

300 So.3d 1236

District Court of Appeal of Florida, Third District.

ISLAND TRAVEL & TOURS, LTD.,
CO., et al., Appellants/Cross-Appellees,

v.

MYR INDEPENDENT, INC.,
Appellee/Cross-Appellant.

No. 3D16-1364

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Opinion filed March 25, 2020.

Synopsis

Background: Ticket seller brought suit against travel agency, its former partner in a joint venture, and several individuals affiliated with travel agency who took part in joint venture negotiations alleging claims for breach of contract, fraud in the inducement, negligent misrepresentation, and civil theft. Travel agency filed counterclaim seeking an accounting and for breach of contract. The Circuit Court, 11th Judicial Circuit, Miami-Dade County, [Antonio Arzola, J.](#), entered directed verdict in favor of negotiators on civil theft claim and final judgment against travel agency on breach of contract claim and against travel agency and negotiators on fraud in the inducement and negligent misrepresentation claims, and granted travel agency's motion for judgment notwithstanding the verdict as to ticket seller's civil theft claim against travel agency. Travel agency and negotiators appealed and ticket seller cross-appealed.

Holdings: The District Court of Appeal held that:

[1] verdict in favor of ticket seller on breach of contract claim was consistent with expert's approach for distribution of costs and profits, and thus supported by substantial evidence;

[2] tort claims for fraud in the inducement and negligent misrepresentation were based on same underlying conduct giving rise to contract claim, and thus seller could not prove tort claims; and

[3] ticket seller could not prevail on claim for civil theft.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal; Motion for New Trial; Motion for Judgment Notwithstanding the Verdict (JNOV).

West Headnotes (8)

[1] **Appeal and Error** — **Competent or credible evidence**

Appellate court will not disturb a final judgment that is based on a jury's verdict if there is competent substantial evidence to support the verdict.

[2] **Appeal and Error** — **De novo review**

Appeal and Error — **Sufficiency of evidence**

With respect to the trial court's entry of a directed verdict, appellate court's standard of review is de novo; however, appellate court can affirm a directed verdict only where no proper view of the evidence could sustain a verdict in favor of the nonmoving party.

1 Cases that cite this headnote

[3] **Appeal and Error** — **Prejudgment interest**

A trial court's decision concerning entitlement to prejudgment interest is reviewed de novo.

[4] **Evidence** — **Damages**

Joint Ventures — **Damages**

Jury's verdict in favor of ticket seller on breach of contract claim against travel agency, its former partner in joint venture, was consistent with expert's approach for distribution of costs and profits, and thus supported by substantial evidence; ticket seller's expert, a certified public accountant (CPA), testified that, based on parties' agreement to share costs of operations and profits of joint venture, each party should recover costs from joint venture's total collected revenue and then split remaining profits evenly.

[5] **Torts** — **Duty, breach, or wrong independent of contract**

A plaintiff may not recover in tort for a contract dispute unless the tort is independent of any breach of contract.

[4 Cases that cite this headnote](#)

[6] Fraud ➡ Effect of existence of remedy by action on contract

Ticket seller's tort claims for fraud in the inducement and negligent misrepresentation were based on the same underlying conduct giving rise to its contract claim, and thus seller was unable to prove its tort claims, where only properly alleged misrepresentation had to do with travel agency's failure to perform under joint venture contract, and seller sought exact same damages for both fraud claim and breach of contract claim.

[3 Cases that cite this headnote](#)

[7] Fraud ➡ Effect of existence of remedy by action on contract

Generally, fraud in the inducement is an independent tort because the alleged misrepresentation inducing one to enter into the contract is unrelated to the obligations under the contract.

[8] Conversion and Civil Theft ➡ Relation to contractual remedies

Evidence merely established existence of a contractual dispute, and not a criminal intent prior to alleged breach, and thus ticket seller could not prevail on claim for civil theft against former partner of failed joint venture.

[1 Cases that cite this headnote](#)

***1237** An Appeal from the Circuit Court for Miami-Dade County, [Antonio Arzola](#), Judge. Lower Tribunal No. 14-2954

Attorneys and Law Firms

Law Offices of Roberto Villasante, and [Roberto Villasante](#), Coral Gables, for appellants/cross-appellees.

Arnold R. Ginsberg, P.A., and [Arnold R. Ginsberg](#), Miami, for appellee/cross-appellant.

Before [FERNANDEZ, LINDSEY](#), and [GORDO](#),¹ JJ.

Opinion

PER CURIAM.

Appellants/Cross-Appellees Island Travel & Tours, Ltd. Co.; William Hauf; Ismael Sene; and Danny Looney (collectively, the “Island Appellants”) appeal from a final judgment entered in favor of Appellee/Cross-Appellant MYR Independent, Inc. for breach of contract, fraudulent inducement, and negligent misrepresentation. MYR cross appeals the trial court's entry of judgment as a matter of law on its civil theft claims. For the reasons set forth below, we affirm the final judgment with respect to breach of contract and civil theft, and we reverse the judgment on MYR's claims for fraudulent inducement and negligent misrepresentation. We also reverse the trial court's determination of the date of prejudgment interest and remand for further proceedings.

I. BACKGROUND

This case stems from a disagreement over the distribution of monies collected during a brief joint venture between Island and MYR. Beginning in the fall of 2013, representatives from the two companies met several times to discuss a potential business arrangement to facilitate travel between Miami and Cuba. Island would provide the flights, and MYR would sell tickets. The meetings culminated in an oral agreement to form a joint venture. Shortly thereafter, the parties entered into a written Joint Venture Agreement “to manage and share the costs of the operations and profits of Island as previously agreed by the Parties via verbal agreement.”

The joint venture was short-lived; the parties mutually terminated the arrangement after just over a month. It is undisputed that Island collected a total of \$1,069,130.10 during the joint venture and ***1238** that the total cost of the operation was \$1,014,847.01. It is also undisputed that in furtherance of the parties' agreement to share costs, MYR advanced several payments totaling \$390,137.25 into a bank account controlled by Island. The purpose of these advanced payments was to prepay certain fees to avoid flight cancellations. None of the joint venture's flights were cancelled.

When the parties were unable to agree how to distribute the money, MYR sued Island and several individuals affiliated with Island who took part in the joint venture negotiations (the “Island Individuals”).² Relevant to this appeal are MYR's claims for breach of contract, fraud in the inducement, negligent misrepresentation, and civil theft. Island, in turn, filed a counterclaim seeking an accounting and for breach of contract.

MYR's claims for fraud in the inducement and negligent misrepresentation, as set forth in its operative complaint, were based on the allegation that during the formation of the joint venture, the Island Appellants misrepresented “that the profit and cost of Island's Operation would be divided in equal shares” MYR later alleged five additional misrepresentations in its amended answer and affirmative defenses to defendants' counterclaim.³ MYR never amended its complaint to include these new allegations.

At the close of a five-day jury trial, Island moved for a directed verdict on all counts. The trial court entered a directed verdict in favor of the Island Individuals on MYR's civil theft claim,⁴ finding no evidence of criminal intent. The remaining counts went to the jury, which returned a verdict against Island on MYR's breach of contract and civil theft claims and against all Island Appellants on MYR's fraud in the inducement and negligent misrepresentation claims. The Island Appellants then moved for a new trial, which the court summarily denied, and for judgment notwithstanding the verdict, which the court granted only as to MYR's civil theft claim against Island.

Final judgment was entered against Island on MYR's breach of contract claim and against all Island Appellants on MYR's fraud in the inducement and negligent misrepresentation claims. MYR was awarded \$380,666.75 with accrued prejudgment interest from December 23, 2013. The Island Appellants appeal the final judgment entered in favor of MYR for breach of contract, fraudulent inducement, and negligent misrepresentation.⁵ The Island Appellants also challenge the date of prejudgment interest. MYR cross-appeals the trial court's entry of judgment on its civil theft claims.

II. STANDARD OF REVIEW

[1] [2] [3] We will not disturb a final judgment that is based on a jury's verdict if *1239 there is competent substantial evidence to support the verdict. See, e.g., [Coba](#)

[v. Tricam Indus., Inc.](#), 164 So. 3d 637, 643 (Fla. 2015) (citation omitted). With respect to the trial court's entry of a directed verdict, our standard of review is de novo; however, we “can affirm a directed verdict only where no proper view of the evidence could sustain a verdict in favor of the nonmoving party.” [Frieri v. Capital Inv. Servs., Inc.](#), 194 So. 3d 451, 455 (Fla. 3d DCA 2016) (quoting [Banco Espirito Santo Int'l, Ltd. v. BDO Int'l, B.V.](#), 979 So. 2d 1030, 1032 (Fla. 3d DCA 2008)). Finally, “[a] trial court's decision concerning entitlement to prejudgment interest is reviewed de novo.” [Albanese Popkin Hughes Cove, Inc. v. Scharlin](#), 141 So. 3d 743, 746 (Fla. 3d DCA 2014).

III. ANALYSIS

[4] We begin by briefly addressing Island's argument that there was no competent substantial evidence to support the jury's verdict in favor of MYR on its breach of contract claim. After closely reviewing the record, we disagree. MYR's expert, a certified public accountant, testified that based on the parties' agreement to share “costs of the operations and profits of Island,” each party should recover its costs from Island's total collected revenue and then split the remaining profits 50/50. The jury's verdict is consistent with this approach, and we therefore affirm the final judgment as to breach of contract.

Next we consider MYR's tort claims for fraud in the inducement and negligent misrepresentation. As an initial matter, we agree with the Island Appellants that MYR's claims cannot be based on alleged misrepresentations that were never mentioned in the operative complaint. See [Fla. R. Civ. P. 1.120](#) (“In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with such particularity as the circumstances may permit.”); [Houri v. Boaziz](#), 196 So. 3d 383, 393 (Fla. 3d DCA 2016) (“Fraud must be pled with particularity and must not only specifically identify a misrepresentation of fact but also identify when, where, or the manner in which it was made.” (citations omitted)); [Morgan v. W.R. Grace & Co.](#), 779 So. 2d 503, 506 (Fla. 2d DCA 2000) (“We conclude that the requirement that fraud be pleaded with specificity also applies to claims for negligent misrepresentation.”).⁶

The only alleged misrepresentation upon which MYR's claims could be based is stated as follows in the operative complaint: “The representations made by the [Island Appellants] to [MYR] during the formation of the Agreement that the profit and cost of Island's Operation would be divided

in equal shares of 50% were material and false.” The Island Appellants argue that MYR failed to prove all the elements of its fraud in the inducement and negligent misrepresentation claims. We agree.

[5] The only properly alleged misrepresentation simply has to do with Island’s failure to perform under the contract. It is a fundamental, long-standing common law principle that a plaintiff may not recover in tort for a contract dispute unless the tort is independent of any breach of contract. See [Peebles v. Puig](#), 223 So. 3d 1065, 1068 (Fla. 3d DCA 2017) (“[F]or an alleged misrepresentation regarding a contract to be actionable, the damages stemming from that misrepresentation must be independent, separate and distinct from the damages *1240 sustained from the contract’s breach.” (citation omitted)).

[6] [7] Because MYR’s tort claims are ultimately based on the same underlying conduct giving rise to its contract claim—Island’s alleged failure to equally divide “the profit and cost of Island’s Operation”—we hold that MYR is, as a matter of law, unable to establish its claims for fraud in the inducement⁷ and negligent misrepresentation. Further, because the date of pre-judgment interest was based on MYR’s misrepresentation claim, we reverse and remand for a calculation of prejudgment interest that is consistent with our holding.

[8] Finally, we address MYR’s argument on cross-appeal that the trial court erred in entering judgment as a matter of law on MYR’s civil theft claims. Based on the record before us, we affirm because there is no evidence of criminal intent prior to the alleged breach. See [Rosen v. Marlin](#), 486 So. 2d 623, 625 (Fla. 3d DCA 1986) (“Under Florida law, a necessary element for establishing the crime of theft is that the defendant had, prior to the commission of the act, an intent to commit a theft.” (citations omitted)). The evidence below merely established the existence of a contractual dispute, nothing more. See [Gasparini v. Pordomingo](#), 972 So. 2d 1053, 1055 (Fla. 3d DCA 2008) (“[C]ivil theft or conversion must go beyond, and be independent from, a failure to comply with the terms of a contract.” (citation omitted)).

IV. CONCLUSION

For the reasons stated, we affirm the judgment with respect to breach of contract and civil theft. We reverse with respect to fraudulent inducement, negligent misrepresentation, and prejudgment interest. The case is remanded to the trial court for further proceedings consistent with this opinion.

Affirmed in part; reversed in part and remanded.

All Citations

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Footnotes

- 1 Judge Gordo did not participate in oral argument.
- 2 William Hauf (Island’s sole director and president), Ismael Sene (an officer and employee of Island), and Danny Looney (Hauf’s advisor).
- 3 These new allegations were that the Island Appellants misrepresented (1) the amounts payable to Cuba, (2) the dates the amounts were payable, (3) the amount of the deposits that Island would make, (4) the dates advanced payments were payable to air-carriers, and (5) that Island would not use MYR’s advanced payments for operations outside of the joint venture.
- 4 The trial court also directed a verdict in favor of the Island Individuals on MYR’s unjust enrichment and civil conspiracy claims. This has not been challenged on appeal.
- 5 The Island Appellants also appeal the denial of their motion for judgment and motion for new trial, both of which involve the same claims addressed in the final judgment.
- 6 In its answer brief, MYR acknowledges that the unpled misrepresentations “went not to establish ‘new claims’ but to defeat the Defendants’ Counter-Claim[.]” (Exclamation mark omitted).

7 Generally, fraud in the inducement is an independent tort because the alleged misrepresentation inducing one to enter into the contract is unrelated to the obligations under the contract. See [HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.](#), 685 So. 2d 1238, 1239 (Fla. 1996). Here, however, MYR's fraud claim is clearly duplicative of its breach of contract claim. Indeed, MYR sought the exact same damages for both its fraud claim and its breach of contract claim. See [Williams v. Peak Resorts Intern. Inc.](#), 676 So. 2d 513, 517 (Fla. 5th DCA 1996) ("It is well settled that a party may not recover damages for both breach of contract and fraud unless the party first establishes that the damages arising from the fraud are separate or distinguishable from the damages arising from the breach of contract.").