

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2005-CA-01389-COA

HAROLD F. GARRIS

APPELLANT

v.

SMITH'S G&G, LLC

APPELLEE

DATE OF JUDGMENT:	4/21/2005
TRIAL JUDGE:	HON. ANDREW C. BAKER
COURT FROM WHICH APPEALED:	TATE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	GERALD W. CHATHAM, SR.
ATTORNEY FOR APPELLEE:	CHRISTIAN T. GOELDNER
NATURE OF THE CASE:	CIVIL - CONTRACT
TRIAL COURT DISPOSITION:	CIRCUIT COURT SET ASIDE JURY VERDICT ON APPELLANT'S COUNTERCLAIM, UPHELD APPELLEE'S VERDICT.
DISPOSITION:	REVERSED AND REMANDED - 10/31/2006
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE MYERS, P.J., BARNES AND ISHEE, JJ.

MYERS, P.J., FOR THE COURT:

¶1. The underlying case involved a contractual dispute between Smith's G & G, LLC (Smith's), the collective group of purchasers of a small country store, and the seller, Garris. Finding that Garris fraudulently misrepresented the amount of the business' monthly revenue, the jury awarded Smith's \$85,000 in damages, and also awarded Garris on his counterclaim an amount representative of the past due installment payments on the promissory note held by him. Following trial, Smith's presented a motion for judgment notwithstanding the verdict, seeking to vacate the portion of the jury verdict awarding damages to Garris. The trial court granted Smith's motion, finding the contract void due to fraud through a faulty application of contract law. This Court is asked to determine

whether the trial court erred in setting aside the jury verdict on Garris' counterclaim and upholding the jury verdict on Smith's damages. Finding error in the trial judge's grant of Smith's motion for judgment notwithstanding the verdict and application of law, this Court reverses the judgment of the lower court and remands the damage computation issue of this case for a new trial.

STATEMENT OF THE CASE

¶2. In the summer of 2003, Garris and Smith's negotiated the sale and purchase of a business named "Donna's Country Kitchen," located on Highway 4 East in Senatobia, Mississippi. During the negotiations, Garris furnished Smith's with a written representation that the store had an average of \$46,868.40 in monthly sales. The business, consisting of commercial real estate and a country store, was purchased on September 15, 2003, for a total price of \$415,000, including a cash down payment of \$85,000. Smith's gave a first mortgage on the real property to Norman Smith and borrowed \$100,000 from an investor, George Smith, executing a second mortgage on the property for said debt. Smith's additional financing was in the form of a promissory note executed to Garris in the amount of \$185,790.51 secured by a financing statement on the inventory and equipment. Less than six months after the closing date, Smith's filed a complaint against Garris alleging several claims, including the claim that Garris had fraudulently misrepresented the income generated from the business in an amount of \$30,000 per month. Upon the filing of the complaint, Smith's discontinued making payments under the promissory note held by Garris. Garris then filed a counterclaim against Smith's for the past due payments.

¶3. The case went to trial in the Circuit Court of Tate County on January 24, 2005. After three days of trial, the jury was given instructions. Significant to our review of this appeal is that the record is devoid of calculations or testimony concerning the actual losses incurred by Smith's due to Garris' misrepresentation. During the deliberations, the jury sent a note to the judge asking

whether they could find for both the plaintiff and the defendant. The record reflects that the trial judge answered their query affirmatively. The jury then found for both Smith's on the fraudulent misrepresentation claim in the amount of \$85,000, and for Garris on his counterclaim in the amount of \$53,080 for past due payments. Smith's award represented the total of her cash down payment for the property. Garris' claimed amount represented the monthly amount due on the note for thirteen months, along with interest. A hearing was later held on the issue of punitive damages and the issue was submitted to the same jury. The jury did not award punitive damages.

¶4. Within the time prescribed by Mississippi Rule of Civil Procedure 50(b), Smith's filed a motion for judgment notwithstanding the verdict (JNOV) and for declaratory judgment. On April 21, 2005, the trial court issued an order granting Smith's motion for JNOV and setting aside the judgment for Garris. In granting the motion for JNOV, the court reasoned that the contract entered into by Smith's was procured by Garris' fraudulent misrepresentation of the monthly income generated by the business. Garris then filed a motion for reconsideration or, in the alternative, clarification of order, which included a request for a new trial. Garris' motion was overruled by the trial judge, thereby denying a new trial pursuant to Mississippi Rule of Civil Procedure 50(c).

¶5. Aggrieved, Garris appeals to this Court identifying the following issue for review:

WHETHER THE TRIAL COURT ERRED IN SETTING ASIDE THE JURY VERDICT ON THE APPELLANT'S COUNTERCLAIM AND UPHOLDING THE JURY VERDICT ON APPELLEE'S DAMAGES INSTEAD OF GRANTING A NEW TRIAL?

STANDARD OF REVIEW

¶6. In review of a trial court ruling on a motion for judgment notwithstanding the verdict, this Court considers the evidence in the light most favorable to the non-moving party. *Tharp v. Bunge Corp.*, 641 So. 2d 20, 23 (Miss. 1994); *King v. Progressive Gulf Ins. Co.*, 913 So. 2d 1065, 1067 (¶4) (Miss. Ct. App. 2005). When a trial court considers a motion for JNOV, it is called upon to test the

legal sufficiency of the evidence supporting the verdict, but not the weight of the evidence. *Id.* We, in turn, review the trial court's grant or denial of a JNOV de novo. *Id.*

LEGAL ANALYSIS

¶7. Garris argues that the judge erred when he granted Smith's motion for JNOV, thereby taking away the damages the jury had previously awarded Garris on his counterclaim for non-payment under the contract. Garris further argues that he should have received a new trial, and that the trial court's denial of same was error. As the record reflects, the trial court vacated Garris' counterclaim judgment and the promissory note, reasoning that the verdict was inconsistent with the jury's finding that Garris falsely misrepresented material facts during the negotiations of the contract. This finding was predicated upon a faulty assumption that because fraud was found in the contract, this fraud vitiated the entire contract. The trial court further reasoned that because fraud vitiated the contract, Smith's would not be liable for payments due on the promissory note. Subsequently, when the trial court ruled on Garris' motion for reconsideration or, in the alternative, clarification of order, the trial court effectively refused to grant a new trial to Garris. We disagree with the trial court that the jury's award was contradictory as a matter of law and find that the jury could have awarded a verdict to both Smith's and Garris. The trial judge's grant of the motion for JNOV was incorrect as a matter of law and, therefore, we reverse. Further, we hold that because the jury was not properly instructed as to the valuation of damages, this issue must be remanded for a new trial.

¶8. In awarding a verdict in favor of Smith's, it is evident to this Court that the jury found that Smith's was defrauded by Garris during the negotiations of the contract. While this portion of the jury finding is not contested by Garris, we note that our standard of review prohibits overturning a jury verdict unless "it is clear that the verdict is a result of prejudice, bias or fraud, or is manifestly against the weight of the credible evidence." *Sessums v. Northtown Limousines*, 664 So. 2d 164,

168-69 (Miss. 1995) (quoting *Wilmoth v. Peaster Tractor Co. of Lexington, Inc.*, 544 So. 2d 1384, 1386-87 (Miss. 1989)). The law is clearly established that the jury's finding of fraudulent misrepresentation allows Smith's to make a choice to either rescind the contract and be restored to its' former position before the store was purchased or to elect to keep the business and bring an action for damages. *Brent Towing Co. v. Scott Petroleum Corp.*, 735 So. 2d 355, 360 (¶14) (Miss. 1999); *Ezell v. Robbins*, 533 So. 2d 457, 458 (Miss. 1988); *Turner v. Wakefield*, 481 So. 2d 846, 848 (Miss. 1985); *Hamilton v. McGill*, 352 So. 2d 825, 828 (Miss. 1977); *Hunt v. Sherrill*, 195 Miss. 688, 701, 15 So. 2d 426, 430 (1943); *Laurel Auto Supply Co. v. Sumrall*, 184 Miss. 88, 93, 185 So. 566, 567 (1939); *Estell v. Myers*, 54 Miss. 174, 194 (1876); *Gardner v. Little*, 755 So. 2d 1273, 1276 (¶9) (Miss. Ct. App. 2000).

¶9. When a rescission of a land sale contract will bring about an inequitable result, abatement of the purchase price is the appropriate remedy. *Hamilton*, 352 So. 2d at 830. Furthermore, when rescission is impossible, such as in this situation where there exists an intervening lien holder that prohibits a rescission of the contract, "the court is powerless to do anything except to accept the situation created by the fraud and award monetary damages upon the tort committed thereby." *Brown v. Ohman*, 42 So. 2d 209, 215 (Miss. 1949).

¶10. While it is true that a contract procured by fraud is voidable as to all provisions and the entire transaction may be avoided by the party who entered into the contract without knowing of the fraud, if it is impossible to elect a rescission, the only other remedy is to recover damages. *Allen v. Mac Tools, Inc.*, 671 So. 2d 636, 641 (Miss. 1996) (quoting *Turner*, 481 So. 2d 846); *Brown*, 42 So. 2d at 215. If this Court were to allow the lower court's judgment to stand, which we cannot, Smith's would be able to keep the property at issue, retain the award of damages, and forgo further payments on the promissory note held by Garris. This remedy, stated conservatively, would be unjust. A party

is not entitled to a recovery of damages if it would constitute a windfall or “double recovery.” *Ciba-Geigy Corp. v. Murphree*, 653 So. 2d 857, 873 (Miss. 1994).

¶11. The Mississippi Supreme Court has addressed the precise issue of whether a finding of fraud in the inducement of a land sale contract requires rescission. *Browder v. Williams*, 765 So. 2d 1281 (Miss. 2000). In that case, the court held that while rescission could be an appropriate remedy, rescission is not required where monetary damages would serve as an adequate remedy. *Id.* at (¶23).

Quoting a leading treatise, the court stated,

One induced to purchase land for fraudulent misrepresentation may either bring an action for the fraud or for breach of covenants of his deed. He has an election.* * He may either affirm the contract, and sue for damages, or disaffirm it and be reinstated in the position in which he was before it was consummated.

Id. at (¶17) (quoting 8A Thompson on Real Property § 4468, at 387-88 (1963)). In discussion of relevant case law concerning a rescission suit, the court noted that when a party cannot be returned to status quo “they are not precluded from relief against fraud, but the court may proceed to restore them to status quo as nearly as possible and make compensation for the difference.” *Id.* at (¶19) (discussing holding in *Brown v. Norman*, 65 Miss. 369, 4 So. 293 (1888)).

¶12. In a case such as this, a rescission of the contract would not be an appropriate remedy because there are intervening lien holders which would complicate the return of the store to Garris. Furthermore, we note that Smith’s did not elect this option of rescission. Therefore, following precedent laid many years before us, we find that Smith’s only remedy is to seek monetary damages incurred due to the fraud in the inducement of the contract. However, we are now faced with a dilemma in determining whether the amount the jury awarded to Smith’s was predicated upon his actual losses due to the fraud in the contract. While it is true that the jury is the ultimate fact-finder in regard to valuation of damages, in this case, the jury was presented with no evidence as to the actual losses incurred by Smith’s due to Garris’ fraudulent misrepresentations. The jury awarded

Garris an amount representative of the amount of the cash down payment, but nowhere in the record is there an indication supportive of this figure. We will reverse a jury finding if it is “manifestly against the weight of the credible evidence.” *Sessums*, 664 So. 2d at 168-69. In this case, the amount awarded to Garris based upon the damages incurred as a product of the fraudulent misrepresentations as to the store’s monthly profit was not based on any evidence presented at trial, much less “credible evidence.”

¶13. In cases where during the negotiations there has been a material misrepresentation of a collateral characteristic of the property, such as misrepresentation concerning past rents or income from property, the proper measure of damages is the difference between the actual value of the property and the contract price. *Hunt*, 195 Miss. 688, 701, 15 So. 2d 426, 430 (1943). Had the jury been instructed on the applicable rule to find the amount of damages to award, we would uphold the jury’s award. However, because the jury was not presented evidence concerning the actual value of the property, we are forced to vacate the jury award of \$85,000 to Smith’s and remand this portion of the case for a new trial so that a jury may consider evidence concerning the damages and award accordingly.

¶14. Upon our de novo review, this Court finds that the evidence presented at trial did not support the trial judge’s granting of the motion for judgment notwithstanding the verdict. We are, thus, compelled to conclude that this judgment must be reversed and remanded for further proceedings to determine the proper amount of compensation due to both Smith’s for the damages incurred due to the fraudulent misrepresentation and to the appealing party, Garris, for the amounts due to him for payments under the promissory note—a proceeding in which the parties must present competent evidence of the difference between the actual value and contract price of the property to set off the amount past due on the promissory note.

¶15. THE JUDGMENT OF THE CIRCUIT COURT OF TATE COUNTY IS REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE DIVIDED EQUALLY BETWEEN APPELLANT AND APPELLEE.

KING, C.J., LEE, P.J., SOUTHWICK, IRVING, CHANDLER, GRIFFIS, BARNES, ISHEE AND ROBERTS, JJ., CONCUR.