IN THE COURT OF APPEALS OF IOWA

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84-1992

PHYLLIS J. ROBINSON, ELAINE M. SCHARES AND TERRANCE P. McKENNA, d/b/a PREFERRED PARTNERS,

Plaintiffs-Appellees/Cross-Appellants,

vs.

PERPETUAL SERVICES CORP., An Iowa Corporation, d/b/a PERPETUAL PARTNERS REALTY,

Defendant,

IOWA-NEBRASKA PARTNERS REAL ESTATE INC.,

Defendant-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Black Hawk County (No. 64030) - Forest E. Eastman, Judge.

Defendant Iowa-Nebraska Partners Real Estate, Inc., appeals and plaintiffs cross-appeal from a judgment rescinding a real estate contract and awarding damages for misrepresentation. **REVERSED.**

Peter C. Riley and Mary Hoefer, of the Tom Riley Law Firm, Cedar Rapids, for defendant-appellant/cross-appellee.

G. Brian Pingel and Katherine E. Schmidt, of the Davis firm, Des Moines, for plaintiffs-appellees/cross-appellants.

Heard by Donielson, P.J., and Schlegel, and Sackett, JJ.

PER CURIAM

Plaintiffs Phyllis J. Robinson, Elaine M. Schares and Terrance P. McKenna are realtors in the Waterloo area. Defendant Iowa-Nebraska Partners Real Estate, Inc., sells a franchise package to realtors. Defendant Perpetual Services Corp., is not a party to this appeal. Defendant sought to sell plaintiffs its real estate franchise package. Plaintiffs sought an exclusive franchise for the Waterloo area. An exclusive franchise was drafted but rejected by defendant Defendant's representative allegedly told plaintiffs an exclusive franchise was illegal. A nonexclusive franchise was drafted, signed and put in place. Plaintiffs alleged defendant's representative told them they would not have to worry about other franchisees in the Waterloo area because after the franchise agreement was signed defendant would not solicit other franchisees in the Waterloo area. The franchise agreement was signed on May 20, 1982.

In 1983, another concern in the Waterloo area signed a franchise with defendant and began operating under the franchise. Plaintiffs sued defendant claiming fraudulent and negligent misrepresentation. Plaintiffs asked for rescission of the franchise agreement and damages. On special interrogatories the jury found defendant had made both fraudulent and negligent misrepresentation and awarded plaintiffs damages. Based on the finding of fraudulent and negligent misrepresentation the trial court rescinded the contract but awarded no additional money damages to plaintiffs.

Defendant appeals challenging the judgments. Plaintiffs cross appeal contending additional damages should have been awarded for rescission.

I. Fraudulent Misrepresentation

Defendant contends the trial court erred in submitting the claims for fraudulent and negligent misrepresentation to the jury.

In assessing defendant's claim we look at evidence most favorable to plaintiffs. Iowa R. App. P. 14(f)(2) (1985). Plaintiffs claim the following evidence supports the submission of the fraudulent misrepresentation claim to the jury:

1. Defendant's sales person testified he would not return to Waterloo and solicit other franchises;
2. Defendant returned to Waterloo to solicit other franchises.

Plaintiffs argue these representations support a submission of fraud because the evidence supports a conclusion the plaintiffs could reasonably believe defendant's representative would solicit no further franchises in the Waterloo area. Defendant argues the statements made are not sufficient to support a finding of fraudulent misrepresentation because, if made, they were statements as to an intention not to perform a future act.

We agree with defendant and determine the misrepresentation allegedly made was a statement of intention not to perform a future act. As such it is actionable only if made with an existing real intention to perform the future act. Hagarty v. Dysart-Geneseo Comm. Inc., 282 N.W.2d 92, 95 (Iowa 1979); Grefe v. Ross, 231 N.W.2d 863, 867 (Iowa 1975).

We must determine therefore whether there is substantial evidence defendant made the statements with an existing real intention to solicit business in the Waterloo area in the future. Fraud may be established by circumstantial evidence. Hagarty, 282 N.W.2d at 95. However, the fact future solicitations were made in the Waterloo area is not alone sufficient to show the earlier representation was false. Id. Restatement (Second) Torts §530.1 (1977) provides:

> A representation of the maker's own intention to do or not to do a particular thing is fraudulent if he does not have that intention.

Restatement (Second) of Torts §530 comments b and d (1977) state:

> b. To be actionable the statement of the maker's own intention must be fraudulent, which is to say that he must in fact not have the intention stated. If he does not have it, he must of course be taken to know that he does not have it. If the statement is honestly made and the intention in fact exists, one who acts in justifiable reliance upon it cannot maintain an action of deceit if the maker for any reason changes his mind and fails or refuses to carry his expressed intention into effect. If the recipient wishes to have legal assurance that the intention honestly entertained will be carried out, he must see that it is expressed in the form of an enforceable contract, and his action must be on the contract.
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> d. Proof of intention not to perform agreement. The intention that is necessary to make the rule stated in this Section applicable to the intention of the promisor when the agreement was entered into. The intention of the promisor not to perform an enforceable or unenforceable agreement cannot be established solely by proof of its nonperformance, nor does his failure to perform the agreement throw upon him the burden of showing that his nonperformance was due to reasons which operated after the agreement was entered into. The intention may be shown by any other evidence that sufficiently indicates its existence, as, for example, the certainty that he would not be in funds to carry out his promise.

In Hi-Way Motor Co. v. International Harvester Co., 229 N.W.2d 456 (Mich. 1975), defendant International Harvester allegedly represented they would not grant other heavy-duty truck franchises in Hi-Way's area when they granted a franchise to plaintiff Hi-Way. The Michigan court determined that even though defendant may have violated its promise not to put another heavy-duty truckline franchise in that area, such violation did not necessarily constitute fraud. The court stated:

> Statements promissory in their character that one will do a particular thing in the future are not misrepresentations, but are contractual in their nature, and do not constitute fraud. (Citations omitted.)
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> 'Since a fraud must relate to facts then existing or which have previously existed, the general rule is that fraud cannot be predicated upon statements promissory in

> their nature and relating to future actions, nor upon the mere failure to perform a promise, or an agreement to do something at a future time, or to make good subsequent conditions which have been assured. Nor, it is held, is such nonperformace alone even evidence of fraud. Reasons given for this rule are that a mere promise to perform an act in the future is not, in a legal sense, a representation, and a failure to perform it does not change its character. Moreover, a representation that something will be done in the future, or a promise to do it, from its nature cannot be true or false at the time when it is made. The failure to make it good is merely a breach of contract, which must be enforced by an action on the contract, if at all.'

Hi-Way, 229 N.W.2d at 459. The court went on to hold:

> . . . defendant's representatives spoke only of those things which might happen in the future. By granting the heavy—duty truckline franchise to [another party], defendant merely failed to make good subsequent conditions which had been assured. . . . this broken promise or unfulfilled prediction did not constitute fraud, nor was it even evidence of fraud. . . . The failure by defendant to make good its guarantee that no other franchises would be granted was merely a breach of contract, which must be enforced by an action on the contract, if at all.

Id.

We find there was not sufficient evidence in the record to support a submission of fraudulent misrepresentation. We reverse the trial court on this issue.

II.

Defendant next contends there was insufficient evidence to submit the claim of negligent misrepresentation. Plaintiffs contend in addition to the evidence of the statement defendant would not solicit franchises in the Waterloo area and did so solicit, the fact that defendant's representative allegedly told plaintiffs exclusive franchises were illegal is sufficient evidence to submit the negligent misrepresentation claim.

Restatement (Second) of Torts §552.1 (1977) provides:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Whether the alleged representation is negligent or fraudulent there must first be evidence of a misrepresentation. A misrepresentation is any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. Pasko v. Trela, 46 N.W.2d 139, 143 (Neb. 1951). A mere promise to perform or not perform an act in the future is not a misrepresentation but is contractual in nature. Hagerty, 282 N.W.2d at 95. See Hinsdale v. W. I. Phillips, 199 N.C. 563, 155 S.E. 238 (1930).

A negligent misrepresentation is a false misrepresentation made by a person who has no reasonable grounds for believing it to be true, although he does not know that it is untrue, or even believe it to be true. 58 C.J.S. Misrepresentation (1948) (citing Black's Law Dictionary). Misrepresentations of the law are generally not actionable in fraud unless the party making the misrepresentations has superior knowledge or is in a fiduciary position. Restatement (Second of Torts) §552.2(a) and (b) (1977). See Larsen v. United Federal Savings & Loan Association, 300 N.W.2d 281, 287 (Iowa 1981).

We fail to determine a legal statement made under these circumstances is evidence to support a submission on negligent misrepresentation.

Plaintiffs claimed the contract should be rescinded because of fraudulent and negligent misrepresentation. Based on the jury's verdict, the trial court determined there was fraud and misrepresentation and rescinded the contract. Having determined there is insufficient evidence on either issue we reverse

the trial court's rescission of the contract. Having done so, we need not address the issues raised by plaintiffs on appeal.

REVERSED.