STATE OF SOUTH CAROLINA COUNTY OF YORK Mark Giles Pafford, Plaintiff, vs. Robert Dwayne Duncan, Jr., Robert Duncan, Sr. and Frank Eason, DBA Rock City Heavy Hauling, Inc., Defendants.	IN THE COURT OF COMMON PLEAS Case No: 2017-CP46-02487 **ORDER**

This matter came before me for trial on January 7, 2020. The Plaintiff, Mark Giles Pafford was represented by John Martin Foster. The Defendants, Robert Wayne Duncan Jr. ("Duncan Jr."), Robert Wayne Duncan Sr. ("Duncan Sr."), and Frank Eason ("Eason") were represented by Stephen D. Schusterman.

BACKGROUND

Plaintiff filed an action in claim and delivery against Duncan Jr. to recover a used 2003 Kenworth W 3900 red truck, VIN # 1XKWDB9X03J392961 ("Kenworth"), and against both Duncan Jr. and Duncan Sr. for unpaid wages, penalties and attorney fees under S.C. Code § 41-10-40 *et seq*. Duncan Jr. and Duncan Sr. filed counter claims for breach of contract, fraud and negligent misrepresentation related to the sale of the Kenworth.

Additional matters raised in trial without objection included: the sale of two trailers and truck accessories along with the Kenworth; two modifications of the terms of sale regarding the Kenworth, and damages to a motorcycle owned by Duncan Sr. caused by Plaintiff's attempt to repossess the Kenworth.

At the close of Plaintiff's case, Defendant Eason moved for a directed verdict stating Plaintiff failed to carry his burden of proof that he was an owner or partner in the business known as Rock City Heavy Hauling, Inc. ("Rock City"). This motion was granted as the record was devoid of facts supporting said claim against Eason. "Defendants" hereafter include only Duncan Jr. and

Duncan Sr.

Based upon the testimony and documentary evidence and in consideration of the credibility of the witnesses, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

Duncan Sr., now retired, owned a trucking business known as Rock City Heavy Hauling, Inc. which his son, Duncan Jr., assisted with its operation. Plaintiff was employed by Rock City as an independent contractor trucker from February 10, 2015 through April 15, 2017, earning $1,000.00 per week.

Aside from his employment, in February of 2015, Plaintiff entered into an oral contract with Duncan Jr., for the sale of the Kenworth Truck, a 1998 Trailking trailer, a 2009 Trailking trailer and truck accessories. Duncan Jr. agreed to pay Plaintiff $85,000.00 in exchange for the truck and two trailers, and $10,000.00 for the truck accessories. Duncan Jr. took possession of the truck and trailers, but never received the truck accessories. Plaintiff was unsure of the price of the truck or trailers, stating Duncan Jr. set the price. Duncan Jr., who has thirty years of experience in the buying and selling of commercial trucks, trailers and related equipment, testified that the value of the 2009 Trailking Trailer was one-half of the agreement of $85,000.00. I find the value of the 2009 Trailking Trailer in Defendants' possession to be $42,500.00.

Thereafter, Plaintiff and Duncan Jr. agreed to modify the sale agreement. The modifications reduced the purchase price owed to Plaintiff. First, Plaintiff agreed to reduce the amount owed by $14,000.00 in exchange for a 2002 Ford Thunderbird. Second, Plaintiff agreed to reduce the amount owed by the costs of repairs to another truck/vehicle Plaintiff owned or possessed. The costs of the repairs were $8,068.09. (Defendant's Exhibit 3). Defendants completed the repairs to Plaintiff's other vehicle and returned to it to Plaintiff. After having the Thunderbird for about a week, Plaintiff returned it to Defendants' property, stating only he was not satisfied. Plaintiff refused return of the vehicle or the transfer of its title. Defendants later sold the vehicle to a third party for $8,000.00.

The parties agree that the sum total of payments made to Plaintiff toward wages and the sale agreement is $163,000.00[1]; however, Defendants dispute the amounts allotted by Plaintiff between these categories in his self-prepared spreadsheet (Plaintiff's exhibit 6). Most of the checks

1 The expenses of $11,067.62 are not in dispute and are omitted from further discussion or calculation.

and receipts in evidence do not show the purpose of the payment. A few show that $2,000.00 was paid toward wages, and $63,000.00 was paid toward the sale agreement. (Plaintiff's exhibit 5). Plaintiff admitted the payment amounts listed in his spreadsheet were applied arbitrarily, and there was no other evidence proving which category the remaining $98,000.00 in payments should be attributed. Therefore, this court is unable to make any such findings.

Plaintiff's claim for unpaid wages alleges Defendants failed to pay a weekly increase of $500.00 starting June 27, 2015. The evidence provided by Plaintiff in support consisted of Plaintiff's testimony, documents prepared by him, and witnesses restating what they were told by Plaintiff. Also, Plaintiff worked over eighteen (18) months without the increase and without addressing the issue with his employer. I find Plaintiff failed to prove his wages increased.

Plaintiff also failed to show that he has not been fully paid for wages he earned. Plaintiff marked ninety-one (91) weeks of earned wages in his spreadsheet. With a weekly wage of $1000.00, Plaintiff earned a total of $91,000.00. Plaintiff has been paid a total of $100,000.00 in addition to the $63,000.00 shown to have been paid toward the sale agreement. This amount more than fully covers the wages he earned, and Plaintiff has failed to show otherwise. Having failed to prove unpaid wages, Plaintiff is also not entitled to additional penalties or attorney's fees as provided in S.C. Code Ann. section 41-10-10 *et seq.*

Plaintiff's remaining actions involve claim and delivery of the truck, trailers and accessories. Plaintiff is the current titleholder and owner of the Kenworth truck and 1998 Trailking Trailer. (Plaintiff's Exhibit 4 and exhibits attached to Plaintiff's Amended Complaint received into evidence). No title was provided for the 2009 trailer, and when questioned further about this trailer, Plaintiff's answers were evasive, conflicting and untruthful. Plaintiff admitted that in 2010 he reported a 2009 Trailking trailer stolen to the sheriff's office, but stated the last time he saw it was after he dropped it off at a gas station for repossession. Plaintiff admitted the trailer he reported stolen in 2010 was the same trailer sold to Duncan Jr., but later denied knowing what trailer he sold as he did not check the VIN number. Plaintiff explained the 2009 trailer now with Defendants just appeared in a yard in Chester County that Plaintiff frequently used; however, he was unable to provide the name of the yard owner, or how he was notified of the trailer's appearance. Plaintiff also stated the trailer may be stolen, the Defendants knew, and could forge a title. Both Defendants denied these allegations.

In an attempt to take back possession of the Kenworth, Plaintiff admitted to entering onto

the Defendants' property without permission. Plaintiff crawled through a window to gain access inside the building where the truck was stored. Plaintiff was stopped by law enforcement before leaving the area with the truck. Underneath the window that Plaintiff used for access into the storage building was parked a Harley Davidson motorcycle belonging to Duncan Sr. After checking the motorcycle, Duncan Sr. observed scratches had been made in the paint by Plaintiff's entry. Duncan Sr. paid $4,195.00 to repair the damage. (Defendants' Exhibit 4).

CONCLUSIONS OF LAW

In order to prevail in claim and delivery, Plaintiff must prove by a preponderance of the evidence that he is the owner of the subject property, and that the subject property is wrongfully retained by Defendants. *Jackson v. Frier*, 146 S.C. 322, 144 S.E. 66 (1928) (citation omitted); S.C. Code Ann. § 15-69-30. Based on this standard, Plaintiff has failed to prove all the necessary elements to warrant return of the property or their value.

First, Plaintiff failed to prove the Defendants are in possession of the truck accessories.

Second, Plaintiff failed to prove he is the owner of the 2009 trailer currently in the Defendants' possession. No current title was provided, and Plaintiff stated repeatedly that he was unsure of what trailer was in Defendants' possession, and whether he could transfer good title. Plaintiff also stated it may be stolen.

Last, Plaintiff has failed to show that he has not been paid in full for the sale of the items and Defendants are in wrongful possession. As stated before, Plaintiff arbitrarily applied payments in his spreadsheet and cannot account for $98,000.00 in payments. It is Plaintiff's burden to show that what amount is unpaid as to the sale agreement, and he has failed to do so.

Aside from Plaintiff's claims, Defendants filed counterclaims for breach of contract, negligent misrepresentation and fraud relating to the 2009 Trailking Trailer and Plaintiff's ability to transfer valid title as agreed.

To maintain a cause of action for negligent misrepresentation, a party must demonstrate by a preponderance of the evidence that the opposing party: made a false representation; had a pecuniary interest in making the statement; owed a duty of care to communicate truthful information and failed to exercise said due care; and the injured party justifiably relied on the representation and suffered a pecuniary loss relying upon the representation. *Gecy v. South Carolina Bank and Trust*, 422 S.C. 509, 812 S.E.2d 750 (Ct. App. 2018) (citation omitted).

The burden of proving fraud is higher. In an action for fraud, one must show by clear and

convincing evidence: "(1) a representation; (2) its falsity; (3) its materiality; (4) knowledge of its falsity or a reckless disregard for its truth or falsity; (5) intent that the plaintiff act upon the representation; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury." *McLaughlin v. Williams*, 379 S.C. 451, 456, 665 S.E.2d 667, 670 (Ct. App. 2008), *citing Hendricks v. Hicks*, 374 S.C. 616, 649 S.E.2d 151 (Ct. App. 2007).

Plaintiff represented to Duncan Jr. when he sold the 2009 trailer now in Defendants' possession that he could transfer valid title. The evidence shows this is false and Plaintiff had knowledge or certainly a reckless disregard for its truth. Plaintiff does not currently have title and has had years to acquire it if this were possible. The falsity is made more evident by Plaintiff's denial of knowing what trailer he sold, and his story of its sudden appearance in Chester County, and stolen nature. I find and conclude the evidence supports fraud, or in the alternative, the lesser standard of negligent misrepresentation.

For damages, Defendants state their preference is to affirm the contract. An action in fraud allows a party to affirm the contract, retain the benefits received under it, and seek to recover damages by reason of the fraud. *Baeza v. Robert E. Lee Chrysler, Plymouth, Dodge, Inc.*, 279 S.C. 468, 309 S.E.2d 763 (Ct. App. 1983) (citation omitted). Damages are measured by the difference between the value as represented and the value actually received which may be offset by the unpaid balance of the purchase price. *Id.* Defendants have proven damages to be $42,500.00; the difference in value of the equipment Plaintiff represented he would convey, and the value of the equipment he can actually transfer. Though Plaintiff failed to prove there was an unpaid balance as to the equipment, I offset the unpaid balance determined by treating wages and equipment as one category. Based upon my previous findings, Plaintiff is owed a total of $163,931.91 for wages and the sale agreement. Defendants have paid $163,000.00. This leaves an unpaid balance of $931.91. Second, Defendants agree damages should be offset by the resale value of the Thunderbird ($8,000.00). Thus, Defendants are entitled to damages in the amount of $33,568.09, and the 2009 trailer shall be returned to the Plaintiff.

Having found for Defendants as to negligent misrepresentation and fraud, I make no rulings regarding Defendants' claim for breach of contract for the same damages.

ORDER

WHEREFORE, this Court finds:

1. Defendant Frank Eason's motion for directed verdict is granted and he is dismissed as a party to this action;

2. Plaintiff's claims are dismissed;

3. Defendants are granted judgment against Plaintiff in the amount of $33,568.09, due within thirty (30) days from the date of service of this Order;

4. Defendant Robert Wayne Duncan Sr. is granted judgment against Plaintiff in the amount of $4,195.00;

5. Plaintiff shall transfer title of the 2003 Kenworth and 1998 Trailking Trailer to the Defendants within thirty (30) days of this order;

6. Defendants shall within thirty (30) days from the date of service of this Order return possession of the 2009 Trailking trailer to the Plaintiff; and

7. The Parties are responsible for their own attorney's fees and costs.

JUDGE'S SIGNATURE PAGE TO FOLLOW