Circuit Court for Cecil County
Case No. C07-CV17-555

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2501

September Term, 2019

MICHAEL W. DePASQUALE, JR.

v.

FRANK BLOMQUIST

Graeff,
Beachley,
Eyler, James R.,
(Senior Judge, Specially Assigned),
JJ.

Opinion by Eyler, James R., J.

Filed: May 7, 2021

This appeal arises from a dispute involving the sale of a vending machine business by Michael W. DePasquale, Jr., appellant, to Frank Blomquist, appellee. On October 20, 2017, Blomquist filed a complaint in the Circuit Court for Cecil County against DePasquale and Brenda Kerr alleging fraudulent inducement, breach of contract, and negligent misrepresentation. An amended complaint was later filed adding additional factual allegations in support of the claim for breach of contract. At a hearing on May 7, 2019, the claims against Brenda Kerr were dismissed with prejudice. A bench trial was held on May 7 and 8, 2019, December 10-13, 2019, and January 24, 2020. The circuit court found that DePasquale fraudulently induced Blomquist to purchase the vending machine business. The court determined that the claims for breach of contract or negligent misrepresentation were "contained within the" fraudulent inducement claim. The court awarded damages in the amount of $234,000 in favor of Blomquist. This timely appeal followed.

QUESTIONS PRESENTED

DePasquale presented five questions[1] for our consideration, which we have consolidated and rephrased as follows:

[1] DePasquale stated the questions presented as follows:

> I Was the Circuit Court's finding that there was clear and convincing evidence of fraud clearly erroneous, based on the Appellee's four month record of lower sales operating the business, when it was undisputed that the Appellee had no prior experience operating a vending business, that he mismanaged it and lost its biggest customer, and the he began to liquidate the business piecemeal thereafter?
>
> II. Was the Circuit Court's finding that there was clear and convincing evidence of fraud clearly erroneous, when the Appellee had no reasonable

I. Was the evidence sufficient to support the circuit court's finding of fraud in the inducement?

II. Did the trial court err in its award of damages?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

DePasquale had a long history in the vending machine business. He was introduced to the business by his father, Michael DePasquale, Sr., who was the owner of Atlantic Vending Company.[2] In the mid-2000s, he began locating vending machines at various locations under the trade name Elite Vending Services. In about 2010 and 2011, he had a

right to rely on the Appellant's sales records from 2012-2014 to forecast Appellee's prospective sales for 2017, when Appellee failed to conduct sufficient due diligence and when he disregarded the lower sales he actually observed prior to his purchase of the business?

III. Was the Circuit Court legally correct in its method of calculating damages, when Appellee failed to produce any expert or other competent evidence of the fair and reasonable value of his actual damages, or of the actual value of the business as of the date he purchased it?

IV. Was the Circuit Court legally correct in its method of calculating damages, when it failed to credit the Appellant for the agreed value of the cash, inventory, equipment and machinery Appellee actually received on the date of settlement?

V. Was the Circuit Court legally correct in its method of calculating damages, when it failed to credit the Appellant for the value of the portion of the business which was lost as the sole result of the Appellee's mismanagement of the business?

[2] DePasquale's father, Michael DePasquale, Sr., whom we shall refer to as DePasquale, Sr., did not own Elite Vending Services, which is the subject of the instant case. According to DePasquale, Sr., his son went into the vending business on his own in approximately 2004.

warehouse in Cecil County where he stored some of his vending machines. At some point, floods caused damage to some of the vending machines stored in that warehouse. In about 2014, those flood-damaged machines were "junked" and DePasquale abandoned the warehouse. Sometime thereafter, DePasquale considered getting out of the vending machine business.

In October 2015, DePasquale met with Joe Gerst, a business broker, who he eventually retained to sell Elite Vending Services. Gerst listed the business for $650,000. Through Gerst, DePasquale received from Amy Miller an offer to purchase the company. On April 12, 2016, Miller purchased the business for $500,000 and DePasquale paid Gerst $25,000 in commissions. Shortly after purchasing Elite Vending Services, Miller contacted DePasquale and asked him to take the business back. On May 2, 2016, DePasquale and Miller entered into a rescission agreement pursuant to which DePasquale paid Miller $315,000 and Miller returned the business to him. DePasquale continued to work on a full-time basis but decided to have Gerst re-list the company for sale.

In November 2016, Blomquist saw an internet ad for the sale of Elite Vending Services. The ad, which had been placed by Gerst, indicated that the owner of the business was "retiring after 30 years/going into unrelated business type." The ad listed a price of $600,000, cash flow of $346,643, and gross revenue of $721,682. According to the ad, the business was established in 1986 and included "186 quality vending machines situated throughout 5 Eastern counties[.]" The ad also provided, "approximately $40K of products in machines included with sale; however coins in machines not included. Seller has loyal customers." Two weeks of training were to be provided after settlement.

Blomquist had experience purchasing convenience stores and restaurants, but no experience in the vending machine business. Notwithstanding the fact that neither he nor any of his family members had ever owned or operated a vending machine business, Blomquist contacted Gerst. After Blomquist signed a non-disclosure agreement, Gerst sent him a business profile for Elite Vending Services. After "researching that business profile," Blomquist asked for financial statements and was provided with Elite Vending Services's Schedule C's for 2012 through 2015. The 2012 Schedule C showed that the business had a net profit of $295,533; the 2013 Schedule C showed a net profit of $304,299; the 2014 Schedule C showed a net profit of $340,576; and the 2015 Schedule C showed a net profit of $346,563. Blomquist "was impressed" with the "great net profit" and thought that "with an asking price at the time of 600,000," "this was a very viable business to buy." Blomquist called Gerst and made a verbal offer to purchase Elite Vending Services for $550,000.

Within a couple of days, Blomquist "got a verbal approval for that amount" and Blomquist started to look for financing. Blomquist had $175,000 in cash but could not obtain financing for the full $550,000. DePasquale agreed to reduce the purchase price to $475,000 and Blomquist was able to secure financing.

Blomquist met with DePasquale on November 5, 2016 and rode with him in his truck for three days. They spent 10 to 12 hours a day "checking out locations and stops." DePasquale showed Blomquist how to put snacks and sodas in the machines, how to collect money from the machines, how to check if the bill validator was working, how to make repairs, and how he purchased products to be placed in the vending machines.

Blomquist requested copies of DePasquale's personal income tax forms. DePasquale provided income tax forms for 2014 and 2015 and financial statements for 2013 through 2015 and a portion of 2016. The tax returns showed a net profit for Elite Vending Services of $340,576 in 2014 and $346,563 in 2015.

Blomquist intended to employ family members in the business and he made arrangements for his daughter, Corrina, and his son-in-law, Kent Massie, to move to Maryland from Wyoming. Corrina and Kent each spent a few days riding along with DePasquale. They observed the work he performed at various locations and counted some of the money that was collected. Blomquist questioned DePasquale about why the revenue collected by his daughter and son-in-law was less than expected, and he responded that he was taking them to many stops to show them the locations, even though those accounts were not normally serviced on those days.

DePasquale's attorney prepared an agreement of sale. Blomquist testified that the initial draft of that agreement allocated $250,000 of the purchase price to the equipment. He challenged that allocation because although the business description provided by Gerst indicated the equipment was valued at $1,200 per machine, DePasquale had told him that each of the 180 machines was worth $2,000, or a total of $360,000. Blomquist rounded up that figure and asked to have the equipment allocated at $400,000. The agreement of sale was ultimately amended to reflect an allocation of $400,000 for equipment (including product and cash in the machines), $70,000 in customer contracts and goodwill, and $5,000 for a covenant not to compete.

The parties closed on the sale on March 1, 2017 with a purchase price of $475,000. The agreement included, among other things, the sale of customer accounts, vehicles, and vending machines, including the products and money in them. Among other provisions, section 2.6 of the agreement of sale included the following warranty:

> Seller has duly filed all tax reports and returns required to be filed by it, and has duly paid all taxes and other charges due or claimed to be due from it and the Business by federal, state, or local taxing authorities (including, without limitation, income, franchise, property, excise, license, sale, corporate, and employment taxes), and there are no tax liens upon any of the assets except liens for current taxes not yet due.

Pursuant to section 2.10 of the agreement of sale, the representations made in section 2.6 were to "survive Closing for six months."

A list of all the vending locations and the amount of revenue generated on a weekly and annual basis in 2012, 2013, and 2014 was attached to the agreement of sale. DePasquale provided written information about the type and quantity of products to order for each truck, the amount of product to have on hand each day, a list of accounts, and advice on how often to stop at each location.

At the end of Blomquist's first week operating Elite Vending Services, the business had generated revenue of only $7,000. Based on the financial statements and tax returns he had received, Blomquist anticipated revenue of $15,000. Blomquist contacted DePasquale and according to Blomquist, the following occurred:

> [DePasquale] told me that, [i]t's a slow time of year, I told you that. I said, Mike, you didn't tell me that. He said, [w]ell, what's Restoration Hardware doing? I told him the dollar amount. He said, [w]ell, there's your problem, he said they're real slow right now because it's Chinese New Year. I said, [w]ell, what does the Chinese New Year have to do with it? Then he explained to me that Restoration Hardware imports most of their products

> from China and China goes through a two week holiday over there, they don't work, none of the goods gets shipped into the warehouse. He said, [i]t will pick up, don't worry about it.

Shortly thereafter, Blomquist asked DePasquale to provide instructions for completing commission reports and sample commission sheets so that he could see how to calculate commissions. After receiving those items and reviewing them, Blomquist noticed that "the revenue used for particular accounts didn't match the amount of money that was shown on the sales log that [DePasquale] had given me. It seemed to be about one third." Blomquist testified that at the bottom of the stack of commission sheets, there "was another two-page sheet that was instructions on how to cheat the commission account." That document was admitted in evidence.

On about March 20, 2017, Blomquist received a call from DePasquale advising that he had received a termination letter from Elite Vending Services's largest account, Restoration Hardware. Blomquist testified that when he asked what the problem was, the following exchange occurred:

> And I said, Okay, well, are you going to send me a copy or give me a copy? What's the problem? Well, what the letter says and what the real problem is is two different things. I said, Oh, what do you mean? He said, Well, Restoration Hardware listed a bunch of grievances, but what they really want is they want to put in a micromart and the business, they do not have enough employees that would support a micromart. They offered it to me a couple months ago and I turned them down. So he basically said that what they're saying in this letter and what is reality is two different things.

DePasquale had not advised Blomquist prior to entering into the sales agreement that Restoration Hardware intended to terminate its contract. The business did not improve through the month of March. On April 1, 2017, Blomquist and DePasquale met to discuss

the revenue generated in March. Blomquist prepared a spreadsheet showing every account and the revenue generated and asked DePasquale to explain why the revenue was $31,500 less than it should have been. According to Blomquist, the following occurred:

> And I asked Mr. DePasquale, I said, I want you to show me which accounts are short, where is the problem here, why am I $31,500 short of where I'm supposed to be? I'm supposed to be generating $60,000 a month. I'm generating $28,500. Please show me. Show me on this revenue sheet which account, where is the problem. He wouldn't even look at my revenue sheet. He says, I know what the problem is. I said, What's that, Mike. He said, Well, Masons called last week and said their snack machine was almost empty. I said, Really, so that's $31,500, Mike? He said, Well, Red Roof Inn called said they were out of Mt. Dew. I said, No, Mike, they're not out of Mt. dew. They're out of Code Red Mt. Dew, you didn't leave me any, and it took me over a week to find any. I went to BJ's, I went to Sam's Club, Venn Central (sic). I found it at Wal-Mart. It now has Code Red Mt. Dew. I said, Mike, you're not making sense, that's not $31,000. Well, RC Service Center called and said they were out of Reese's peanut butter cups. I threw up my hands. I mean, there's no talking to him. At that point I told him that I was going to sue him.

Several weeks later, Blomquist retained counsel to pursue a fraud claim against DePasquale. At some point after April 1, 2017, Blomquist observed DePasquale filling snack and soda machines at a Rodeway Inn in Newark, Delaware, at a Jiffy Lube in Aberdeen, Maryland, and at the Chesapeake Service Center in Elkton, Maryland. Blomquist believed that DePasquale had breached a covenant not to compete that was part of the agreement of sale.

Blomquist ran Elite Vending Services from March through July 2017 and monthly revenue continued to be less than what he had anticipated. In July 2017, Blomquist was no longer servicing Restoration Hardware and his sales volume decreased as a result of the loss of that account. In addition, a few other accounts were no longer in operation and

some of the vending machines were not in working order. During the time Blomquist ran the company, the average revenue generated per month was $27,960. Based on the tax returns, financial statements, and profit and loss statements provided by DePasquale, Blomquist had anticipated monthly gross revenues of $60,000. On his 2017 tax return, Blomquist claimed a business loss of $187,473. Blomquist also learned "that Coke and Pepsi bottling companies owned the [Coke and Pepsi] machines that [he] had purchased" and that they were merely on loan. Of the 82 Coke and Pepsi machines he had purchased, Blomquist returned about 20 to Coca Cola and 7 or 8 to Pepsi. DePasquale claimed that he owned the machines.[3]

Blomquist decided to sell his Baltimore and Harford County routes and ultimately sold them for $63,000. He ended 2017 with "about a $10,000" operating profit and $84,000 in annual debt load. Blomquist decided to get out of the vending machine business and he attempted to sell additional portions of the business. On October 23, 2017, he sold a portion of the business for $35,000, some equipment for $3,900, a few sites with equipment for $7,700, and some routes and other assets for $15,100. In all, Blomquist made $140,000 to $150,000 from selling various assets of the business. He also realized $91,000 in tax benefits from write-offs due to business losses. At the time of trial, Blomquist was not operating the vending machine business, but he still owned a box truck that was not

[3] At trial, the parties stipulated, among other things, that DePasquale would testify that he transferred all vending machines to Blomquist in conformance with the sales agreement entered into on March 2, 2017, that he had good and marketable title to all of the machines and other assets, "free and clear of any imperfection of title, lien, encumbrance, charge, equity or restriction," and that the vending machines and equipment were in good operating order and condition, subject to normal wear and tear.

operational, which he valued at approximately $1,000, and two dollar-bill changers and a coin sorting machine which he valued at $1,000.

Blomquist testified as to how he had intended to make the vending company work, financially:

> [Plaintiff's Counsel]: So when you were making your own determination what did you look at and what did you calculate into what your expenses were going to be so that you could determine if you could make this work?
>
> [Blomquist]: I did a cash flow analysis or a profit analysis on this business. This business was generating, supposedly generating, 340-some odd thousand dollars.
>
> Q. That's net. Right?
>
> A. That's net profit. So out of that net, I knew that I would have employees, whereas Mr. DePasquale showed no employees.
>
> Q. What did you anticipate your expenses for employees?
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> A. 110,000 for the wages and approximately $20,000 for workmens comp, payroll taxes, unemployment insurance.
>
> Q. So that's 130,000?
>
> A. That's correct.
>
> Q. What else did you know that you were going to have to be paying out of that money?
>
> A. Obviously my debt load, how much would it cost me a month, how much it would cost me a year to service my debt in order to buy this business, which was $7,000 a month, $84,000 a year.
>
> Q. So what did that leave you after all that?
>
> A. Well, 84,000 plus 130 is 210, 220, in that neighborhood. We also had operating expenses to pay, which was 15 to 20,000.
>
> Q. Operating expenses different from his operating expenses?

A. No. Not much.

Q. Okay.

A. That I recall. Okay. This would leave me in the neighborhood of approximately $100,000 net profit left over. Now, I would have some tax burden against that. That's when the depreciation would factor in. I would depreciate a portion of the equipment which would reduce that liability to probably ten percent. So now I have $90,000 left after everybody is paid. My intent was to take 30 to $40,000 of that money and apply it towards the high interest portion of my debt. That way, I could pay it off in three to four years. The other $50,000 left was for me. That's how I approached the purchase of this business.

On cross-examination, Blomquist made clear that he based his decision to purchase the company on DePasquale's personal tax returns and financial statements, specifically the net income. Transcripts of DePasquale's tax filings with the Internal Revenue Service were admitted in evidence. They showed that DePasquale's tax returns for 2013 and 2014 were not filed until July 3, 2017, and that no taxes had been paid. His tax return for 2015 was filed on September 29, 2017, and no taxes had been paid. In addition, his tax return for 2016 was filed on April 4, 2018, and no taxes had been paid. DePasquale acknowledged that he had retained a service to assist with the filing of his tax returns. On November 6, 2015, DePasquale entered into a service agreement with Victory Tax Solutions to assist with his federal taxes for 2007 through 2014. On March 8, 2017, he extended that agreement to cover federal taxes through 2016 and to deal with state taxes for 2007 through 2016.

DePasquale denied ever falsifying revenue to an accountant or the Internal Revenue Service or data on his Schedule Cs. He also testified that he did not know until the instant

litigation that his tax returns were not being filed. He maintained that he would not have provided his 2014 and 2015 returns to Blomquist if he knew they had not been filed.

DePasquale's 2015 and 2016 bank statements for both his business and personal accounts were also admitted in evidence. They showed deposits of about $100,000 despite the fact that records supplied to Blomquist indicated receipts from Elite Vending Services of more than $720,000 and net profits of more than $346,000. In addition, receipts on the profit and loss statement from January through September 2016, showed revenue of $548,232 and net profit of $262,809.

DePasquale had a different view of what had occurred. He took the position that he transferred exactly what he said he would transfer. He maintained that Blomquist was a novice, that he did not have any experience in the vending machine business, and that he had no basis on which to value the business. DePasquale acknowledged that none of the tax returns had his signature or dates on them but noted that Blomquist did not make any inquiry about that or request tax returns from the Internal Revenue Service.

DePasquale testified that Blomquist rode with him only three times in December 2016 and January 2017, that he spent at most seven to eight hours on the job, and that he never rode from the beginning of a day until all of the accounts had been serviced. Blomquist's son-in-law spent a total of seven days riding with DePasquale and counted money from some of the machines, and his daughter rode with him for two days in February 2017. DePasquale did not receive any complaints indicating any dissatisfaction with the money that was collected.

DePasquale explained how he handled the money he collected from the various vending machines. At each stop, he collected the money from the vending machine and placed it into a money bag that was placed in a safe that he had in his truck. At the end of the day, he took the money home and put it in a secure place. On the weekends, he counted the money. He kept a handwritten list of his cash receipts that he gave to his accountant on a monthly basis. He frequently used cash to purchase products for the vending machines. He kept receipts for the products he purchased and gave them to his accountant every four to six weeks. He did not keep an accounting of the products he purchased.

DePasquale did about $100,000 worth of business each year with Restoration Hardware. On March 17, 2017, after he received the letter from Restoration Hardware, he shared it with Blomquist. According to DePasquale, Blomquist did not ask him to intervene in the matter or ask what he needed to do to keep the account.

DePasquale presented testimony from three witnesses, all of whom were employees of companies that he had serviced. Those witnesses testified that they had no complaints about the vending machines at their places of employment when they were serviced by DePasquale, but after Blomquist took over the business, the machines were not fully stocked, had limited selection, and the service was slow. One of those witnesses, Dennis Blevins, worked at Elk Neck Elementary School and Bohemia Manor High School. He testified that DePasquale's wife worked in the kitchen at Elk Neck Elementary School. Another of those witnesses, Marjorie Bernat, hired DePasquale to come back to her place of business in May 2019.

DePasquale also called his father as a witness. DePasquale, Sr. testified that he was the owner of Atlantic Vending and had been self-employed for 50 years. He testified that it is harder to get a location than to purchase a vending machine and the most important consideration is how much revenue is being generated. When purchasing a vending company, he looked at the location and bank deposits, accompanied the owner on routes for two weeks, and pulled and counted the money. He acknowledged that Coca Cola and Pepsi machines are provided by those companies and that they write off the machines after about five years so that the machines are not on their books. He stated that he could purchase a vending machine for $600 to $1,000, although others "would probably pay more."

On January 24, 2020, the court announced its decision from the bench. The court found that Blomquist established by clear and convincing evidence that DePasquale fraudulently induced Blomquist to execute the sales agreement. In support of that determination, the court found that the Schedule C's and tax returns indicated that the net profit of the business was $340,576 in 2014 and $323,599 in 2015, that the information contained in those documents was not representative of the income of the business, and that Blomquist relied on those documents in determining whether or not to purchase the business. The court also found that the income stated on the commission reports was substantially lower than what had been reported on the tax documents. The court found that DePasquale's testimony that he was unaware that his accountant had not filed his tax returns was not credible.

The court reviewed the bank records for Elite Vending Services as well as DePasquale's personal bank records and concluded that they did not "in any way corroborate net income of $350,000[,]" and did "not justify or corroborate the income that" DePasquale reported to Blomquist. The court determined that "the income generated by this business was substantially less than the income" DePasquale represented to Blomquist, that Blomquist "certainly had the right to rely on these Schedule C's and tax returns[,]" and that Blomquist had no obligation to believe that the tax returns had not been filed.

The court found that Blomquist ran the business in accordance with DePasquale's instructions, and although there were issues with service, they did not contribute to the "loss of income commensurate with the disparity between the income reported by [DePasquale] and actually received by [Blomquist]." Similarly, the court concluded that the dissatisfaction expressed by Restoration Hardware and two other accounts did not "explain the disparity in loss of income[.]" With respect to the Coca Cola and Pepsi machines, the court found that DePasquale had transferred the interest he had in them to Blomquist.

The court awarded Blomquist damages in the amount of $234,000. It explained its calculation of that award as follows:

> The Court finds that [Blomquist] paid $475,000 for Elite Vending. According to his testimony, the Court finds that he sold assets of $150,000, leaving $325,000. [Blomquist] did admit in his testimony that he had a tax benefit of $91,000, so that in the Court's mind reduces the amount to $234,000.

We shall include additional facts as necessary in our discussion of the issues presented.

DISCUSSION

In considering an appeal from a bench trial, we "review the case on both the law and the evidence." Md. Rule 8-131(c). We "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." *Id.* We review "the record for the presence of sufficient material evidence to support the [trial court's] findings" and "all evidence contained in an appellate record must be viewed in the light most favorable to the prevailing party." *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996)(citation omitted). "A factual finding is clearly erroneous if there is no competent and material evidence in the record to support it." *Anderson v. Joseph*, 200 Md. App. 240, 249 (2011)(quotations and citations omitted). The clearly erroneous standard does not "apply to a trial court's determinations of legal questions or conclusions of law based upon findings of fact." *Elderkin v. Carroll*, 403 Md. 343, 353 (2008)(citing *Southern Mgmt. Corp. v. Kevin Willes Const. Co., Inc.*, 382 Md. 524, 539 (2004)). We review such determinations *de novo*. *Id.*

I.

DePasquale contends that the trial court erred in finding that there was clear and convincing evidence that he committed fraud in the inducement with regard to the sale of Elite Vending Services. The Court of Appeals has described fraud in the inducement as "a term used to describe a situation where a person is induced by some fraudulent representation or pretense to execute the very instrument which is intended to be executed[.]" *Meyers v. Murphy*, 181 Md. 98, 100 (1942). We have explained that "[t]he tort of fraudulent inducement 'means that one has been led by another's guile,

surreptitiousness or other form of deceit to enter into an agreement to his detriment." *Rozen v. Greenberg*, 165 Md. App. 665, 674 (2005)(citing *Sec. Constr. Co. v. Maietta*, 25 Md. App. 303, 307 (1975)). In Maryland, a party asserting a cause of action for fraudulent inducement must prove, by clear and convincing evidence that: (1) the defendant asserted a false representation of material fact to the plaintiff; (2) the defendant knew that the representation was false, or the representation was made with such reckless disregard for the truth that knowledge of the falsity of the statement can be imputed to the defendant; (3) the defendant made the false representation for the purpose of defrauding the plaintiff; (4) the plaintiff relied with justification upon the misrepresentation; and (5) the plaintiff suffered damages as a direct result of the reliance upon the misrepresentation. *See First Union Nat'l Bank v. Steele Software Sys. Corp.*, 154 Md. App. 97, 134 (2003), *cert. denied*, 380 Md. 619 (2004); *Maryland Envtl. Trust v. Gaynor*, 370 Md. 89, 97 (2002); *Sass v. Andrew*, 152 Md. App. 406, 429 (2003).

In the case at hand, DePasquale argues that proof of fewer sales for a limited four-month period "is not sufficient" and that Blomquist mismanaged the business and caused his own losses. He maintains that the evidence, "at best, proved that a retired person from Florida, with no experience in the vending business, couldn't operate a vending business as well as an individual with over 30 years of experience." According to DePasquale, Blomquist had no justifiable right to rely on the Schedule C's and tax returns for 2012 through 2015 to "forecast his prospective sales for 2017" because they were not part of the sales agreement. In support of that argument, he points to section 11.4 of the sales agreement, which provided, in part:

> 11.4 Entire Agreement. This Agreement constitutes the entire agreement between the parties and there are no representations, warranties or commitments except as set forth herein. This Agreement supersedes all prior and contemporaneous agreements, understandings, negotiation and discussions, whether written or oral, of the parties hereto, relating to the transactions contemplated by this Agreement.

DePasquale contends that the sales agreement did not contain any warranties pertaining to the accuracy of the numbers on the customer list and that there was no guaranty of future performance. He points out that the cover letters provided with the financial statements expressly warned that the statements had not been audited or reviewed by the accountant who prepared them and did "not express an opinion or any other form of assurance on them." Moreover, Blomquist had actual knowledge prior to his purchase of the business that the sales and profits in 2017 were lower than in prior years because when his daughter and son-in-law traveled with DePasquale, they "learned that the machines produced less money than what the records indicated." Blomquist "even confronted [him] about this prior to the sale and was satisfied with the explanation he received." As a result, any misrepresentation was immaterial because Blomquist knew or reasonably could have ascertained the true facts.

DePasquale also challenges the weight given by the trial court to the fact that his tax returns were not filed until after the sale of the business. He claims the court ignored the fact that the sales and profits reported to Blomquist were the same amounts he reported to the Internal Revenue Service and that the amount of taxes he ultimately owed or paid was irrelevant. Finally, DePasquale argues that the commission reports and his bank records

were not reviewed or relied upon by Blomquist prior to his purchase of the business and, therefore, the trial court's reliance on them was misplaced. We are not persuaded.

In support of his arguments, DePasquale directs our attention to *Central Truck Center, Inc. v. Central GMC, Inc.*, 194 Md. App. 375 (2010). That case involved an agreement for the sale of a truck dealership. Central GMC, Inc. and Burgess-Katz, LLC (referred to collectively as "the sellers") agreed to sell "certain truck dealership assets and associated real property" to Central Truck Center, Inc. and 3839 Ironwood Place, LLC, (referred to collectively as "the buyers"). 194 Md. App. at 380. After the sale, the sellers filed a complaint alleging that the buyers breached the sales agreement by failing to pay the full purchase price and fulfill other requirements under the sales agreement. *Id.* The buyers filed counterclaims asserting breach of contract, fraud, concealment, and negligent misrepresentation on the part of the sellers. The buyers claimed that following their purchase of the truck dealership, their income was "considerably less than anticipated, given [the sellers'] sales history." *Id.* The buyers maintained that they had relied on the sellers's sales history in negotiating a price for the dealership. *Id.* That history included sales and service figures relating to a contract the sellers had with the District of Columbia Public Schools ("DCPS"). *Id.* The buyers asserted that, prior to the sale, the sellers had "overbilled DCPS for parts and service and used the overbilled figures to enhance gross receipts and, hence, inflate the value of the truck dealership." *Id.* at 381.

The sellers filed a motion for summary judgment as to the counterclaim. *Id.* They argued that the sales agreement "constituted a complete integration of the terms of the contract and did not provide for any representations or stipulations to [the buyers] as to a

continuation of [the sellers'] past income." *Id.* The sellers maintained that they explicitly notified the buyers that attempts to collect accounts receivable from DCPS on a contract that had expired in the year prior to the sale were continuing, that DCPS had disputed the claim, and that DCPS had given notice of its intent to conduct an audit of the parts and service department. *Id.* As a result, the buyers "could not claim that [they] had an expectation of income from DCPS on the expired contract." *Id.* The trial court agreed with the sellers and found that the buyers failed to establish by clear and convincing evidence that the sellers intended to defraud them and that they failed to establish fraud, concealment, or negligent misrepresentation. *Id.* at 383-84.

On appeal, the buyers argued, among other things, that their tort claims should have been evaluated on their own merits, "separate from the contractual duties and remedies, asserting that it was improperly induced into executing the [sales agreement] by false and/or inadequate representations" by the sellers. *Id.* at 385-86. We affirmed the trial court's decision and held that the buyers failed to show that the sellers "made any false representations, that [they] justifiably relied on any such representations, or that [they] suffered compensable injury resulting from the representations." *Id.* at 388.

In affirming the trial court's decision, we noted that the contract, books, and records pertaining to the contract with DCPS were in existence long before the sales agreement was contemplated and that the buyers were given notice in the sales agreement of a pending DCPS audit. *Id.* at 389. The sellers made no representations about the income the buyers could expect from the DCPS contract and did not warrant the validity of their financial statements. *Id.* at 390. We also agreed with the trial court that the buyers could not

reasonably have relied on the financial statements of past performance as a guarantee of future performance. *Id.* at 390-91. In reaching that conclusion, we noted that the financial statements, which were prepared and utilized by the sellers in the course of business, had been provided to the buyers. After reviewing them, the buyers "did not take further action to verify or question the numbers prior to entering" the sales agreement, "even in light of its undisputed knowledge that a DCPS audit was in the offing." *Id.* at 390.

With respect to the integration clause contained in the sales agreement, we noted that it "explicitly superseded all prior and contemporaneous agreements, understandings, inducements, or conditions[,]" and was "no doubt the product of considerable negotiation and bargaining by sophisticated businesspeople represented by experienced advisors." *Id.* at 391. The financial statements were not incorporated into the sales agreement, as they could have been. *Id.* at 391. We held that the buyers' "reliance on extra-contractual documents was unreasonable" and the sellers' failure "to disclose more details of the DCPS issue" was immaterial. *Id.* at 390.

In reaching that conclusion, we recognized an exception to the parol evidence rule for claims of fraud in the inducement, but concluded that it did not apply in light of the particular facts of the case, stating:

> As noted in *One-O-One Enterprises, Inc. v. Caruso,* 848 F.2d 1283, 1287 (D.C.Cir. 1988), "[o]n a matter of such large significance to the parties' bargain, silence in a final agreement containing an integration clause – in the face of prior explicit representations – must be deemed an abandonment or excision of those earlier representations." [The buyer] cannot overcome the written instrument and, particularly, the integration clause
>
> > by invoking the fraud-in-the inducement exception to the parol evidence rule. The exception for a party who has been induced

> by a fraudulent misrepresentation to enter the contract must not be stretched or inflated in a way that would severely undermine the policy of the parol evidence rule, which is grounded in the inherent reliability of a writing as opposed to the memories of contracting parties.

Id. (internal quotations and citations omitted).

Id. at 391.

Further commenting on the integration clause, we wrote:

> Affirming [the United States District Court's decision in *One-O-One Enterprises, Inc.*], the United States Court of Appeals, District of Columbia Circuit (Ruth Bader Ginsburg, J.) noted: "Were we to permit plaintiff's use of the defendants' prior representations (and defendants' nondisclosure of negotiations inconsistent with those representations) to defeat the clear words and purpose of the Final Agreement's integration clause, 'contracts would not be worth the paper on which they are written.'" *One-O-One*, 848 F.2d at 1287 (quoting *Tonn v. Philco Corp.*, 241 A.2d 442, 445 (D.C. 1968)).
>
> Particularly cogent, relative to the facts before us in this appeal, is the court's observation:
>
> > We have here the case of "a party with the capacity and opportunity to read a written contract, who [has] execute[d] it, not under any emergency, and whose signature was not obtained by trick or artifice"; such a party, if the parol evidence rule is to retain vitality, "cannot later claim fraud in the inducement."
>
> *Id.* (quoting *Management Assistance, Inc. v. Computer Dimensions, Inc.*, 546 F.Supp. 666, 671-72 (N.D.Ga. 1982), *aff'd sub nom. Computer Dimensions v. Basic Four*, 747 F.2d 708 (11th Cir. 1984)).

Id. at 392-93.

Based on that reasoning, in *Central Truck Center, Inc.*, we reached the following conclusion:

> [The buyers] had the capacity and opportunity to read and understand the Agreement, which it executed with no evidence of "trick or artifice.'

> Therefore, Central Truck, "if the parol evidence rule is to retain vitality, 'cannot later claim fraud in the inducement.'"
>
> This rationale applies in the instant case, as well. If the information in the financial statements was of "such large significance to the parties' bargain," it was unreasonable of Central Truck not to insist they be incorporated into the Agreement. While we do not hold that an integration clause *bars* a claim of fraud based on pre-contractual representation in every instance, we do hold that the integration clause in the Agreement, together with the evidence of the unreasonableness of [the buyer's] reliance, in combination with the other evidence, defeated the fraud-based claims asserted by [the buyers] in [their] counterclaim.

Id. at 393 (internal citations omitted).

The *Central Truck* case is distinguishable on the facts from the case at hand. Here, DePasquale provided Blomquist with tax returns that had never been filed despite a representation to the contrary. That was a direct violation of the covenants in the sales agreement. Section 2.1 of the sales agreement provided:

> Corporate Status. Seller is a sole proprietorship duly organized, validly existing and in good standing under the laws of the State of Maryland **and all taxes have been paid and up to date with no outstanding debt,** to include past Elite Vending Services, Inc. It has full power and authority to own its properties and assets and to carry on its business as heretofore conducted.

In addition, the commission reports that were submitted after the closing and the bank records showed that Elite Vending Services's revenue was significantly less than DePasquale reported. Unlike *Central Truck*, Blomquist established that DePasquale misrepresented Elite Vending Services's revenue. Blomquist also established that he justifiably relied on those misrepresentations. As a result, the exception to the parol evidence rule for fraud in the inducement is applicable in the instant case.

As Blomquist suggests, our decision in *Rozen v. Greenberg*, 165 Md. App. 665 (2005) is more closely analogous to the instant case. In *Rozen*, an accountant who entered into an agreement to sell her client list filed a fraudulent inducement claim against the accountant who purchased it. 165 Md. App. at 668. The seller sought to rescind the sales agreement because the purchaser misrepresented his background. *Id.* Specifically, the purchaser claimed to have been a certified public accountant (CPA) for many years, when in fact he had been a CPA for about five weeks when he first contacted the seller. *Id.* at 673) In addition, the purchaser claimed to have a business when in fact he had no clients or team of professionals working for him. In reality, the purchaser had recently started working for a tax preparation firm. *Id.* When the seller asked to see the purchaser's business, the purchaser drove her to the office of his employer in Virginia. *Id.* The trial court concluded, *inter alia*, that the purchaser's misrepresentations were material, that the seller reasonably relied on those material misrepresentations, and that the contract should be rescinded. *Id.* at 673-74.

On appeal, the purchaser argued that the seller had no right to rely on his misrepresentations about his experience or his business resources because if she had conducted an investigation, she could have discovered the truth before entering into the sales agreement. *Id.* at 677. In rejecting that argument, we noted that the seller was not required to conduct an investigation:

> Maryland law is generally consistent with § 540 of the *Restatement (Second) of Torts*: "The recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation." *See Gross v. Sussex*, 332 Md. 247, 264-69, 630 A.2d 1156 (1993); *Schmidt v. Millhauser*,

> 212 Md. 585, 592-93, 130 A.2d 572 (1957). The exception to this general rule arises when, "under the circumstances, the facts should be apparent to [a person of the plaintiff's] knowledge and intelligence from a cursory glance or he has discovered something which should serve as a warning that he is being deceived. . . ." *Id.* (quoting W. Page Keeton *et al.*, *Prosser & Keeton, on the Law of Torts* § 108 at 752 (5th ed. 1984)).

Rozen, 165 Md. App. at 677.

In *Rozen*, we concluded that the seller "conducted more of an investigation than the law required; she was, after all entitled to rely on [the buyer's] representations." In upholding the trial court's decision, we recognized that in cases where a buyer intentionally seeks to deceive a seller, "the law imposes no duty on [the seller] to, in effect, become a sleuth attempting to ferret out wrongdoing." *Id.* at 678.

Similarly, in the case at hand, Blomquist was entitled to rely on the representations made in DePasquale's tax returns and to believe that those returns had been filed. It was also reasonable for him to believe that the financial statements were true. The evidence presented at trial, including DePasquale's bank statements and commission reports, supported the circuit court's finding that Elite Vending Services had not received the sums of money reported on the tax returns. Thus, the trial court did not err in concluding that Blomquist established, by clear and convincing evidence, that DePasquale made false representations about the profitability of Elite Vending Services, that he knew those representations were false, that he made those false representations for the purpose of inducing Blomquist to enter the sales agreement, and that Blomquist justifiably relied to his detriment on the tax returns that he believed were true and had been filed with the Internal Revenue Service.

II.

DePasquale contends that the circuit court erred in its calculation of damages. Specifically, he argues that the circuit court did not have a sufficient factual basis to support its award because there "was no expert or other competent evidence as to the actual value of the business as of March 1, 2017, nor that the sums [Blomquist] received over the next 15 months when he sold the business off piecemeal were fair and reasonable, or were equal to what he would have received had he sold it on March 1, 2017." DePasquale also argues that the circuit court failed to credit him with $400,000, which was the value of the physical assets, inventory, and cash that Blomquist received according to the allocation of the purchase price that was included in the sales agreement. DePasquale's final challenge to the calculation of damages is that the circuit court failed to credit him for the amount of business lost to Blomquist's alleged mismanagement of the business, specifically with respect to the business lost from accounts that were "dissatisfied" with Blomquist. We disagree and explain.

In awarding damages, the circuit court found that Blomquist paid $475,000 for Elite Vending Services, that he "sold assets of $150,000," and that he "had a tax benefit of $91,000[.]" Deducting the value of the assets sold and the tax benefits from the purchase price resulted in damages of $234,000, which the court awarded to Blomquist. In fraudulent inducement cases, a party who has been defrauded "may elect between two remedies, which are exclusive." Paul Mark Sandler & James K. Archibald, *Pleading Causes of Action in Maryland* §3.90 (6th ed. 2018). "Persons who discover that they have been induced into a contract by fraud must decide, or the law will decide for them,

whether unilaterally to rescind the contract or to ratify the contract and seek damages, either affirmatively or by recoupment." *Sonnenberg v. Security. Mgmt. Corp.*, 325 Md. 117, 127 (1992). Blomquist did not elect rescission of the contract in this case.

In determining the proper measure of damages in fraud and deceit cases, Maryland applies the "flexibility theory," pursuant to which a plaintiff may elect to recover either out-of-pocket expenses or benefit of the bargain damages. *Goldstein v. Miles*, 159 Md. App. 403, 422 (2004). "The former will permit the plaintiff to recover his or her actual losses; the latter put[s] the defrauded party in the same financial position as if the fraudulent representations had in fact been true, . . . by awarding as damages the difference between the actual value of the property at the time of making the contract and the value that it would have possessed if the representations had been true." *Id.* at 422-23 (internal quotations and citations omitted). Under the "flexibility theory," [i]f the defrauded party is content with the recovery of only the amount that he actually lost, his damages will be measured under that rule[.]" *Id.* at 423-24 (relying on *Hinkle v. Rockville Motor Co.*, 26`2 Md. 502, 522-12 (1971)(citing *Selman v. Shirley*, 161 Or. 582 (1938))).

DePasquale contends that Blomquist was required to produce expert testimony to value the assets of the business and testify that the amount he received from the sale of portions of the business was fair and reasonable. He also argues that Blomquist failed to mitigate his damages because "he did not attempt to sell the business by using a professional business broker to realize its full value." We disagree.

In support of his contention that expert testimony was required, DePasquale directs our attention to *Goldstein, supra*, but his reliance on that case is misplaced. In

Goldstein, the plaintiffs sought to recover benefit-of-the-bargain damages. In the instant case, Blomquist sought to recover his out-of-pocket losses. There was no requirement that Blomquist provide expert testimony in support of his claim for out-of-pocket losses.

With regard to mitigation of damages, DePasquale does not refer us to any authority to support his contention that Blomquist had a duty to engage a broker. At trial, DePasquale, Sr. testified that typically he would sell to someone in the vending machine business. The court credited his testimony and found it "to be very important." With regard to Blomquist's decision to sell off certain portions of Elite Vending Services, the evidence established that Blomquist sought advice from people with experience in the vending machine business. He posted fliers at locations where people in the vending machine business purchased supplies and he advertised on the internet site Craigslist. The evidence also established that DePasquale's broker, Gerst, had also advertised on the internet, which is how Blomquist first learned that Elite Vending Services was for sale. The record is devoid of any testimony by DePasquale, his father, or any other witness, that any of the assets of Elite Vending Services that were sold by Blomquist were worth more than he obtained for them or that he would have sold them for a higher price if he had enlisted the service of a business broker.

DePasquale contends that the circuit court failed to credit him with $400,000, which was the value of the physical assets, inventory, and cash that Blomquist received according to the allocation of the purchase price that was included in the sales agreement. Without citing any authority, DePasquale asserts that the damage award cannot exceed the remainder of the purchase price, which was $75,000. We are not persuaded.

There was conflicting evidence at trial about the value of the vending machines. DePasquale's broker valued the machines at $1,200, Blomquist testified that DePasquale told him the machines were worth $2,000 each, and DePasquale testified that he would "probably not" pay $1,000 for a machine. The undisputed evidence established that the $400,000 figure used in the allocation of the purchase price was based on DePasquale's statement to Blomquist that the vending machines were worth $2,000 each and on Blomquist's desire to increase the allocation from $250,000 to $400,000 for depreciation purposes. The evidence also established that the true value in what was being purchased was the revenue and the net profit generated by the business. DePasquale, Sr. testified that "[l]ocation is the most important thing." He explained:

> I always look at the location. The machines are secondary to me. And because, like I said before, it's harder to get a location than it is to buy a vending machine. I can hand you a vending machine, what are you going to do with it. It might take you six months to get a place to put it. That's how I look at it. And that's how most all the vendors look at it. They're looking at the location. Location.

As we have already noted, the trial court found DePasquale, Sr.'s testimony "to be very important." In light of the conflicting evidence about the cost of a vending machine, the testimony about the purpose for increasing the allocation of the purchase price, the evidence about the importance of the locations in which the vending machines are placed, and the credit given to DePasquale, Sr.'s testimony, we find no error in the trial court's use of the full purchase price in calculating the damage award.

DePasquale's final challenge to the calculation of damages is that the circuit court failed to credit him for the amount of business lost to Blomquist's alleged

mismanagement of the business. That claim is without merit. The court recognized that after the sale of Elite Vending Services there were problems with service and dissatisfied customers but it did not give weight to any loss of income that might have resulted from those issues. Moreover, Blomquist's son-in-law, Massie, testified that he followed DePasquale's guidance. The trial court specifically found that Blomquist ran Elite Vending Services "in accordance with the instructions of" DePasquale. The court found that "there were issues with services" but did not find that those issues "contributed to the loss of income commensurate with the disparity between the income reported" by DePasquale and the income actually received by Blomquist. The court also determined that Restoration Hardware, Citrus & Allied, and the public schools were "dissatisfied" with the service Blomquist provided, but that those accounts did not "explain the disparity in loss of income." For all these reasons, we find no error in the trial court's decision not to credit DePasquale for business lost by Blomquist or in the court's calculation of damages.

JUDGMENT OF THE CIRCUIT COURT FOR CECIL COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.