bankruptcy and all matters before the trial court were stayed. After the bankruptcy petition was dismissed, Osborne moved forward with the instant action, filing an amended complaint on November 16, 2015. In his amended complaint, Osborne asserted claims against Small and others for breach of contract, fraud, constructive fraud, conversion, breach of fiduciary duty, and

violation of Indiana's RICO statutes, and he requested imposition of constructive trust against Executives. Small subsequently filed a counterclaim for defamation. Results is no longer in business, having voluntarily filed Articles of Dissolution with the Indiana Secretary of State in February 2018.

[10] Small and the other named defendants⁶ moved for summary judgment, and the trial court granted summary judgment in favor of all defendants on Osborne's action to quiet title and in favor of Realty Executives on Osborne's fraud claim but denied summary judgment on all remaining claims. Thereafter, the parties stipulated to dismissal of numerous defendants and certain claims, leaving only claims of fraud and constructive fraud against Small and a request that a constructive trust be imposed against Executives, Small, and Lynette, which would later be decided by the court at a damages hearing.

[11] The matter proceeded to a bench trial on June 10, 2021. Thereafter, the parties submitted their respective proposed findings of fact and conclusions. On September 14, 2021, the trial court issued its Findings of Fact and Conclusions of Law and Final Appealable Judgment as to Liability. In short, the trial court entered judgment in favor of Osborne and against Small on Osborne's claims of fraud and constructive fraud. The court found in favor of Lynette on all claims asserted against her by Osborne. The trial court also imposed a constructive

⁶ In addition to Small, his wife Lynette, Executives, and Results, Osborne named as defendants all who had any interest in the identified businesses, including Dustin Burkhart, Serina Burkhart, Joshua Bailey, and Jim Terell.

trust against Executives “in the amount to be determined at a damages hearing.” *Id.* at 97. Small now appeals.⁷ Additional facts will be provided as necessary.

Discussion & Decision

Standard of Review

[12] Where, as here, a party has requested specific findings of fact and conclusions, we apply a two-tiered standard of review. *Carnahan v. Moriah Prop. Owners Ass’n, Inc.*, 716 N.E.2d 437, 443 (Ind. 1999). We must first determine whether the evidence supports the findings. *Id.* Then, we determine whether the findings support the judgment. *Id.* The findings are clearly erroneous when a review of the record leaves us firmly convinced that a mistake has been made. *Id.* We will disturb the judgment only where there is no evidence supporting the findings or the findings fail to support the judgment. *Id.*

1. Material Misrepresentation

[13] The elements of actual fraud are: (i) material misrepresentation of past or existing facts by the party to be charged (ii) which was false (iii) which was made with knowledge or reckless ignorance of the falseness (iv) was relied upon by the complaining party and (v) proximately caused the complaining party

⁷ Even though damages have not yet been determined, this appeal is properly before us given that the trial court, in writing, expressly determined that there is no just cause for delay and directed entry of a final judgment. *See* Ind. Trial Rule 54(B).

injury. *Kapoor v. Dybwad*, 49 N.E.3d 108, 121 (Ind. Ct. App. 2015) (quoting *Rice v. Strunk*, 670 N.E.2d 1280, 1289 (Ind. 1996)), *trans. denied*.

The elements of constructive fraud are: (i) a duty owing by the party to be charged to the complaining party due to their relationship; (ii) violation of that duty by the making of deceptive material misrepresentations of past or existing facts or remaining silent when a duty to speak exists; (iii) reliance thereon by the complaining party; (iv) injury to the complaining party as a proximate result thereof; and (v) the gaining of an advantage by the party to be charged at the expense of the complaining party.

Kapoor, 49 N.E.3d at 124 (quoting *Rice*, 670 N.E.2d at 1284). Both require a material misrepresentation of past or existing facts.

[14] Small argues that the evidence does not support the trial court's findings and conclusions that he made material misrepresentations to Osborne during their interactions regarding the sale of the Property. As did the trial court, we begin by considering 876 Ind. Admin. Code 8-2-6, which provides:

A broker shall not directly or indirectly buy, offer to buy, sell, offer to sell, or receive compensation for real estate in which the broker owns an interest, unless the broker discloses in writing the:

(1) broker's interest in the real estate to all parties to the transaction; and

(2) fact that the broker holds a valid real estate license.

The trial court found that pursuant to this provision, Small had an obligation to disclose to Osborne that he was part-owner of Results, the buyer of the Property, and that Small did not so disclose such interest to Osborne. Indeed, Osborne testified that Small always referred to himself as the agent of the buyer and represented that he was merely the real estate agent who was facilitating the real estate transaction for Results.

[15] The court considered language in both the Purchase Agreement and the Contract, which Small argued satisfied his disclosure obligation, but found that such written representations were “vague.” *Appellant’s Appendix Vol. III* at 70. Such vague written representations were in stark contrast to Small’s numerous oral representations to Osborne that he was merely a real estate agent for Results, representations Small knew to be false given his ownership interest in Results. Small’s misrepresentation in this regard belies his representation that he could fairly represent the interests of both Osborne and Results, as he clearly had a conflict of interest being part-owner of Results. Further, Small reinforced his misrepresentations that he was merely an agent for Results when at closing he informed Osborne that the buyer could not be there, despite knowing that he was part-owner of the “corporate buyer” of the Property. He also wrote “Agent” next to his signature on the Purchase Agreement and the Contract that he signed on behalf of Results, again hiding his ownership interest therein. Indeed, Small acknowledges in his brief that “the sum total of [the court’s] findings is that Art Small at all times held himself out as an agent of Results,

LLC and failed to disclose that he was also an owner of Results, LLC.”

Appellant’s Brief at 32.

[16] In addition to misrepresenting his interest and role in the real estate transaction, Small misrepresented in initial communications to Osborne that the buyer was part of one of the largest home buying networks in the country. Such misrepresentation was clearly intended to convince Osborne that the corporate buyer was a large, nationwide, reputable, and solvent company, not a small company majority owned by Small and his family. From this evidence, we cannot say that the trial court’s conclusion that Small materially misrepresented his interest and role in the real estate transaction is clearly erroneous. The court’s findings are supported by the evidence and those findings support the court’s conclusion.

2. Proximate Cause

[17] Small also argues that the court’s finding of fraud and constructive fraud cannot stand because the court made no findings or conclusions to establish a causal link between Small’s material misrepresentations and Osborne’s alleged damages. To that end, Small claims that Osborne’s damages arise from a breach of contract by Results, not from any misrepresentations made by him.

[18] Osborne desired to sell the Property and turned to the internet to find help in doing so. He was connected with Small through a website identified as a home buyer network. Small has decades of experience as a real estate broker. He met with Osborne at the Property and they discussed potential offer scenarios

Osborne could receive from a buyer that Small “represented.” Although there is nothing nefarious about serving as the real estate agent for a potential buyer in which he had an ownership interest, Small had a duty to disclose such interest up front. As noted above, from the start, Small repeatedly held himself out as merely the agent for Results and at no time did he disclose to Osborne his ownership interest therein. Failing to disclose such fact allowed him to secure the business of selling the Property, which, in the end, had Osborne paying nearly \$19,000 to Results to consummate the transaction. Osborne testified that he would not have entered into the contract with Results if he had known that Small was a part-owner thereof. Osborne believed Small when Small told him that he could fairly represent Osborne and Results. The trial court concluded that given Osborne’s lack of real estate experience and Small’s extensive real estate experience, Small’s false representations that he was merely an agent for Results and could fairly handle the transaction for both parties induced Osborne to enter into the Contract, which ultimately was breached causing damage to Osborne. We cannot say that the trial court’s determination in this regard is clearly erroneous.

3. Constructive Trust

[19] The trial court imposed a constructive trust over Executives in an amount to be determined at a damages hearing. Executives argues that no basis for imposition of a constructive trust exists. We agree.

[20] “A constructive trust is a creature of equity, devised to do justice by making equitable remedies available against one who through fraud or other wrongful

means acquires property of another.” *Kalwitz v. Estate of Kalwitz*, 822 N.E.2d 274, 280 (Ind. Ct. App. 2005), *trans. denied*. The Indiana Supreme Court has explained as follows:

A constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. The duty to convey the property may rise because it was acquired through fraud, duress, undue influence or mistake, or through a breach of a fiduciary duty, or through the wrongful disposition of another’s property. The basis of the constructive trust is the unjust enrichment which would result if the person having the property was permitted to retain it.

Id. (quoting *Melloh v. Gladis*, 261 Ind. 647, 656, 309 N.E.2d 433, 438-39 (1974) (citing 5 SCOTT ON TRUSTS § 404.2)). A constructive trust is more in the nature of an equitable remedy than an independent cause of action. *Kalwitz*, 822 N.E.2d at 280. Further, the law is firmly established that fraud, either actual or constructive, is a prerequisite to the imposition of a constructive trust. *Id.* (emphasis added).

[21] Relevant to the imposition of the constructive trust, the trial court made general findings about expenditures by Results as evidenced by checks signed by Small and written on Results’ bank account. In one such finding, the court noted that “Results, LLC loaned \$25,000.00 to Executives, LLC.” *Appellants’ Appendix Vol. III* at 91. A copy of this check was attached to Small’s deposition that was introduced into evidence during the bench trial. The check was dated February

21, 2013, written on Results' account, made payable to "Executives," signed by Small, and contained a notation of "loan" in the memo line. *Id.* at 44.

[22] Specifically pertaining to Osborne's request for a constructive trust, the trial court made the following findings:

81. Osborne was never in direct privity with Executives, LLC, but he was in direct privity with Results, LLC, and that transaction is at the heart of the dispute in this cause.

82. Art Small . . . own[s] all or part of both companies.

83. Results, LLC went out of business in February 2018 with an unsatisfied claim held by Benjamin Osborne in the amount of \$18,395.17.

84. Results, LLC failed to follow the requirements for winding-up a business . . . thereby avoiding a procedure for settling claims and avoiding personal liability for the owners and shareholders.

85. Art Small admitted in his deposition that Results, LLC loaned \$25,000 to Executives, LLC, another company he and his wife owned.

86. [Small] produced no evidence at trial to show that the loan had ever been paid back to Results, LLC and therefore the Court finds the money loaned by Results, LLC to Executives, LLC is a proper target of a claim for constructive trust.

Id. at 96.

[23] We begin by noting that other than submitting Small's deposition into evidence, Osborne presented no other evidence, discussion, or argument concerning the \$25,000 check from Results to Executives. In his deposition, Small acknowledged the notation in the memo line but could not recall whether Results was loaning money to Executives or repaying a loan previously received from Executives. If indeed there was a loan from Results to Executives, no evidence was elicited as to whether the loan was paid back. Further, the check was written months before Osborne and Small were even in contact and even longer before Osborne came to the closing on the Property with nearly \$19,000. The evidence does not establish a nexus between the fraud and the loaned funds. The trial court erred in imposing a constructive trust against Executives.

[24] Judgment affirmed in part, reversed in part, and remanded for further proceedings.

Vaidik, J. and Crone, J., concur.