

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUBAR, INC. T/A : CIVIL ACTION
BG PACKAGING CORP. :
 :
v. :
 :
PRECISION PLASTICS, INC. and :
SHIFRA LEFKOWITZ : NO. 96-2815

M E M O R A N D U M

WALDMAN, J.

March 25, 1998

This is a breach of contract and fraud case. Jurisdiction is predicated on diversity of citizenship. The claims are governed by Pennsylvania law. The pertinent facts alleged by plaintiff are as follow.

Plaintiff printed plastic bags for sale by the defendant corporation ("Precision"). Precision owed plaintiff \$177,881.39 for services performed over a fifteen month period. Plaintiff notified defendant Lefkowitz, an employee of Precision, that no further services would be provided until Precision commenced payment of its outstanding obligation. She represented that checks for \$24,435.60 and \$17,987.07 would be forthcoming, with the remainder to be paid "in due course."

Plaintiff then did receive a check for \$24,435.60 which it deposited. The check was returned for insufficient funds. Plaintiff thereafter received a post dated check for \$17,000 and an assurance from Ms. Lefkowitz that the first check would be honored if redeposited. She also advised plaintiff that within

several days another check for \$35,787.36 would be forwarded. Plaintiff then agreed to release to Precision printing plates which had been used in producing the printed bags.

The checks for \$24,435.60 and \$17,000 could not be negotiated because stop-payment orders had been issued. A check for \$35,787.36 was never sent.

Plaintiff alleged that defendant Lefkowitz had fraudulently misrepresented the availability of funds to induce plaintiff "to continue to produce product for the Defendants and relinquish the printing plates." Plaintiff asserted a breach of contract claim against Precision for \$177,881.39 and a fraud claim against Precision and Ms. Lefkowitz for \$77,222.96, the total of the promised payments.¹

Defendants Precision and Lefkowitz persistently and flagrantly ignored plaintiff's discovery requests and court orders to provide discovery. Precision also ignored its legal obligation and court directives to appear through counsel. The court ultimately granted plaintiff's request for default judgments as a sanction pursuant to Fed. R. Civ. P. 37(b)(2)(C).

The court entered judgment against Precision for the \$177,881.39 owed plus interest. The court also entered a default judgment on liability against defendant Lefkowitz and scheduled a

¹ Plaintiff also sued Oscar Wercberger, another Precision employee, for fraud on allegations mirroring those made against Ms. Lefkowitz. Plaintiff later moved to dismiss its claim against Mr. Wercberger with prejudice. Plaintiff also voluntarily dismissed an unjust enrichment claim it had included against Harrison Baking, a client of Precision.

hearing to determine the appropriate amount for which she might be liable as a result of her misrepresentations.² The record was silent as to the value of the printing plates tendered and products produced in reliance on the representations regarding partial payments for past services.

At the hearing, plaintiff acknowledged that the plates had no intrinsic value and that in fact no additional work had been preformed for Precision.³ The court concluded that plaintiff had not sustained a loss proximately caused by defendant Lefkowitz's misrepresentations about forthcoming partial payments. Indeed, plaintiff did not have a cognizable fraud claim as "pecuniary loss is an element of the cause of action." Brown v. Maxfield, 663 F. supp. 1193, 1206 (E.D. Pa. 1987).⁴

A fraud victim can only recover an "actual loss" proximately caused by his reliance on a misrepresentation. Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 735 (3d Cir. 1991); Torres v. Borzelleca, 641 F. Supp. 542, 545 (E.D. Pa.

² This did not include Precision as to whom a separate award of \$77,222.96 for the alleged fraud would admittedly be duplicative.

³ Apparently the only potential use for the plates would be in conjunction with future printing services for which the provider would presumably expect to be paid.

⁴ The court ruled on the record that plaintiff was not entitled to a judgment against Ms. Lefkowitz and stated the reasons therefor. It advertently failed to enter a formal memorandum and order reflecting that ruling and those reasons which it now does.

1986). See also AAMCO Transmissions, Inc. v. Marino, 1992 WL 38120, *4 (E.D. Pa. Feb. 20, 1992); Motorola, Inc. v. Electronic Laboratory Supply Co., Inc., 1991 WL 12437, *5 (E.D. Pa. Jan. 31, 1991) ("under Pennsylvania law a victim of fraud can only recover his actual loss and not the benefit of his bargain") (citing cases); Delahanty v. First Pennsylvania Bank, N.A., 464 A.2d 1243, 1257 (Pa. Super. 1983). Damages recoverable for fraud are those "that will put the injured party in a position that he was in before he was injured." Killian v. McCulloch, 850 F. Supp. 1239, 1253 (E.D. Pa. 1994). These damages consist of the difference in value between what a plaintiff received and what he gave plus other pecuniary loss proximately caused by his reliance on the defendant's misrepresentation. Delahanty, 464 A.2d at 1257; Restatement (Second) of Torts § 549.

The value of what plaintiff gave and received was zero. If plaintiff sustained some other economic loss as a proximate result of Ms. Lefkowitz's representations, it has not alleged or presented evidence of it. Plaintiff appears to have been in the same economic position after the misrepresentations as before. Before the fraud, plaintiff was owed \$177,881 and had printing plates of no material value. Afterwards, plaintiff was owed \$177,881 and had no plates of material value.⁵

⁵ Plaintiff suggested that the plates must be worth \$77,222.96 at least to defendants since Ms. Lefkowitz promised to pay that sum. The actual evidence, however, is that this sum was already owed to plaintiff and no additional sum was negotiated for the plates. Moreover, the essence of plaintiff's fraud claim is that defendant never intended to make the promised payments. Plaintiff presented no evidence of the cost of reproducing the plates and, more importantly, made no showing that it

(continued...)

Plaintiff relies on dicta in one case which suggests that a plaintiff who is fraudulently induced by the defendant to enter a contract with it may be able to recover benefit of the bargain damages on a fraud claim under Pennsylvania law. The principal case cited for the proposition, however, is a California Supreme Court case from 1918 which does not appear to reflect current Pennsylvania law.⁶ Indeed, one of the most often cited cases for the proposition that such damages are not recoverable involved a claim of fraud by a plaintiff who was fraudulently induced by the defendant to enter into a contract with it. See Scaife Company v. Rockwell-Standard Corp., 285 A.2d 451 (Pa. 1971), cert. denied, 407 U.S. 920 (1972). The Court in Scaife did sanction an award for expenses which were incurred as a proximate result of the fraud but only after noting that such losses were not "benefit of the bargain" damages which the Court had "prohibited." Id. at 457. See also Silverman v. Bell Sav. & Loan Ass'n., 533 A.2d 110, 116 & n.4 (Pa. Super. 1987) (noting measure of damages for fraud is actual loss in case involving parties to formal contract).

⁵(...continued)
realistically ever could have received anything for them from anyone including defendants. Indeed, it is inconceivable that any prudent business person would have released the plates without waiting for the promised checks to arrive and clear if the plates had any market value.

⁶ See DeBartolo v. Coopers & Lybrand, 928 F. Supp. 557, 565 (W.D. Pa. 1996).

Plaintiff also refers to cases which recognize the right of a fraud victim to recover lost profits to argue that Pennsylvania allows benefit of the bargain damages. Fraud victims may recover lost net profits under Pennsylvania law. See Tunis Bros., 952 F.2d at 736-37 (where defendant fraudulently induced plaintiff to sell business he may recover net profits he would have earned had he not sold); Delahanty, 464 A.2d at 1258 (plaintiff alleged destruction of used car and leasing businesses caused by defendant's misrepresentations). There is, however, a difference between net profits a plaintiff would have earned had his business not been lost, sold, damaged or destroyed by his reliance on fraudulent misrepresentations and the "profit" he hoped to realize from exchanging something of nominal value for a large promised sum the recipient never intended to pay, i.e., the benefit of the bargain.

A default judgment ordinarily is entered only where the plaintiff has stated a cognizable claim and only for relief to which he would be entitled from his factual allegations. See Wagstaff-El v. Carlton Press Co., 913 F.2d 56, 57 (2d Cir. 1990) (default judgment even against willfully defaulting party properly vacated and judgment entered for defendants where plaintiff's claim was not valid or supportable); Alan Neuman Productions, Inc. v. Albright, 862 F.2d 1388, 1392 (9th Cir. 1988) cert. denied, 493 U.S. 858 (1989); Patray v. Northwest Pub. Inc., 931 F. Supp. 865, 869 (S.D. Ga. 1996); Morales v. Farley,

1996 WL 698027, *4 (N.D. Ill. Oct. 30, 1996) (citing cases). The instant case is not ordinary.

Ms. Lefkowitz willfully defaulted on her obligations in defending the claim. Plaintiff had presented a facially valid fraud claim but had not specified the value of the printing plates and products or services of which it was allegedly defrauded. As a sanction, the court precluded defendant from contesting liability with the entry of an order imposing default judgment.⁷ It was only after a hearing to take evidence regarding loss or damage that it became evident there was no sustainable fraud claim against Ms. Lefkowitz.

Plaintiff argues that unless it is awarded "benefit of the bargain" damages of \$77,222.96 against Ms. Lefkowitz, she will "get away with perpetrating a fraud" and "with thumbing her nose at no less than four Court Orders." The court does not condone Ms. Lefkowitz's conduct. Nevertheless, the court cannot conscientiously treat her more harshly than if she had defaulted in a fraud action in which the essential element of pecuniary loss had not been alleged. If plaintiff had not incorrectly alleged that it had produced additional products and had specified that the plates had no value, the court would not have

⁷ The order was not literally a final judgment as it required defendant to pay or do nothing and did not terminate the litigation. It was accompanied by notice of a hearing to determine the proper amount to be awarded in a final judgment order.

entertained a request for default judgment and in the circumstances would have dismissed the fraud claim.⁸

It is easy to rule for the only party actively appearing in a case and against a derelict party who now appears to have absconded. To do so in the particular circumstances of this case, however, is not justified or just.⁹ As indicated orally at the hearing on damages, the court will vacate the order imposing a default judgment against defendant Lefkowitz on liability as it is now clear there is no liability for damages for fraud and will dismiss the fraud claim asserted against her.

⁸ Had plaintiff not alleged and at a hearing been unable to show actual loss, the fraud claim would be subject to dismissal sua sponte. See, e.g., Baker v. Director, U.S. Parole Com'n., 916 F.2d 725, 726 (D.C. Cir. 1990); Herrmann v. Meridian Mortg. Corp., 901 F. Supp. 915, 924 (E.D. Pa. 1995); Parsons v. City of Philadelphia, 822 F. Supp. 1181, 1182 n.1 (E.D. Pa. 1993). The same reasonably follows where plaintiff's allegations suggest but do not specify damages and after an opportunity to present its evidence, it is apparent plaintiff cannot sustain its claim. See Caputo v. Vauver, 800 F. Supp. 168, 172 (D.N.J. 1992), aff'd, 995 F.2d 216 (3d Cir. 1993).

⁹ Plaintiff indicated that if the court were not persuaded that plaintiff was entitled to benefit of the bargain damages on its fraud claim, it would propose to add a claim for breach of contract. That a party elected to default on one claim would not, of course, justify granting relief against her on another legal claim with which she was not served. If plaintiff believes it is legally and practically sound to sue Ms. Lefkowitz for breach of contract, it will not be precluded from doing so. It would have until March 2000 to assert such a claim. See 42 Pa.C.S.A. § 5525. The court will dismiss this action against Ms. Lefkowitz without prejudice to plaintiff timely to assert any cognizable claim against her. In so doing, the court expresses no opinion on whether a breach of contract claim could be sustained against Ms. Lefkowitz on the record in this action.

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O R D E R

AND NOW, this day of March, 1998, following a hearing on plaintiff's request for entry of a final money judgment against defendant Lefkowitz and for the reasons articulated by the court at that proceeding and set forth in an accompanying memorandum, **IT IS HEREBY ORDERED** that the court's order imposing a default judgment on liability against defendant Lefkowitz is vacated and the sole claim against her in the above action is dismissed, without prejudice to plaintiff to file any new claim it may wish and in good faith be able to assert.

BY THE COURT:

JAY C. WALDMAN, J.