

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOVEMBER 20, 1996

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2661

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

FRANCIS LIU,

Plaintiff-Appellant,

v.

MARK CHAO,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Racine County:
ALLAN B. TORHORST, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Francis Liu appeals from a judgment dismissing his complaint against Mark Chao, Liu's former partner in a restaurant business. On October 1, 1993, Liu and Chao sold the restaurant to William Dye, the attorney for an undisclosed principal. On October 5, 1993, Dye sold the restaurant to Chao at the direction of the undisclosed principals, who were

revealed to be Fred and Gretchen Hackbarth, the parents of Chao's fiancée. Liu then sued Chao, seeking rescission of the sale or, alternatively, a money judgment. The trial court dismissed the complaint after a trial to the court. We affirm its judgment.

Prior to the initial sale, Liu had indicated to both Chao and the broker who handled the listing contract that he refused to sell his share of the business to Chao. Evidence at trial indicated that after receiving the offer from Attorney Dye, Liu requested the broker to ask Chao whether he was trying to buy the restaurant through a third party, to which Chao answered "no." Liu further testified that, while reviewing the offer and a proposed counteroffer, he asked Chao if he had any idea who might be purchasing the restaurant, and Chao told him he had no idea. Liu testified that, before the closing, Chao also told him that he "was not involved with the buying," that he had no financing with which to buy the restaurant, and that he had arranged for a new job in Milwaukee after the restaurant was sold.

After acquisition of the restaurant by Chao, Liu commenced this action, alleging that Chao, as his business partner, had a legal duty to disclose to him that the Hackbarths were the undisclosed principals seeking to buy the business, and that Chao had consented to manage the business after the sale to them. On appeal, Liu reiterates this argument, claiming that Chao's actions violated §§ 178.17 and 178.18(1), STATS. In addition, he contends that he acted reasonably in relying on Chao's representations that he was not involved in

buying the business, did not know who the purchasers were, and was taking a job in Milwaukee.

The findings of fact made by a trial court in a trial to the court will not be disturbed unless they are clearly erroneous. *Noll v. Dimiceli's, Inc.*, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). Where the trial court acts as the finder of fact and there is conflicting testimony, the trial court is the ultimate arbiter of the credibility of the witnesses. *Id.* at 644, 340 N.W.2d at 577. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trial court. *Id.*

After hearing the testimony in this case, the trial court found that the sale to the Hackbarths, acting through Dye, was fair and equitable and constituted an arms-length transaction with an unrelated, independent buyer. In reaching this conclusion, it found that the sales price paid for the restaurant was fair and reasonable, and resulted from arms-length negotiations between both partners, the broker, and Dye as agent for the Hackbarths, producing an offer and counteroffer. It also found that, at the time of the offer and counteroffer, the Hackbarths intended to purchase the restaurant for themselves and merely to employ Chao in operating it. It further found that the Hackbarths had a reasonable basis for deciding to transfer ownership to Chao after acceptance of the counteroffer. In addition, it found that they remained at financial risk after the sale to Chao and their acceptance of a promissory note from him because the mortgage they took out on their home to obtain the

purchase money for the restaurant remained in effect. Based on these factors, it found that the Hackbarths' original purchase of the restaurant through Dye was legitimate and arms-length.

Because these findings of fact are not clearly erroneous, they cannot be disturbed by this court on appeal.¹ Based on the findings, particularly the finding that the sale to the Hackbarths was a bona fide, good faith transaction, Chao's representations that he was not buying the restaurant or involved in buying it must be deemed truthful. Chao's subsequent purchase of the restaurant therefore cannot be deemed part of a subterfuge entitling Liu to any kind of relief, even assuming the partnership statutes cited by him apply.

In making this determination, we note that the trial court made no finding as to truth of Liu's allegation that Chao denied knowing who the buyers were. However, even if true, Chao's failure to disclose that he knew who the buyers were and that they intended to hire him as a manager provides no basis for relief. Based on the trial court's finding that the sale to the Hackbarths was a bona fide, arms length transaction, the information about who they were and their intent to hire Chao did not affect the partnership in any way, or the financial gain it would receive from the sale. Since Chao's potential employment by the new owners was not a type of financial benefit that affected the partnership or its financial gain from the sale, the trial court properly determined that no right to relief arose under §§ 178.17 and 178.18(1), STATS.

¹ We note that in his appeal briefs, Liu indicates that he is not challenging the fairness of the sales price or the finding that the Hackbarths intended to buy the business for themselves and have Chao manage it.

By the Court. – Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.