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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-502 / 89-1953

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FEEDSTUFF, INC., A Corporation,

Plaintiff-Appellee,

vs.

FIRST TRUST AND SAVINGS BANK, Aurelia, Iowa,

Defendant-Appellant.

Appeal from the Iowa District Court for Cherokee County, Frank B. Nelson, Judge.

Bank appeals a district court judgment awarding plaintiff compensatory and exemplary damages. **AFFIRMED.**

Colin J. McCullough of McCullough Law Firm, Sac City, for appellant.

Willis J. Hamilton of Hamilton Law Firm, P.C., Storm Lake, for appellee.

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

SACKETT, J.

This appeal follows a jury verdict awarding actual damages of $56,522 and punitive damages of $2,000 to plaintiff-appellee Feedstuff, Inc., in a fraud action against defendant-appellant First Trust and Savings Bank, Aurelia, Iowa. Plaintiff claimed they sold woodshavings for which they were not paid to Maple Valley Woodshaving of Aurelia because of fraudulent representation as to Maple Valley's financial condition made by an officer of defendant bank, Scott Monical. Defendant appeals. We affirm.

I.

Defendant contends we should dismiss the case or grant a new trial because plaintiff had been in bankruptcy. The issue of plaintiff's bankruptcy was first raised in posttrial motions. The trial court refused defendant's request for relief, finding there was ample evidence of the bankruptcy and defendant could have found out about it earlier. We agree with the trial court that defendant's claim was not timely made. The fact that plaintiff is in bankruptcy does not necessarily defeat its claim. See Donezal Commodities v. City of Cedar Rapids, 387 N.W.2d 572, 575 (Iowa 1986). However, it was apparent here the claim was a part of the bankrupt estate. See Collins v. Federal Land Bank, 421 N.W.2d 136, 138 (Iowa 1988). We stayed the proceedings to allow communication with the bankrupt estate. The trustee for the bankrupt estate has

now advised us this claim will be a part of the estate and plaintiff's attorney has been hired to represent the bankrupt estate. We therefore find no reason to dismiss the case or grant a new trial on this basis.

II.

Defendant next contends there was not substantial evidence to support a finding of fraud and a finding that plaintiff was damaged by defendant's conduct. We disagree.

Recovery in a fraud action is premised on plaintiff's ability to show by a preponderance of clear, satisfactory and convincing evidence the following elements: (1) representation, (2) falsity, (3) materiality, (4) scienter, (5) intent to deceive, (6) reliance, and (7) resulting injury or damage. Cornell v. Wunschel, 408 N.W.2d 369, 374 (Iowa 1987); B & B Asphalt C. v. T.S. McShane Co., 242 N.W.2d 279, 284 (Iowa 1976).

A misrepresentation can be an affirmative misstatement; it can also come from a failure to disclose material facts. See Sennard v. Roach, 414 N.W.2d 100, 105 (Iowa 1987); Cornell, 408 N.W.2d 374; Kunkle Water and Elec. Inc. v. City of Prescott, 347 N.W.2d 648, 653 (Iowa 1984). Elements of fraud may be proven by direct proof or circumstantial evidence. Haack v. Burlington Northern, Inc., 309 N.W.2d 147 (Iowa App. 1981). Plaintiff must prove all the elements of fraud by a clear and convincing preponderance of the evidence. Wilden Clinic v. City of

Des Moines, 229 N.W.2d 286, 292 (Iowa 1975); Nie v. Galena State Bank & Trust, 387 N.W.2d 373, 375 (Iowa App. 1986).

Plaintiff was a Utah corporation selling woodshavings. Bill Edwards owned a major part of plaintiff corporation. Maple Valley was an Aurelia retailer of woodshavings that was a customer of and had a substantial indebtedness to defendant bank.

There are facts from which the jury could have found that in March 1987 Maple Valley wanted to make substantial purchases from plaintiff and gave Bill Edwards defendant's name as a credit reference. Edwards called and spoke to Scott Monical at defendant bank on March 12, for nearly twenty minutes. Edwards in the course of the phone conversation told Monical his company hoped to do a large amount of business, probably $20,000--$30,000 monthly, with Maple Valley and he wanted to know the financial condition of the business and if they paid their bills.

Edwards was told by Monical (1) Maple Valley was a long-time and profitable business, (2) it was currently profitable, (3) it was in the process of being sold to Jim Ebel, (4) it was important to the area, (5) the bank had investment in the company and wanted to see it survive, (6) there should be no problem with receiving payment within 30 days after invoice, and (7) there was no problem with the amount of business sought to be done.

Monical told Edwards "If I were you I would sell woodshavings to Maple Valley." Edwards, after the conversation with Monical and in reliance on Monical's representations plaintiff could bill Maple Valley on 30-day invoice, started shipping woodshavings to Maple Valley without making any effort to obtain any security. In the next month plaintiff shipped some $50,000 worth of woodshavings to Maple Valley. Plaintiff quit shipping to Maple Valley on April 29, 1987. Plaintiff has not been paid the $50,000 by Maple Valley and will not be paid.

Edwards came to Iowa on May 15, 1987, and found the defendant bank closing Maple Valley because of financial problems. Maple Valley owed defendant $310,000 on a loan. The loan had become a problem loan in July 1983 and continued to be a problem loan to the time of closing of the business. There was reference in notations on the defendant's records that on January 21, 1985, Maple Valley's business was going backwards, and that the bank did not want to "let the rabbit out of the hat." There was a notation in defendant's records dated August 15, 1986, that when the "time comes can get the high demand deposit for right of offset."

In November/December 1986, three months before Monical's conversation with Edwards, defendant had received a deed to the Maple Valley business and a surrender of their assets. The deed and surrender had been given with

an agreement they would keep it confidential. The deed was not recorded until about May 14, 1987. When the business was closed, plaintiff was notified by defendant that the assets of the business were necessary to cover its security interests and the general creditors would not be paid. An increase in the worth of Maple Valley by virtue of plaintiff's $50,000 in sales was additional security for defendant.

There is clear and convincing evidence from which a fact finder could find (1) defendant made representations to plaintiff and withheld information from plaintiff and, but for these representations and failures to disclose, plaintiff would not have extended credit to Maple Valley, (2) defendant knew the information supplied was false and, as a substantial creditor of Maple Valley and the entity confidentially holding title to Maple Valley, gave the information to plaintiff to encourage the loan, and (3) defendant's failure to give accurate information and make a disclosure was fraudulent and intended to induce plaintiff to extend credit that would accrue to defendant's benefit. There is clear and convincing evidence to support a finding the credit was extended as a result of fraud, see Schalz Homes, Inc. v. Larson, 411 F.2d 342, 348 (7th Cir. 1969), and the statements induced plaintiff to do substantial business with Maple Valley. See Wilden Clinic, Inc. v. City of Des Moines, 229 N.W.2d 206, 292 (Iowa 1975).

Defendant's argument centers not on the absence of evidence but on the fact the evidence introduced was not clear and convincing. It points out a considerable amount of the evidence supporting plaintiff's case centers on Bill Edward's testimony about his phone call with Monical. Monical did not remember a phone call. Plaintiff introduced a telephone bill showing a nearly twenty minute call between plaintiff and defendant at the applicable time. Defendant also argues other facts in the record negate plaintiff's evidence. We find the evidence meets the clear and convincing standard. See Cornell, 408 N.W.2d at 374.

Defendant also argues defendant's actions were not fraudulent because plaintiff could have obtained correct information from a lien search or other sources. We disagree. Defendant held an unrecorded deed and assignment of the business interest to it. These would not have shown up on a lien search. The fact that other information may have been available from other sources does not negate the material misrepresentations.

III.

Defendant also contends the evidence was not sufficient to submit the issue of punitive damages. Generally, a recovery of punitive damages in a suit alleging fraud will be allowed only where the fraud is an aggravated one, as where it is malicious, deliberate, gross, or wanton. Cornell, 408 N.W.2d at 382. Punitive damages are awarded

as punishment and as a deterrent to the wrongdoers and others. Lola v. Peoples Bank and Trust, 420 N.W.2d 804, 807 (Iowa 1988). They are justified against a party who acts maliciously. See Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149, 167 (Iowa 1984). Malice may exist when a party acts improperly or with reckless or willful disregard of another's rights. See Kloaster v. North Iowa State Bank, 404 N.W.2d 564, 512 (Iowa 1987); Beeck, 350 N.W.2d at 167.

There was evidence from which a jury could conclude defendant knowingly gave plaintiff false information about the financial condition of Maple Valley and failed to disclose its interest in Maple Valley for the purpose of inducing defendant to sell substantial merchandise to Maple Valley on open account, thereby increasing defendant's equities in Maple Valley. The evidence is sufficient to support the award of punitive damages.

AFFIRMED.

Schlegel, P.J., concurs; Habhab, J., specially concurs.

HABHAB, J. (specially concurring)

I specially concur in the result only.