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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-230 / 89-1077

FREDERICKSBURG FARMERS COOPERATIVE,

Appellee,

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vs.

FARMERS SAVINGS BANK, Frederika, Iowa,

Appellant.

Appeal from the Iowa District Court for Chickasaw County, Robert E. Mahan, Judge.

Farmers Bank appeals from a district court judgment awarding the Farmers Cooperative $21,900 on its claim for fraudulent misrepresentation in regards to certain check proceeds. **AFFIRMED IN PART, REVERSED IN PART.**

Frances L. Gohlke, Waverly, for appellant.

Ronald K. Noah of Noah & Smith, Charles City, for appellee.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ.

HAYDEN, J.

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Dale and Dan Ellsworth were engaged in a farming operation. The Farmers Savings Bank (Bank) loaned approximately $100,000 to the Ellsworths during 1984 for operating expenses. The Fredericksburg Farmers Cooperative (Cooperative) also provided the Ellsworths with some supplies during the 1984 crop year. As of early 1985, the Ellsworths owed the Farmers Bank over $90,000 and the Farmers Cooperative about $5,000.

In April and May 1985, the Ellsworth brothers purchased additional supplies from the Farmers Cooperative. The brothers stated they were again receiving financing from the Farmers Bank that year. However, the Bank decided they would no longer finance the Ellsworths. The brothers informed the Farmers Cooperative about this. On May 4, 1985, a telephone conversation between Fred Rewoldt, president of the Bank, and Don Rowe, manager of the Cooperative, took place.

The Cooperative contends the Bank promised to guarantee any monies advanced by the Cooperative for supplies in 1985. The Cooperative further alleges a subsequent letter by the Bank to Farmers Cooperative indicated it had agreed to guarantee the Ellsworths' 1985 operating expense bill. The letter on its face purported to release the Bank's interest in crop lien monies in favor of the Cooperative.

Testimony at trial by the Cooperative manager, Don Rowe, indicated the letter did not fully and accurately

describe the telephone conversation of May 4. However, Mr. Rowe never attempted to correct the letter with its author, Fred Rewoldt. Instead, he allowed the letter to stay as it was and did not bring it up until it was apparent the Ellsworth could not pay their debts.

In April of 1986, a check was issued for $45,106.64 for crops grown by the Ellsworths in 1985. Several payees were on the check, including Farmers Cooperative. Farmers Cooperative endorsed the check on May 20, 1986.

At trial, the Cooperative manager, Don Rowe, claimed the Bank, through its agent Fred Rewoldt, represented the Cooperative would receive $30,000 if it endorsed the check. Fred Rewoldt claims to have only said the Cooperative would get a check on the Ellsworth account in the future. The Cooperative did eventually receive two checks totaling $10,600. The Ellsworths defaulted on their remaining debts and filed bankruptcy.

The Farmers Cooperative filed suit against the Bank seeking recovery for its unpaid 1985 sales to the Ellsworths. The Cooperative alleged four counts: 1) the telephone conversation and letter of May 4, 1985, was a guarantee by the Bank of the Ellsworths' debts; 2) the Bank fraudulently induced the Cooperative to extend credit in reliance on the guarantees; 3) the Bank fraudulently misrepresented it would send a check for $30,000 on the Ellsworth account if the Cooperative would endorse the crop check; and 4) the Bank breached its promise to loan the

Ellsworths money for the 1985 crop season, to the Cooperative's injury as third-party beneficiary.

Although the district court found no fraud in the May 4, 1985, exchanges, it did find the Bank had guaranteed the Ellsworths' debts to the Cooperative. The district court further found the Bank had fraudulently misrepresented the Cooperative would receive $30,000 plus $2,500 from cattle sales, if it endorsed the check on May 20, 1986. No evidence was found to support the fourth count of third-party beneficiary.

Since damages on the fraud theory exceeded those under the guarantee theory, the court awarded the Cooperative $21,900 based on fraudulent misrepresentation. The Bank has filed this appeal.

Our review in this case is on error of law. Iowa R. App. P. 4.

I. Preliminary Matters

We will address the following preliminary matters first. We dismiss as groundless the appellant's contention in their reply brief that Fred Rewoldt was acting in his personal rather than his professional capacity. A general or managing officer will be presumed, in the absence of proof to the contrary, to have authority to contract in the usual course of corporate business. Newberry v. Barth, Inc., 252 N.W.2d 711, 714 (Iowa 1977); Mayrath Co. v. Helgeson, 258 Iowa 543, 550, 139 N.W.2d 303, 307 (1966). The record is replete with evidence of Mr. Rewoldt's

presidency of the Bank and his dealings with the Cooperative in this capacity. The Cooperative manager was fully justified in relying on Mr. Rewoldt's role as president and agent for the Bank.

The appellant Bank contends the statute of fraud bars evidence of a guarantee unless it is in writing. See Iowa Code 622.32(2). However, this affirmative defense is raised for the first time on appeal. Because the Bank failed to raise this defense at the district court, it is waived. Heflen v. Brown, 208 Iowa 325, 328, 223 N.W. 763 (1929).

The Bank further contends the Bank had no authority to guarantee debts of its customers unless it derives some benefit. See C.J.S. Bank and Banking, § 661. Assuming this is true, the Bank would have received consideration in the form of payment on the Ellsworths' $90,000 debt if the Ellsworths had a successful crop year. Secondly, if the president of the Bank had indeed guaranteed the debt, promissory estoppel in the Cooperative's favor may be appropriate. We dismiss the Bank's defense in this regard.

Appellant Bank's argument concerning no secured interest by the Cooperative in the check is waived, as the Bank has presented no legal authorities supporting its position. Iowa R. App. P. 14(a)(3).

II. Guarantee and Third Party Beneficiary

We turn to the alleged guarantee and third-party beneficiary counts. The district court found no evidence

to support the third-party beneficiary theory of the Cooperative. We agree with the district court and accordingly affirm.

The district court found the telephone conversation and letter of May 4, 1985, constituted a guarantee by the Bank of the Ellsworths' account with the Cooperative. We find this holding is not supported by substantial evidence. On direct examination, Don Rowe, the manager of the Cooperative, said: "I called Fred Rewoldt on the phone [on May 4, 1985] and he said, no, he was not going to advance money for their [Ellsworths'] crop this year. He wanted us to advance it, but he would not guarantee payment of it in the fall."

Mr. Rowe also admits the letter dated May 4, 1985, does not purport to be a guarantee. In fact, it clearly states it is only a release on crop money. Don Rowe claims it does not accurately represent the telephone conversation. However, he never attempted to clarify the letter with Mr. Rewoldt to more accurately reflect the parties' intentions. Custom of trade and usual business practices dictate if a letter which purports to set out parties' understandings and does not do so, it is the responsibility of the complaining party to bring this to the attention of the other party in an expeditious manner. This Mr. Rowe clearly failed to do. He can not be heard now to say the parties meant something different than what was clearly expressed in their plain writing. Mr. Rowe claims to have

been in the cooperative business for thirty years. He is expected to be familiar which such common commercial practices as financing statements, security agreements, crop liens, and lien releases. If he did not agree with the May 4th letter, he should have told Mr. Rewoldt. Mr. Rewoldt would then have had an opportunity to reform the letter or clarify his position. Mr. Rowe failed in his business responsibility. The May 4th letter is clearly a release, not a lien. Mr. Rowe admitted himself in trial testimony Mr. Rewoldt would not guarantee payments. The district court's finding of a guarantee is against the substantial weight of the evidence. We reverse the trial court on this issue.

III. Fraudulent Misrepresentation

To show fraud, the plaintiff must establish: (1) representation, (2) falsity, (3) materiality, (4) scienter, (5) intent to deceive, (6) reliance, and (7) resulting injury and damage. Robinson v. Perpetual Services Corp., 412 N.W.2d 562 (Iowa 1987); Cornell v. Wunschell, 408 N.W.2d 369 (Iowa 1987); Beeck v. Kapalis, 302 N.W.2d 90 (Iowa 1981). The plaintiff's reliance must be justifiable. Beeck v. Kapalis, 302 N.W.2d at 94. A statement of intent to perform a future act is actionable if the speaker had an existing intention not to perform. Robinson v. Perpetual Services Corp., 412 N.W.2d at 565.

> "Unless the present state of mind is misstated, there is no misrepresentation. When a promise is made in good faith, with the expectation of carrying it out, the fact that it

> subsequently is broken gives rise to no cause of action, either for deceit, or equitable relief. Otherwise any breach of contract would call for such a remedy. The mere breach of a promise is never enough in itself to establish the fraudulent intent. It may, however, be inferred from the circumstances, such as the defendant's insolvency or other reason to know that he cannot pay, or his repudiation of the promise soon after it is made, with no intervening change in the situation, or his failure even to attempt any performance,, or his continued assurances after it is clear that he will not do so."

Prosser, The Law of Torts, § 109, pp. 730-731 (4th ed. 1971).

Thus, when a promise is made by one individual in good faith with the expectation of carrying that promise out, the mere fact the promise was not fulfilled does not, alone, constitute actionable fraud. For the breaking of such a promise to be actionable as fraud, the speaker must have had an existing intent not to perform at the time the promise was made.

The representation or promise need not be an affirmative misstatement. Fraud can also arise from failure to disclose material facts. Sinnard v. Roach, 414 N.W.2d 100 (Iowa 1987). The misrepresentation or failure to disclose material facts must relate to a material matter which is known by the party. The party must have a legal duty to communicate the information to the other party. Such a duty can arise from a relation of trust, a relation of confidence, inequality of condition and knowledge, or other circumstances as shown by a particular fact situation. In addition, the element of scienter is met

when the evidence of any particular case shows that representations were made in reckless disregard of their truth or falsity. B & B Asphalt Company, Inc. v. T.S. McShane Company, Inc., 242 N.W.2d 279 (Iowa 1976). Although such a false statement innocently or mistakenly made will not establish an intent to defraud, a statement recklessly asserted will give rise to an intent to defraud. Grefe v. Ross, 231 N.W.2d 863 (Iowa 1975). As can be seen, the elements of scienter and intent to deceive are similar.

The burden is on the plaintiff to establish fraud by a preponderance of clear, satisfactory, and convincing evidence. Robinson v. Perpetual Services Corp., 412 N.W.2d 562 (Iowa 1987); Cornell v. Wunschel, 408 N.W.2d 369 (Iowa 1987). We review the law and facts of this case in light of that standard.

The district court found no fraudulent misrepresentation with regard to the events of May 4, 1985. The evidence clearly does not show Fred Rewoldt, as president and agent of the Bank, had a present intent to defraud the Cooperative. The letter memorializing the telephone conversation only purports to be a release, while the Cooperative claims a guarantee was actually made by the Bank on the Ellsworth account. The district court ruled in favor of the Bank. We affirm the district court's holding on this count.

Next, the Cooperative asserted its manager, Don Rowe, endorsed a $45,106.64 crop check in reliance on Fred Rewoldt's fraudulent promise. The Cooperative alleged Fred Rewoldt informed Don Rowe in exchange for his endorsement on check, Fredericksburg Farmers Cooperative would immediately be sent a check for $30,000. The Bank contended Mr. Rewoldt's only statement was to the effect that the plaintiff could expect a check. Two checks, totaling $10,600, were in fact later sent to the Cooperative from the Ellsworths' account at the Bank.

The district court ruled a fraudulent misrepresentation was made in securing the endorsement of Don Rowe on the $45,000 crop check in 1986. The district court found a representation was made to Don Rowe if he endorsed the check, he would be immediately sent a check in the amount of $30,000 plus an additional $2,500 from cattle feeding.

For purposes of this appeal, we must separate the amounts awarded under count III into distinct categories. There was a mention in the transcript of a conversation concerning $2,500 to come from the sale of cattle. However, the Cooperative only asked for $30,000 in its petition. Only later did it claim an extra $2,500 was also promised. The short reference to the $2,500 in the transcript indicates the Ellsworths were planning to sell cattle for that amount in the fall. Fred Rewoldt did not promise, nor does the transcript show Don Rowe initially assumed it to be a promise, for an additional $2,500. The

evidence in the record does not rise to the clear and convincing standard required to support the $2,500 award. We determine as a matter of law the district court erred in awarding the additional $2,500 to the Cooperative. We reverse the district court on this point.

The Cooperative's main argument is the $30,000 allegedly was fraudulently promised as inducement for its officer to endorse the $45,106.64 crop check. We review the record in light of the clear and convincing evidence standard for fraud as required by law. Robinson v. Perpetual Services Corp., 412 N.W.2d at 565. The district court found the Cooperative had established fraudulent misrepresentation by the Bank in securing endorsement of the check. However, a review of the court file seems to indicate the district court relied more on an instrument filed and designated "Plaintiff's Trial Argument" than on the evidence actually presented at trial.

The record reveals Don Rowe, the manager of the Cooperative, misunderstood and misconstrued what was said to him. First, it is clear from the record the Bank never guaranteed the Ellsworth account on May 4, 1985. In fact, the Bank refused to make a loan to the Ellsworths at that time. That fact was known to the Cooperative. Don Rowe himself admitted at trial Fred Rewoldt told him the Bank would not guarantee the Ellsworth account in their telephone conversation of May 4, 1985.

The May 4, 1985, letter is clearly a release of crop liens. Don Rowe took it to be a written guarantee of the Ellsworth account. Yet he admitted at trial the letter is not a guarantee, but merely a release. Furthermore, he knew the letter was a release and claimed it did not accurately reflect the May 4, 1985, telephone conversation. Yet he neglected to contact Fred Rewoldt to inform him the letter did not contain the parties' agreement. The parties could then have clarified it.

Don Rowe did not act as a prudent, reasonable, and knowledgeable businessman under the circumstances. He purports to have been in the agricultural supply business for thirty years. Yet he failed to get a financing statement or security agreement from the Ellsworths. He did not attempt to file such an instrument with the secretary of state in compliance with Iowa's article nine of the Uniform Commercial Code. See generally Iowa Code § 554.9101 et seq.

Don Rowe signed a check for $45,106.64 which others, who had priority over him, had already endorsed. There were still other payees who had not endorsed it. The Cooperative did not file a financing statement and had no security agreement; therefore, it is obvious it would have a low priority in obtaining a portion of that check.

Don Rowe admitted the Ellsworths only recently opened their account with him. They were already in debt to him for over $5,000. He claims they were open and honest in

their business dealings with him. Yet they told him the Bank would be financing their 1985 farming operations when in fact this was not the case. Don Rowe never checked with the Bank to see if this was true. Instead, he simply extended credit to them on their word. When they finally told him the Bank would not be financing their operation, Don Rowe continued to extend credit. When he contacted the Bank, he was told the Bank would not guarantee the Ellsworth account. Yet he still extended them credit. We determine the Cooperative clearly failed to establish at least one necessary element of fraud, namely justifiable reliance on the alleged promise of $30,000. Beeck v. Kapalis, 302 N.W.2d at 94; see also 37 C.J.S. Fraud §§ 3, 102.

The record supports Mr. Rewoldt's testimony concerning the crop check. Fred Rewoldt did in fact make good on his word to see the Cooperative got a check on the Ellsworth account. Two checks totaling $10,600 were paid from the Ellsworth account at the Bank to the Cooperative. Additionally, he released the Bank's lien on the Ellsworth crop monies in favor of the Cooperative. He was under no obligation to do so. If this was an action on which creditor had priority, it is possible the Cooperative would have priority based on the lien release. This, however, is an action alleging fraud. As such, the law views the case in the most serious light. See 37 C.J.S. Fraud §§ 1, 2.

Fred Rewoldt appears to have been acting as a concerned, responsible businessman throughout this period. His actions appear to be unambiguous, straight forward, and prudent. The mid-1980's were difficult times for many Iowa farmers. Almost everyone connected with the agricultural business experienced some loss. The Bank in this case lost over $90,000 when the Ellsworths filed for bankruptcy.

We hold the Cooperative failed to prove by clear and convincing evidence the Bank made fraudulent misrepresentations to induce the endorsement of the $45,000 crop check. We reverse the district court on this point.

AFFIRMED IN PART, REVERSED IN PART.