NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA-08-781

PRESTON & EUNICE FERGUSON
APPELLANTS

V.

TRI-CITY INVESTMENTS, L.L.C.
APPELLEE

Opinion Delivered FEBRUARY 4, 2009

APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT,
[NO. CV 2006-2573-5]

HONORABLE GARY L. CARSON, JUDGE

AFFIRMED

RITA W. GRUBER, Judge

Preston and Eunice Ferguson appeal from an order of the Washington County Circuit Court rescinding a written contract between them and Tri-City Investments, LLC, for the sale of certain commercial property in Fayetteville. The Fergusons assert two points on appeal: first, the circuit court clearly erred in finding constructive fraud and ordering rescission on that basis; and, second, the circuit court clearly erred in finding a mutual mistake and ordering rescission without identifying the mutual mistake. We find no error, and we affirm the order of the circuit court.

The Fergusons owned commercial property in Fayetteville referred to by the parties as the Stonebridge property. On December 2, 2005, The Nelson & Beaty Company, LLLP (NBC), entered into a contract with the Fergusons to purchase the Stonebridge property, conditioned on the City of Fayetteville approving the property for a large-scale development. The contract also provided NBC with a 120-day contingency period in which to decide

whether to close on the sale in "Buyer's sole discretion." On December 5, 2005, NBC assigned its interest in this contract to appellee, Tri-City. Tri-City is owned by Lance Beaty and Chris Beaty and by NBC's real estate brokers for this transaction, Jay Rodman and Sean Trumbo.

Tri-City filed an application with the City of Fayetteville for approval of "The Shoppes at Stonebridge," a large-scale development, which was approved. On April 27, 2006, Tri-City entered into a contract with Rolin Park, LLC, owned by Helen and John Selig, to sell the Stonebridge property to Rolin Park. The sale of the Stonebridge property from the Fergusons to Tri-City closed on June 1, 2006, followed immediately by the closing on the sale from Tri-City to Rolin Park.

The problems arose shortly thereafter when the Fergusons' son, David Ferguson, provided to Rolin Park copies of two executed long-term leases that he claimed were in full force and effect on the Stonebridge property: a 2004 All My Treasures Lease and a 2005 David Ferguson Lease. Neither Tri-City nor Rolin Park had been given a copy of either of these executed leases before the closings. Because Rolin Park intended to develop the property within several years and Tri-City had assured Rolin Park that there were no long-term leases encumbering the property, but only month-to-month handshake agreements with the tenants, Rolin Park sued Tri-City for rescission of the sale of the Stonebridge property on November 15, 2006. Tri-City answered and filed a third-party complaint against the Fergusons, requesting the court to rescind the contract between it and the Fergusons if the court rescinded the contract between Rolin Park and Tri-City.

After a bench trial, the circuit court entered a letter order on November 20, 2007, rescinding the contract and warranty deed between Rolin Park and Tri-City for substantial failure of consideration and rescinding the contract and warranty deed between Tri-City and the Fergusons for constructive fraud and mutual mistake. On February 8, 2008, the circuit court entered a judgment detailing its order of rescission and incorporating its letter order. The Fergusons filed this appeal from the circuit court's judgment.

We review equity cases de novo; however, we will not reverse the trial court's findings of fact unless they are clearly erroneous. *Riley v. Hoisington*, 80 Ark. App. 346, 96 S.W.3d 743 (2003); *see also* Ark. R. Civ. P. 52(a). Facts in dispute and determinations of credibility are within the province of the factfinder. *El Paso Prod. Co. v. Blanchard*, 371 Ark. 634, 640, 269 S.W.3d 362, 368 (2007).

The Fergusons' first point on appeal is that the circuit court erred in finding constructive fraud and ordering rescission on that ground. In order to rescind a written contract by proof that alters the written terms of the contract, we have held that a plaintiff must prove the fraudulent misrepresentations by clear and convincing evidence. *See Riley*, 80 Ark. App. at 350, 96 S.W.3d at 746 (citing *Strout Realty, Inc. v. Burghoff*, 19 Ark. App. 176, 718 S.W.2d 469 (1986)). Clear and convincing evidence is that degree of proof which produces in the factfinder a firm conviction as to the allegation sought to be established; it is not necessary that the evidence be undisputed to be clear and convincing, so long as it imparts a clear conviction to the mind of the factfinder. *Id.*

The supreme court has described constructive fraud in a rescission case as follows:

> To rescind a contract based upon fraud, it is not necessary that actual fraud exist. It is well settled that representations are construed to be fraudulent when made by one who either knows the assurances to be false or else not knowing the verity asserts them to be true. (Citing cases). In 37 C.J.S. Frauds, § 2, Pg. 211, constructive fraud is succinctly defined as 'a breach of legal or equitable duty which, irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because its tendency to deceive others . . . *Neither actual dishonesty of purpose nor intent to deceive* is an essential element of constructive fraud'. [Emphasis in original.]
>
> In the case at bar it is undisputed that the [purchasers] relied, to their detriment, upon the statements and assurances made to them by the [sellers] and these statements proved to be untrue. [Sellers] lack of knowledge of these material representations asserted by them to be true is no defense nor can liability be escaped by their good faith in making the representations.

80 Ark. App. at 353–54, 96 S.W.3d at 748 (quoting *Lane v. Rachel*, 239 Ark. 400, 389 S.W.2d 621 (1965)). In *Cardiac Thoracic & Vascular Surgery, P.A. Profit Sharing Trust v. Bond*, 310 Ark. 798, 840 S.W.2d 188 (1992), the supreme court applied a four-part test for determining whether constructive fraud existed in a rescission case:

> (a) Was the fraud material to the contract; did it relate to some matter of inducement to the making of the contract?
> (b) Did it work an injury?
> (c) Was the relative position of the parties such, and their means of information such, that the one must necessarily be presumed to contract upon the faith reposed in the statements of the other?
> (d) Did the injured party rely upon the fraudulent statements of the other, and did he have a right to rely upon them?

310 Ark. at 806, 840 S.W.2d at 192 (quoting *Ballard v. Carroll*, 2 Ark. App. 283, 621 S.W.2d 484 (1981)).

The circuit court found that Tri-City was purchasing the property to develop it; that Tri-City would not have been interested in the property if there were leases of a significant duration on the property; and that Tri-City would not have closed on the transaction with

the Fergusons if it had known of the existence of long-term leases against the property. It found further—based upon the sellers' disclosure statement, the owners' affidavit signed at closing, two unsigned long-term leases, and representations by the Fergusons' real estate agent that there were no long-term leases against the property, all of which, the court found, Tri-City relied upon and which were substantially material to the transaction—that there was clear and convincing evidence of constructive fraud and mutual mistake supporting rescission.

The Fergusons admit that evidence exists to support the trial court's finding of constructive fraud. Indeed, they do not challenge the circuit court's finding that Tri-City was purchasing the property to develop it, which included tearing down the existing buildings on the property. They argue, however, that the evidence was not sufficient to meet a clear-and-convincing standard of proof. Relying upon two "admissions" by Tri-City, they argue that the proof was not met on the issues of whether Tri-City knew at the time of closing that there were long-term leases on the property and whether the existence of these long-term leases was a "material" fact. The pertinent admissions propounded by the Fergusons and answered by Tri-City in pre-trial discovery are set forth herein:

> REQUEST FOR ADMISSION NO. 7: Admit that Tri-City Investments, LLC intended to convey the real property described in Request for Admission No. 6 to Plaintiff [Rolin Park] without any long term leases.
>
> RESPONSE: Denied.
>
> REQUEST FOR ADMISSION NO. 13: Admit that the absent existence [sic] of long term leases was a major factor in both Defendant's [Tri-City's] purchase and subsequent sale to Plaintiff [Rolin Park].
>
> RESPONSE: Denied. Tri-City affirmatively states that this sentence may contain typographical errors. In any event, Tri-City cannot admit that the

absence of long term leases was a "major" factor in both its purchase and Rolin Park's purchase of the subject property.

The Fergusons contend that Tri-City's responses to these admissions directly conflicted with the evidence Tri-City presented at trial and thus that the trial court erred in finding constructive fraud by clear and convincing evidence. With regard to Tri-City's denial of Admission No. 7, the Fergusons argue that, because Tri-City denied that it intended to convey the property to Rolin Park without long-term leases, Tri-City was admitting that it knew about the long-term leases. The Fergusons next argue that Tri-City's refusal to admit that the absence of long-term leases was a "major" factor in its purchase of the property directly conflicted with its position at trial that the absence of long-term leases was material to its decision to purchase the property.

Tri-City presented the following evidence to support its position at trial. First, the Fergusons provided a property disclosure statement dated December 12, 2005, indicating that there were no leases affecting the property that a title search would not reveal. There is no dispute that there were no recorded leases on the property. The disclosure statement also mentioned month-to-month leases affecting the property. Second, the owners' affidavit, signed by the Fergusons at closing, stated that there were no lease agreements outstanding which affected the property. The Fergusons testified at trial that this was a mistake because they both knew at the time that there were two long-term leases on the property. Finally, there was a factual dispute regarding exactly what information the Fergusons' broker, Stacy McSpadden, provided in November 2005 to Jay Rodman, the real estate broker for NBC and later a principal of and broker for Tri-City.

Both Mr. Rodman and Ms. McSpadden agreed at trial that Mr. Rodman asked her if any of the tenants had leases of a significant duration. After checking with David Ferguson, the Fergusons' son who managed the property, Ms. McSpadden provided to Mr. Rodman copies of two *unexecuted* leases—a 2004 lease for All My Treasures and a 2005 lease for David Ferguson. Both leases provided five-year lease terms with five-year options. At this point, their testimony diverged. Mr. Rodman testified that either of these leases, if signed and in full force and effect, would have been a "deal breaker" for NBC, which wanted to develop the property before 2015. He testified that he called Ms. McSpadden for further information and that she confirmed that the leases had never been executed and that all tenants were operating under oral month-to-month leases that could be terminated upon thirty days' notice. Conversely, Ms. McSpadden testified that she did not remember speaking to Mr. Rodman about the leases after providing them to him. She said that she would not have told anyone that there were only month-to-month leases on the property because that was not what she believed.

The court specifically found in its letter opinion that the credible evidence supported the testimony of Mr. Rodman. Moreover, the court made the following statement in its letter opinion before setting forth any of its findings of fact and conclusions of law:

> During the two days of trial, the Court listened very carefully to the testimony of all the parties and their witnesses and has had ample time to read, with some care, the numerous exhibits that were put into evidence. The Court had an opportunity to personally observe the parties and the participants, watch their body language, their demeanor, and listen to the tone of their voices as they testified. The Court has had a full opportunity to judge the consistency or inconsistency of the testimony and has certainly had an opportunity to come to a conclusion concerning the credibility of the witnesses through personal

> observation. The findings and [sic] fact and conclusions of law that I am about to give rely in no small measure upon the ability to personally observe the witnesses as they testified.

We reject the Fergusons' argument that the circuit court clearly erred because it chose not to rely upon two admissions from pretrial discovery that were arguably inconsistent with evidence presented at trial. The circuit court weighed the conflicting evidence and made specific findings supporting its finding of constructive fraud. Facts in dispute and determinations of credibility are within the province of the factfinder. *El Paso Prod. Co.*, 371 Ark. at 640, ___ S.W.3d at ___. Here, the court's findings by clear and convincing evidence that Tri-City did not know at the time of closing that there were long-term leases on the property and that the existence of these long-term leases was substantially material to the transaction are not clearly erroneous. Therefore, we affirm its order of rescission on the basis of constructive fraud.

Because we affirm the circuit court's order of rescission on the basis of constructive fraud, we need not address whether the court erred in ordering rescission on the alternate basis of mutual mistake.

Affirmed.

VAUGHT, C.J., and ROBBINS, J., agree.