

JULY AT THE MULTIPLEX[©]

The days had been extremely hot. It had been hotter than normal. In addition, the moisture coming up from the gulf had increased the humidity to almost unbearable levels. It was under these circumstances that Tommy decided to go see a movie. The theater would at least be air conditioned and would provide some welcome relief from the weather.

Tommy looked in the movie section of the newspaper to see what movies were being screened in his area. He saw that the highly anticipated movie "The Governator" was being shown at the nearby Royal 16 Theater complex in the Eastfield Mall. The newspaper advertisement indicated that the movie was scheduled to begin in 30 minutes, at 1:00 pm.

Tommy got his wallet and car keys, jumped into his car, and sped off to the mall. Since he always had difficulty finding a seat in the dark, one thing Tommy did not want was to be late for the beginning of the movie. Once the lights were out, he could barely see where he was going.

Tommy made it to the Royal Theater in 15 minutes. While at the ticket window to purchase his ticket, Tommy asked the cashier when the movie was scheduled to begin. The cashier told him that the movie would begin in 15 minutes, at 1:00 pm, the time posted on the marquee.

Tommy asked what was the cost of an admission ticket to see "The Governator." The clerk replied, "nine dollars." Tommy exclaimed, "Nine dollars, why so expensive? Don't you give any discount for an early movie?" The cashier replied that because this was a long awaited "blockbuster movie" the theater owner was not reducing the price for early afternoon showings. Tommy reluctantly paid the nine dollars and was given a ticket of admission that stated the movie would begin at 1 pm. The ticket contained no other relevant statements.

Tommy was not a regular moviegoer. He had not been to the movies for several years because he was too busy. He was a business major at the local university and worked about 20 hours a week. Attending classes, studying, and working left him very little time for entertainment.

Having already parted with nine hard earned dollars, Tommy reluctantly decided to stop at the refreshment counter. The line was long, but Tommy got in line anyway. After spending another nine dollars for a large tub of buttered popcorn, a large iced soda, and a super-sized candy bar, Tommy hurried off in the direction of the sixteen movie viewing rooms in search of the one showing "The Governator."

Tommy found the right theatre room at 12:58 p.m. He walked down the aisle, found a suitable row, and headed for a selected seat. Tommy softly exclaimed, "Pardon me, excuse me, pardon me," as he squeezed and climbed past other moviegoers to finally get to his seat. Tommy settled into his seat as best he could (with a little less popcorn and soda, but still clutching his candy bar). He let out a big sigh of relief. He was seated with 10 seconds to spare. The lights began to dim, and then Tommy uttered ". . . what the (expletive deleted) was this? A commercial!" Tommy was outraged. He had paid eighteen dollars to watch commercials? All that hurrying, all that worrying, all that anxiety to find his seat before the movie would begin. All that, just to see commercials!

As a matter of fact, twenty minutes of commercials were shown before the movie began. Tommy endured the commercials. After all, the theater was air conditioned and comfortable. Finally the movie started. However, very early into the showing, it was clear to Tommy that this was the worst movie ever made. He decided to give the movie a chance to improve. Tommy watched the movie for another 30 minutes, but the movie did not get any better. Tommy stumbled and fumbled his way out of the viewing

room and headed off to find the manager of the theater. Tommy was disgusted. Not only had he been forced to watch 20 minutes of commercials, the movie was, in his opinion, a bust. It was a waste of nine, hard earned dollars to see the movie. Tommy asked for his money back. The manager explained that it was the policy of the theater owner not to refund the admission fee.

Tommy left the theater, vowing not to let this episode pass without some resolution. He was sure that the theatre had violated his legal rights as well as the rights of other moviegoers, particularly by showing all of those commercials. He returned home, found his Business Law textbook, and began to consider various legal actions he could pursue. There had to be some recourse.

Tommy, remembering a few things from a Business Law course he had taken, wrote a letter to Mr. Mull T. Plex, the owner of the Royal Theatre. In the letter Tommy expressed his dissatisfaction with the showing of the commercials and indicated to Mr. Plex that he was going to pursue legal recourse including the possibility of filing a class action lawsuit.

Class Action Case: Statistical Analysis

After reading Tommy's letter and the possibility of a class action lawsuit being filed, Mr. Plex was livid. Not knowing how to proceed, he decided to contact other theatre owners in the area to see if they had also been notified as being potential defendants in Tommy's threatened class action lawsuit. After learning that all of his competitors had been contacted, Mr. Plex's initial reaction was "Good! With my untarnished reputation, I'll prevail in the lawsuit, but my competitors will go under. Then I'll be the only show in town." However, after realizing that he too could go belly up, Mr. Plex decided that it would be better if he and his competitors stuck together and prepared to defend any lawsuit by forming a consortium. Pleased with his *esprit de corps* strategy, Mr. Plex presented his idea to his competitors. The response was overwhelmingly positive and the consortium was formed.

After much debate, the consortium agreed that it would be useful to know the percentage of all theater goers who are unhappy with the practice of showing advertisements before the featured film begins. They reason that if the percentage is small, then Tommy is a "voice in the wilderness" and there is no basis for a class action lawsuit. On the other hand, if the percentage is substantial, then perhaps Tommy's response is not an aberration, in which case the more prudent course of action would be to proceed cautiously in the hope of avoiding the cost of defending a lawsuit. The consortium, while suspecting that the percentage is relatively low, probably less than 10%, decides to apply the following decision rule: if the percentage is actually 10% or more, the consortium will seriously consider negotiating a settlement of any lawsuit filed by Tommy. However, if the percentage is less than 10%, they will vigorously defend any lawsuit filed by Tommy.

The consortium is not sure how to go about surveying its patrons. In addition, the consortium is not sure what to do with the results of the survey if in fact it is conducted. Further, the consortium is concerned about the causes of action that Tommy may include in his lawsuit.

Your law firm handles business law matters, with a specialty in statistical analysis, and has been hired by Mr. Plex. Mr. Plex has indicated to you that he has several concerns and would like your firm to provide him some answers.

Required

Write a report to Mr. Plex using the guidelines for writing a report found on the course web site.

LDC topics: business law topics 1, 5, and 6; statistics concepts 2, 9, and 10.

JULY AT THE MULTIPLEX LIBRARY[®]

Lee P. Cao and Louann P. Cao, v. Huan Nguyen and Nega Pham
258 Neb. 1027; 607 N.W.2d 528; 2000 Neb. LEXIS 56

Wright, Justice

NATURE OF THE CASE

Lee P. Cao and Louann P. Cao (buyers) brought this action in the state trial court seeking rescission of a purchase agreement they entered into with Huan Nguyen and Nega Pham (sellers). The buyers alleged that the sellers fraudulently misrepresented that the property at 2223 R Street in Lincoln, Nebraska, was a duplex and could be rented to two separate families when in fact the property did not conform to the municipal code so as to be rented as a duplex or two-family dwelling.

The trial court found that the buyers had not proved the elements of fraudulent misrepresentation and dismissed their petition. The buyers timely appealed.

FACTS

In May 1997, the buyers responded to an advertisement for the sale of a duplex and arranged to see the property. The buyers inspected the property on several occasions and observed that the property consisted of two units. The buyers informed the sellers that they intended to rent both units and to operate the property as a two-family dwelling. The sellers had rented both units in the past and at trial acknowledged that when they first purchased the house, it had been divided into two units in which two separate families resided.

The buyers decided to purchase the house, and the initial purchase agreement executed by the parties described the property as a "duplex house." The buyers subsequently applied for a building permit to make improvements to the property and were informed by the city building and safety department that the property could not be used as a duplex or two-family dwelling because the lot was not sufficiently wide to comply with the municipal code. The buyers then sought rescission of the purchase agreement, claiming that the sellers had fraudulently misrepresented to them that the property could be rented as a duplex.

The trial court dismissed the action, finding that the buyers had not proved the elements of fraudulent misrepresentation.

ANALYSIS

The party alleging fraud as a basis from rescission must prove all the elements of the fraudulent conduct by clear and convincing evidence.

In order to maintain an action for fraudulent misrepresentation, a plaintiff must allege and prove the following elements: (1) that a representation of fact was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth; (4) that it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff reasonably did so rely; and (6) that the plaintiff suffered damage as a result.

REPRESENTATION OF FACT

The representations made by the sellers were representations of fact. The buyers informed the sellers that they intended to use the house as rental property, and upon inspection, the buyers saw that the property consisted of two separate apartments and had two front doors, two mailboxes, and two gas meters. The buyers were told by the sellers that the house was divided into two units, and the sellers admitted that the house had been rented to two separate families in the past. The statement that the home could be rented to two families is a representation of fact.

REASONABLE RELIANCE

We next address whether the buyers' reliance upon the sellers' representations that the property could be used as a duplex or two-family dwelling was reasonable. The trial court concluded that ordinary prudence would have required the buyers to contact the city building and safety department to ascertain whether the property could be rented as a duplex or two-family dwelling.

Whether a party's reliance upon a misrepresentation was reasonable is a question of fact. A party is justified in relying upon a representation made to the party as a positive statement of fact when an investigation would be required to ascertain its falsity.

The trial court's findings suggest it concluded that the buyers' reliance on the representation was unreasonable, since a search of public records would have revealed the falsity of the representations. Standing alone, this fact is insufficient to constitute unreasonable reliance. In *Foxley Cattle Co. v. Bank of Mead*, 196 Neb. 1, 241 N.W.2d 495 (1976), we stated that generally, fraud may be predicated on false representations although the truth could have been ascertained by an examination of public records.

In this case, the means of discovering the truth were not in the buyers' hands. The buyers were not provided with any information which would have placed them on notice that the home did not meet the municipal code requirement for a two-family dwelling. The sellers informed the buyers that the house had been rented to two families in the past. The physical layout of the property suggested that it was divided into two units. The buyers were told by the sellers that the property had been divided into two units, the advertisement for the property described it as a duplex, and the initial contract signed by the parties described the property as a duplex. Although one unit was not rented at the time of inspection, there was no indication that it could not be rented in the future.

In order to prove the sellers' representations were false, the buyers would have had to contact the city, research the public records, and compare the building code to the actual structure of the home. Therefore, the buyers' reliance was reasonable.

We conclude that the sellers made representations that the property could be used as a two-family dwelling, that such representations were false, and that when such representations were made, they were known to be false or were made recklessly without knowledge of the truth and as positive assertions. We also find that the sellers intended for the buyers to rely upon such representations, the buyers did in fact so rely upon the representations, and the buyers were damaged as a result. Thus, the buyers have proved each of the elements of fraudulent misrepresentation.

CONCLUSION

Since we conclude that the buyers have proved the elements of fraudulent misrepresentation, the judgment of the trial court is reversed, and the cause is remanded for further proceedings.