

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Gold Craft Co.,	:	
Plaintiff-Appellant,	:	
v.	:	
Ebert's Contracting & Remodeling, LLC	:	No. 09AP-448
et al.,	:	(C.P.C. No. 2007CVE-10-14012)
Defendants-Appellees.	:	(REGULAR CALENDAR)
	:	

D E C I S I O N

Rendered on August 12, 2010

Law Office of Charles H. Lease, Inc., and Charles H. Lease,
for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Plaintiff-appellant, Gold Craft Co. ("appellant"), appeals the judgment rendered by the Franklin County Court of Common Pleas awarding it compensatory damages against defendants-appellees, Ebert's Contracting & Remodeling, LLC ("ECR" or "appellees") and Richard Ebert ("Ebert" or "appellees"). For the following reasons, we affirm the judgment of the trial court.

{¶2} In April 2007, appellant and ECR agreed to purchase properties located at 2579 Atwood Terrace, Columbus ("Atwood Terrace" or "the properties") and 1596 East Fourth Avenue, Columbus ("East Fourth" or "the properties"). As a result, appellant and ECR entered into two separate contracts under which they were to purchase the properties, rehabilitate them, and sell them for a profit. Generally, appellant was the financier of the purchases, while ECR was to perform the rehabilitation work.

{¶3} With regard to the Atwood Terrace property, appellant provided \$60,000 to ECR, of which \$40,000 was used to purchase the property and \$20,000 was to be used for rehabilitation costs. ECR granted appellant a mortgage to secure the debt and agreed to repay appellant \$77,000 on or before August 17, 2007. Additionally, as the sole member of ECR, Ebert signed a personal guaranty to repay \$77,000 to appellant.

{¶4} As for the East Fourth property, appellant provided \$32,500 to ECR, of which \$19,203 was used to purchase the property and \$13,297 was to be used for rehabilitation costs. ECR granted appellant a mortgage to secure the debt and agreed to repay appellant \$51,000 on or before August 22, 2007. Again, Ebert signed a personal guaranty to repay \$51,000 to appellant.

{¶5} According to the contracts, the titles of the properties were granted to ECR. If appellees sold the properties for more than \$77,000 and \$51,000, appellees were entitled to keep the gain.

{¶6} Under the contracts, ECR was responsible for the payment of real estate taxes, in addition to the procurement of casualty, fire and hazard insurance. Appellant and ECR also agreed that attorney fees would be recoverable upon a breach.

{¶7} On October 17, 2007, appellant filed suit against appellees for breach of contract, fraud, conversion, and intentional misrepresentation. In filing suit, appellant sought an accounting, compensatory and punitive damages, in addition to a decree in foreclosure.

{¶8} On November 21, 2008, the trial court granted a default judgment as a discovery sanction and set the case for a damages hearing before a magistrate. The magistrate presided over the damages hearing on January 12, 2009 and issued a decision the next day. Appellant filed objections to the magistrate's decision on February 11, 2009 and amended objections on February 20, 2009. On April 6, 2009, the trial court overruled appellant's amended objections, adopted the magistrate's decision, and entered judgment. One week later, appellant filed a motion for relief from judgment under Civ.R. 60(B). On May 6, 2009, appellant filed a notice of appeal. Our court issued a limited remand to allow the trial court to decide appellant's pending Civ.R. 60(B) motion. On July 15, 2009, the trial court denied appellant's motion for relief from judgment. Appellant thereafter filed an amended notice of appeal and raises the following assignments of error:

I. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S CLAIM FOR PUNITIVE DAMAGES.

II. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S CLAIM FOR ATTORNEY FEES.

III. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT.

{¶9} Before we address appellant's assignments of error, we must first address two procedural motions. On November 18, 2009, a motion to strike was filed by appellant's former counsel. With this motion, former counsel asks for this court to strike

the affidavit in support of appellant's Civ.R. 60(B) motion for relief from judgment. On November 20, 2009, appellant filed a motion to strike former counsel's motion to strike. In this motion, appellant argues that its former counsel is not a party in the instant matter and has not filed an amicus brief. As a result, appellant argues that its former counsel has no standing to ask this court to strike portions of the record. Former counsel offers no argument in response. Accordingly, we see no reason to strike the affidavit in support of appellant's Civ.R. 60(B) motion. We therefore overrule former counsel's November 18, 2009 motion to strike and overrule as moot appellant's November 20, 2009 motion to strike.

{¶10} With regard to appellant's assignments of error, the only substantive issues regard the adequacy of the damages awarded by the trial court's judgment. With respect to the first and second assignments of error, appellant argues that the damages award was against the manifest weight of the evidence.

{¶11} When the argument is that a civil judgment is against the manifest weight of the evidence, an appellate court must review the record to determine if the judgment is supported by "some competent, credible evidence." *Sotos v. Edel*, 10th Dist. No. 02AP-1273, 2003-Ohio-6471, ¶86, citing *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279. "[U]nder the civil manifest-weight-of-the-evidence standard, 'a court has an obligation to presume that the findings of the trier of fact are correct.' " *Corrigan v. Illuminating Co.*, 122 Ohio St.3d 272, 2009-Ohio-2524, ¶34, citing *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶24, quoting *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. When there is some competent, credible evidence supporting a judgment, an appellate court must affirm the judgment. See *Shemo v.*

Mayfield Hts., 88 Ohio St.3d 7, 10, 2000-Ohio-258; see also *Myers v. Garson*, 66 Ohio St.3d 610, 1993-Ohio-9 (a reviewing court must not substitute its judgment for that of the trial court where some competent, credible evidence supports the judgment). Indeed, a reviewing court will not reverse a civil judgment as being against the manifest weight of the evidence unless the evidence cannot be interpreted in a way that supports the verdict. *Cent. Motors Corp. v. Pepper Pike*, 73 Ohio St.3d 581, 584, 1995-Ohio-289.

{¶12} In its first assignment of error, appellant argues that the trial court erred in denying its request for punitive damages. "Punitive damages are intended to deter conduct resulting from a mental state that is 'so callous in its disregard for the rights and safety of others that society deems it intolerable.' " *Ward v. Hengle* (1997), 124 Ohio App.3d 396, 405, quoting *Calmes v. Goodyear Tire & Rubber Co.* (1991), 61 Ohio St.3d 470, 473. A party seeking punitive damages has the burden of proving by clear and convincing evidence that it is entitled to them. *Cabe v. Lunich*, 70 Ohio St.3d 598, 601, 1994-Ohio-4. Punitive damages may be awarded if the defendant's actions or omissions "demonstrate malice or aggravated or egregious fraud." R.C. 2315.21(C)(1).

{¶13} The malice necessary to award punitive damages is either "(1) that state of mind under which person's conduct is characterized by hatred, ill will, or spirit of revenge, or (2) a conscious disregard for rights and safety of other persons that has great probability of causing substantial harm." *Preston v. Murty* (1987), 32 Ohio St.3d 334, syllabus. Because an individual is unlikely to admit to acting with malice, a finding of malice may be inferred from conduct and surrounding circumstances. *Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St.3d 36, 37.

{¶14} When seeking punitive damages on the basis of fraud, a plaintiff must first demonstrate the elements of fraud before then showing either "that the fraud is aggravated by the existence of malice or ill will," or that it is "particularly gross or egregious." *Charles R. Combs Trucking, Inc. v. Internatl. Harvester Co.* (1984), 12 Ohio St.3d 241, paragraph three of the syllabus. Therefore, something more than a "bare case of fraud" is necessary to support an award of punitive damages. *Logsdon v. Graham Ford Co.* (1978), 54 Ohio St.2d 336, 339, quoting 25 Ohio Jurisprudence 2d 34, Fraud and Deceit, Section 205. Nevertheless, even a bare case of fraud requires a plaintiff to demonstrate the element of actual damages. *Epicor Software Corp. v. Sample Machining Co.*, 2d Dist. No. 20390, 2005-Ohio-2234, ¶54.

{¶15} In the instant matter, the magistrate held that appellant failed to demonstrate the malice necessary to support a punitive damages award. He further held that appellant failed to demonstrate actual damages associated with its fraud and conversion claims. For these two independent reasons, the magistrate held that appellant was not entitled to punitive damages. Upon the filing of objections, the trial court conducted its own independent review of the issues. The court analyzed appellees' conduct and referenced the facts that appellees used funds to pay for Ebert's personal obligations, failed to pay property taxes, failed to procure insurance for the properties, and failed to remit rents to appellant. The trial court concluded that this conduct amounted to breaches of the contracts but did not reach the level of implied malice. Specifically, the court held that these breaches of the contracts neither amounted to conduct characterized by hatred, ill will, or a spirit of revenge, nor did they constitute conduct

demonstrating a conscious disregard for the rights and safety of other persons that had a great probability of causing substantial harm.

{¶16} On appeal, appellant argues that the trial court erred by not concluding that appellees' conduct demonstrated implied malice. In support, appellant references appellees' bank statements in addition to Ebert's testimony from the damages hearing, which purportedly demonstrate that appellees improperly spent funds that were earmarked for rehabilitation. Specifically, appellant references bank statements demonstrating that Ebert used funds for personal expenses, such as going to movies, going to dinner, and playing golf. Additionally, appellant argues appellees failed to procure insurance, failed to pay taxes, and failed to remit rents received. For these reasons, appellant contends the trial court committed reversible error when it denied punitive damages after finding that appellees did not act with malice.

{¶17} The record demonstrates that Ebert used only one bank account to pay for his personal expenses in addition to the expenses of ECR. While this dual use of one bank account is undoubtedly an unsound business practice, we cannot find that it amounts to conduct demonstrating hatred, ill will, or a spirit of revenge. Nor can we find that it amounts to conduct demonstrating a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. We reach the same finding with regard to appellees' failure to procure insurance, pay taxes, and remit rents. While this conduct did amount to breaches of various provisions of the contracts, we do not find that the trial court erred in not finding implied malice. In this regard, we find that appellant has failed to overcome the presumption that the findings of the trier of fact were correct. *Corrigan* at ¶34, citing *Wilson* at ¶24, quoting *Seasons Coal Co.* at 80.

Indeed, in presenting its argument in favor of implied malice, appellant seeks for this court to analyze appellees' conduct and the surrounding circumstances with a filtered lens. In fact, however, the record contains competent, credible evidence demonstrating surrounding circumstances that favor the trial court's finding on the issue of malice.

{¶18} The primary reason appellant and appellees entered into these contracts was that Ebert had poor credit and could not obtain funds to purchase and rehabilitate real estate on his own. When the parties entered the agreements, they believed the properties would sell for \$51,000 and \$77,000 respectively, within four months of the initial purchase. Alternatively, Ebert believed he would be able to obtain a traditional mortgage from a lending institution in those amounts and transfer those funds to appellant. Soon after the parties entered these contracts, the housing market began to falter. This situation made a subsequent sale much more difficult than first imagined. Further, when considering the weakening housing market along with Ebert's poor credit, appellees' efforts at refinancing with a traditional mortgage became that much more difficult.

{¶19} Based upon these surrounding circumstances, we cannot find that the evidence cannot be interpreted in a way that supports the verdict. See *Pepper Pike* at 584. Indeed, there was some competent, credible evidence supporting the trial court's resolution of the issue of implied malice. We reject appellant's contention to the contrary.

{¶20} Appellant next contends that the trial court erred by not finding actual or nominal damages associated with the claims for fraud and conversion. In support, appellant references Ebert's testimony, in which he stated that he spent between \$20,000 and \$22,000 to rehabilitate the properties, despite the fact that he was given \$32,500 to

do so. Appellant acknowledges that an award of actual or nominal damages would be duplicative of the \$128,000 it was awarded in compensatory damages. Nevertheless, appellant advances this argument in support of its position that punitive damages should have been awarded.

{¶21} It is well-settled:

A breach of contract claim does not create a tort claim, and a tort claim based upon the same actions as those upon which a breach of contract claim is based exists only if the breaching party also breaches a duty owed separately from that duty created by the contract, that is, a duty owed even if no contract existed.

Homewood Homes, Inc. v. Helwig, 10th Dist. No. 08AP-406, 2009-Ohio-1699, ¶13, quoting *Prater v. Three-C Body Shop, Inc.*, 10th Dist. No. 01AP-950, 2002-Ohio-1458, citing *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.* (1996), 115 Ohio App.3d 137, 151; see also *Mabry-Wright v. Zlotnik*, 165 Ohio App.3d 1, 7, 2005-Ohio-5619, ¶19. "The evidence must show damages attributable to the wrongful acts which are in addition to the damages attributable to the breach of contract." *Id.*

{¶22} In the instant matter, appellees were contractually obligated to perform the rehabilitation. There is no separate duty that appellants have alleged apart from the duty to use the funds for rehabilitation. Inasmuch as appellant's fraud and conversion claims stem from appellees' alleged failure to meet their obligations under the contract, we find that the trial court did not err in refusing to find actual or nominal damages associated with the purported fraud or conversion.

{¶23} Having rejected both arguments in support of appellant's challenge to the trial court's denial of punitive damages, we overrule appellant's first assignment of error because the trial court did not err in denying punitive damages.

{¶24} In its second assignment of error, appellant argues that the trial court erred when it refused to grant attorney fees and failed to conduct a second evidentiary hearing on the issue. Initially, appellant classifies this assignment of error as a manifest weight of the evidence challenge. However, after reviewing the arguments presented, appellant is actually challenging the trial court's resolution of appellant's Civ.R. 60(B) motion, which is also the subject of appellant's third assignment of error.

{¶25} In the trial court's proceedings, appellant consistently argued that it was entitled to recover its attorney fees, regardless of whether or not they were reasonable. This was the only argument appellant advanced in seeking its fees. On appeal, appellant has completely abandoned this position by conceding that attorney fees must be reasonable to be recoverable. Appellant further acknowledges that it did not present any evidence regarding the reasonableness of its fees until after the judgment was rendered. Indeed, appellant's sole argument is that the Civ.R. 60(B) affidavit established the reasonable value of the attorney fees. As a result, appellant essentially concedes that it failed to meet its burden on the issue of attorney fees during the damages hearing. Accordingly, we overrule appellant's second assignment of error because we cannot find that the judgment was against the manifest weight of the evidence.

{¶26} In its third assignment of error, appellant argues that the trial court erred in denying its motion for relief from judgment. Appellant argues that it alleged sufficient operative facts to warrant relief from judgment and at the very least should have been entitled to a second evidentiary hearing on the issue of damages.

{¶27} A trial court's decision on a Civ.R. 60(B) motion is subject to an abuse of discretion standard of review on appeal. *GTE Automatic Elec., Inc. v. ARC Industries,*

Inc. (1976), 47 Ohio St.2d 146, 148. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken.

GTE Automatic Elec., Inc., paragraph two of the syllabus.

{¶28} In this assignment of error, appellant challenges the damages award and cites excusable neglect, inadvertence, and surprise as the basis for relief under Civ.R. 60(B)(1). Appellant again challenges the trial court's finding on the issue of malice and punitive damages. Next, appellant challenges the denial of attorney fees and argues that the trial court never considered appellant's supporting affidavit. Finally, it challenges the amount of compensatory damages awarded by the trial court.

{¶29} Based upon the arguments presented, it is clear that appellant seeks a second chance at proving its damages. The trial court already conducted one damages hearing, during which appellant was able to present evidence. The trial court issued a decision based upon the evidence presented. Being unsatisfied with the result, appellant filed its Civ.R. 60(B) motion and presented additional evidence, which it argued proved the essential elements of its damages claims.

{¶30} With regard to Civ.R. 60(B) motions, "any 'mistake, inadvertence, surprise or excusable neglect,' as set forth in Civ.R. 60(B)(1), by counsel for a party does not entitle that party to relief from judgment under the rule." *Brewer v. Brewer*, 10th Dist. No.

09AP-146, 2010-Ohio-1319, ¶29, quoting *Argo Plastic Prods. Co. v. Cleveland* (1984), 15 Ohio St.3d 389, 393. Further, "a movant may not use the arguments lost in the underlying judgment to justify relief from that judgment." *Id.* at ¶23, citing *City of Streetsboro v. Encore Homes*, 11th Dist. No. 2002-P-0018, 2003-Ohio-2109, ¶10, citing *Elyria Twp. Bd. of Trustees v. Kerstetter* (1993), 91 Ohio App.3d 599, 603; see also *Wells Fargo N.A. v. Smith*, 10th Dist. No. 09AP-559, 2009-Ohio-6576, ¶11.

{¶31} Again, the gravamen of appellant's third assignment of error is that the trial court abused its discretion when it refused to allow appellant a second chance at proving its damages claims. Appellant attached additional evidence to its Civ.R. 60(B) motion but did not reference Civ.R. 60(B)(2), which pertains to newly discovered evidence. Appellant's position is essentially that the requested relief is appropriate because appellant's former counsel was unprepared for the damages hearing. She did not know that attorney fees needed to be reasonable, which appellant's counsel now concedes is required. She did not know that she had to introduce evidence demonstrating the hours she expended on the case and her hourly rate. Finally, she apparently believed the magistrate had no choice but to find implied malice and punitive damages.

{¶32} With regard to appellant's challenge to the denial of punitive damages and the extent of compensatory damages awarded, we find that appellant has not presented any new grounds for relief. Accordingly, in relation to Civ.R. 60(B), appellant has lost these arguments in the underlying judgment. See *Smith* at ¶11. Inasmuch as appellant's Civ.R. 60(B) motion challenges the denial of attorney fees, we find that the excusable neglect, inadvertence, and surprise of appellant's former counsel does not entitle appellant to relief from judgment. See *Brewer* at ¶29. Because the conduct of appellant's

counsel is imputed to appellant, appellant's recourse may lie in an action for legal malpractice for any alleged damages. See *Arnold & Caruso, Ltd. v. Nyktas*, 6th Dist. No. L-05-1011, 2005-Ohio-5566, ¶11. However, for purposes of this appeal, we cannot find that the trial court abused its discretion in refusing to allow appellant a second chance at proving its damages claims. We accordingly overrule appellant's third assignment of error.

{¶33} Having overruled appellant's three assignments of error, we affirm the judgment rendered by the Franklin County Court of Common Pleas. We also overrule former counsel's motion to strike, filed November 18, 2009, and overrule as moot appellant's motion to strike, filed November 20, 2009.

*Judgment affirmed;
former counsel's motion to strike overruled;
appellant's motion to strike overruled as moot.*

KLATT and FRENCH, JJ., concur.
