

FILED

JAN 25 1979

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IN THE COURT OF APPEALS OF IOWA
CLERK SUPREME COURT

U.S. HOMES, INC.,

Appellee,

vs.

JAMES W. HEATH,

Appellant.

Filed January 25, 1979

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2-61438

Appeal from the Polk District Court - Dale S. Missildine, Judge.

Defendant appeals from trial court order granting new trial as to both plaintiff's claim and defendant's counterclaim. Affirmed with respect to defendant's claim; reversed with respect to plaintiff's claim.

William F. Fanter of Bradshaw, Fowler, Proctor & Fairgrave, of Des Moines, for appellant.

Robert Sandler and Harold Leener of Des Moines for appellee.

Heard by Oxberger, C.J., and Snell, Carter and Johnson, JJ; Donielson, J. takes no part.

PER CURIAM

Defendant, James W. Heath, appeals from trial court order granting a new trial.

The action is a suit by plaintiff, U. S. Homes, Inc. (Homes), for recovery of lost profits from defendant's alleged breach of contract for construction of a house. Defendant counterclaimed, seeking damages, including mental pain and anguish, caused by false and fraudulent representations made by agents of Homes and, in addition, exemplary damages. The jury returned a verdict for defendant on Homes's claim and a verdict of \$5,300 actual and \$9,850 exemplary damages against Homes on defendant's counterclaim.

Homes filed a motion for a new trial urging among other things that (a) the verdict was contrary to the evidence and law, and (b) that the defendant failed to establish fraud on the part of Homes. In response to said motion, the trial court ruled:

"Motion for New Trial filed by Plaintiff November 25, 1977 coming on for hearing this date, and the Court having listened to arguments of counsel and considered the evidence presented at trial finds that there is no evidence in the record from which the jury could find that plaintiff/defendant to Counterclaim made representations to Defendant-Counterclaimant amounting to fraud. Counterclaimant is given seven (7) days from this date to file a remittitur of actual and punitive damages found by the jury in favor of Counterclaimant and against Plaintiff/Defendant to Counterclaim. If said remittitur is filed within the specified time the Motion for New Trial will be overruled. If said remittitur is not filed within said specified time, the Motion for New Trial will be sustained."

The defendant declined to file any remittitur and has appealed.

I. Defendant asserts as his first issue that regardless of the validity of the motion for new trial with respect to the counterclaim, the trial court erred in granting a conditional new trial as to Homes's claim. We agree with this contention. Whether it be called fraud or misrepresentation (the trial court used both terms in its instructions), the evidence of misrepresentations by Homes's agent was clearly sufficient to sustain the pleaded affirmative defense of avoidance contained in Count III of defendant's answer. The jury could have found for defendant on either this theory or his general denial. There was no basis to grant a new trial on Homes's claim. Nor is that claim so inseparable from the counterclaim as to require a new trial as to all issues because of defects, if any, in the verdict on the counterclaim. See, e.g., McCarville v. Ream, 247 Iowa 1, 10-13, 72 N.W.2d 476, 481-83 (1953).

II. Next, we consider defendant's second contention, which is that no new trial should have been granted as to the counterclaim. In passing on this question, we must

initially conclude that the trial court's findings as to lack of fraud are too broad. We believe the jury could have found the alleged misrepresentations as to the non-binding character of the contract were fraudulent if, at the time they were made, Homes intended to claim the opposite as soon as the agreement was executed. But in this case, and under the various grounds of the motion for a new trial, the relationship of this fraud, if any, to the theory of defendant's counterclaim and the damages awarded becomes material. Defendant's theory of recovery contains among other elements, the alleged intentional infliction of emotional distress as that cause of action is established and defined in *Amsden v. Grinnell Mutual Reinsurance Co.*, 203 N.W.2d 252, 255 (Iowa 1972). The alleged misrepresentations in the present case are as follows:

- (1) That the instrument signed was not a contract and was not binding upon defendant.
- (2) That the instrument was only binding on Homes.
- (3) That the instrument was merely a guarantee by Homes to deliver the materials called for at a certain price.
- (4) That the instrument was only an estimated cost projection.
- (5) That the defendant would be permitted to have an attorney review and approve any documents before an enforceable legal relationship would be established between defendant and Homes.

We believe that these allegations, even if proven, fall far short of the type of outrageous conduct necessary to satisfy the holdings of *Amsden v. Grinnell Mutual Reinsurance Co.*, supra. In addition, we believe the evidence in the record of defendant's mental pain and anguish is insufficient to satisfy the requirements of severe or extreme emotional distress required by Amsden. Because the element of intentional infliction of emotional distress was improperly submitted to the jury, the trial court correctly sustained the motion for a new trial on the claim for actual damages. This necessarily requires retrial of the claim for exemplary damages.

That portion of the trial court's order granting a new trial of the counterclaim is affirmed. The portion of the order granting a new trial of Homes's claim is reversed.