

## **JUNE 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 triplex and could be rented to three separate families when in fact the property did not conform to the municipal code so as to be rented as a triplex or three-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 triplex and arranged to see the property. The buyers inspected the property on several occasions and observed that the property consisted of three units. The buyers informed the sellers that they intended to rent all three units and to operate the property as a three-family dwelling. The sellers had rented all three units in the past and at trial acknowledged that when they first purchased the house, it had been divided into three units in which three separate families resided.

The buyers decided to purchase the house, and the initial purchase agreement executed by the parties described the property as a "triplex 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 triplex or three-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 triplex.

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 three separate apartments and had three front doors, three mailboxes, and three gas meters. The buyers were told by the sellers that the house was divided into three units, and the sellers admitted that the house had been rented to three separate families in the past. The statement that the home could be rented to three 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 triplex or three-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 triplex or three-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 three-family dwelling. The sellers informed the buyers that the house had been rented to three families in the past. The

physical layout of the property suggested that it was divided into three units. The buyers were told by the sellers that the property had been divided into three units, the advertisement for the property described it as a triplex, and the initial contract signed by the parties described the property as a triplex. 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 three-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.