

IN THE COURT OF APPEALS OF IOWA

FILED

AUG 26 1982

CLERK SUPREME COURT

AMERICAN BUILDING COMPANY,

Plaintiff-Appellant,

vs.

LEO MONAHAN; FULLERTON LUMBER COMPANY;
AND ROCKWELL CITY READY MIX,

Defendants-Appellees.

Filed August 26, 1982

2-161
2-67001

220

Appeal from Calhoun District Court, Edward J. Flattery, Judge.

Plaintiff appeals the judgment for defendant in an action in which the trial court (a) refused to foreclose plaintiff's perfected mechanic's lien and (b) awarded defendant \$51,579.93 for consequential damages and lost profits on defendant's negligent misrepresentation counterclaim. Plaintiff claims (a) there was insufficient evidence to support the trial court's finding plaintiff's misrepresentation was negligent (b) expected profits are not recoverable in an action for negligent misrepresentation (c) the damages for loss of expected profits were too speculative to be awarded (d) the judgment should have been reduced by the value of plaintiff's building materials remaining on defendant's property and (e) the evidence of estoppel to prevent foreclosure of plaintiff's mechanic's lien was not clear, convincing, and satisfactory. REVERSED IN PART AND AFFIRMED IN PART.

Kurt Wilke of Bennett, Beisser & Wilke, Fort Dodge, for plaintiff-appellant.

Arthur H. Johnson and James L. Kramer of Johnson, Erb, Latham & Gibb, P.C., Fort Dodge, for defendant-appellee Monahan.

Considered en banc.

Plaintiff appeals the judgment for defendant in an action in which the trial court (a) refused to foreclose plaintiff's perfected mechanic's lien and (b) awarded defendant \$51,579.93 for consequential damages and lost profits on defendant's negligent misrepresentation counterclaim. Plaintiff claims (a) there was insufficient evidence to support the trial court's finding plaintiff's misrepresentation was negligent (b) expected profits are not recoverable in an action for negligent misrepresentation (c) the damages for loss of expected profits were too speculative to be awarded (d) the judgment should have been reduced by the value of plaintiff's building materials remaining on defendant's property and (e) the evidence of estoppel to prevent foreclosure of plaintiff's mechanic's lien was not clear, convincing, and satisfactory. We reverse the trial court's award of damages for negligent misrepresentation and affirm its conclusion plaintiff is estopped from foreclosing its mechanic's lien.

Plaintiff, American Building Co., manufactures grain storage bins. Defendant, Leo Monahan, visited plaintiff's plant in Atlantic, Iowa, and indicated to Fred Maughan, an employer of plaintiff, he was interested in purchasing a building. Maughan informed defendant he would have to purchase the building through one of the independent dealers associated with plaintiff. Maughan then recommended Central States Clear Span Sales Company to Monahan. Monahan testified he relied upon Maughan's recommendation and contracted with Central States in August of 1978 to erect the building. Defendant gave \$9185.83 to Central States as downpayment for the building.

The building materials were shipped by truck to Monahan's farm on October 30, 1978. The driver of the truck, an employee of plaintiff, had been instructed to obtain a cashier's check prior to unloading the materials. Plaintiff had instituted that policy for all materials ordered through Central States as several of Central States' checks to plaintiff had been dishonored. Monahan did not have a cashier's check, but a representative of Central States took Monahan's check and reissued a Central States check to the driver. The driver then

phoned plaintiff, informed his supervisor of the situation and obtained authorization to disregard the new policy and accept Central States' check rather than demand a cashier's check. Central States' check was subsequently dishonored. On December 5, 1978, plaintiff filed a mechanic's lien for \$13,395.31 against Monahan's property.

After learning of the mechanic's lien, Monahan called Maughan at American Building. The evidence is conflicting on the content of that conversation. Monahan claims Maughan told him not to worry and he would not have to pay any more for the building. Monahan also claims he offered to return the building. Maughan testified he merely empathized with Monahan and suggested he retain legal counsel.

In January of 1979, Central States' crew returned to Monahan's farm and performed some work on the building. The framework was partially constructed before work on the building was totally abandoned. On March 17, 1979, the building collapsed.

When American Building sought to foreclose the mechanic's lien on Monahan's property, Monahan counterclaimed for damages proximately caused by plaintiff's negligent recommendation of Central States. Monahan testified he paid Central States a total of \$16,634.83 in total reliance upon Maughan's high recommendation of Central States. Monahan testified he had satisfied the mechanic's lien of co-defendant, Fullerton Lumber Company, in the amount of \$1148.77 for concrete forms for the building. Co-defendant, Rockwell City Ready Mix, has not had its lien of \$5512.58 paid, but Monahan intends to satisfy the lien. Monahan also counterclaimed for the loss of expected profits for storing corn in the building under a federally sponsored grain storage program. Monahan claims he was prevented from participating in the program because the dealer recommended by plaintiff failed to erect the building. Monahan testified he would have stored 37,725 bushels of corn and received twenty-five cents per bushel. Over a three-year period, this would have amounted to \$28,293.75. Monahan also asserted a claim for damages based upon a fraudulent misrepresentation theory.

The trial court held plaintiff was estopped from foreclosing its mechanic's lien. Judgment was rendered on Monahan's counterclaim for the damages he sustained from plaintiff's negligent misrepresentation. The fraudulent misrepresentation claim was dismissed. The court awarded Monahan a total of \$51,579.73 plus interest and costs.

I. Scope of Review

Monahan claims this case should be reviewed as an ordinary action, in which the trial court's findings of fact are binding on this court if supported by substantial evidence. We disagree.

In Rector v. Alcorn, 241 N.W.2d 196, 198-99 (Iowa 1976), the plaintiff brought an equitable action to enjoin forfeiture of a lease of real property. Defendants cross-petitioned for damages for breach of contract. On review of the trial court decision, plaintiff claimed the court was restricted to corrections of errors at law. The court held, although the cross-petition stated a claim normally cognizable at law, the attachment of equity jurisdiction over the plaintiff's petition allows the court to accomplish full and complete justice between the parties. Id. at 199. The case stood in equity and was reviewed de novo. Id. In the case at bar, plaintiff's petition for foreclosure of its lien was an equitable action. § 572.26, The Code 1979. Equity jurisdiction therefore also attached to the defendant's counterclaim, Rector v. Alcorn, 241 N.W.2d at 199; Grandon v. Ellingson, 259 Iowa 514, 518, 144 N.W.2d 898, 901 (Iowa 1966), even though the claim would normally be tried and reviewed as an ordinary proceeding. Ryan v. Krame, 170 N.W.2d 395, 399 (Iowa 1969). Consequently, we are not bound by the trial court's findings of fact, but we accord them due weight, especially regarding the credibility of witnesses.

II. Estoppel

The trial court held plaintiff was estopped from foreclosing its mechanic's lien. We agree with the trial court's conclusion.

Equitable estoppel arises when a

person by his acts, representations, or admissions, or even by his silence when it is his duty to speak, intentionally or

through culpable negligence induces another to believe that certain facts exist, and the other person rightfully relies and acts on such belief, and will be prejudiced if the former is permitted to deny the existence of such facts.

Laverty v. Hawkeye Security Insurance Co., 258 Iowa 717, 726, 140 N.W.2d 83, 88-89 (Iowa 1966)(quoting 31 C.J.S. Estoppel § 59 at 368 (1964)). "An estoppel is based upon the idea that one who has made certain representations or taken a certain position, should not thereafter be permitted to change his position to the prejudice of one who has relied thereon." Id. The elements of equitable estoppel enumerated in Merrifield v. Troutner, 269 N.W.2d 136, 137 (Iowa 1978), are: "(1) a false representation or concealment of material facts; (2) lack of knowledge of true facts on part of actor; (3) intention that it be acted upon; and (4) reliance thereon by the party to whom made, to his prejudice and injury." The elements must be established by clear, convincing and satisfactory evidence. Johnson v. Johnson, 301 N.W.2d 750, 754 (Iowa 1981).

In this case, Monahan, upon learning that a mechanic's lien had been filed on his property, contacted Maughan, the sales manager of American Building. Monahan testified he was told by Maughan not to worry about the lien and that he would probably get the building free. Monahan also claims Maughan indicated this problem had occurred before, which elevates Maughan to a position of superior knowledge of peculiar facts and procedures material to the problem. Monahan also testified he offered to return the building materials, still packed in the original containers, to American Building when he learned of the mechanic's lien. Maughan testified he merely empathized with Monahan and suggested he retain an attorney. Maughan testified he reassured the noticeably agitated Monahan by saying "there isn't very many courts in the land that would make you pay twice for the same building."

We are of the opinion, after viewing the entire record, the elements of equitable estoppel have been proved by defendant. In Dierking v. Bellas Hess Superstore, 258 N.W.2d 312, 315 (Iowa 1977), false representation was

characterized as "anything short of a warranty which produces upon the mind a false impression conducive to action." Maughan concealed, or failed to apprise Monahan, that Central States was in bad financial straits and was not performing to customers' satisfaction. Maughan also failed to tell Monahan that American Building habitually filed mechanic's liens on customers' property in the event a dealer failed to pay for the building supplies. We think the evidence is clear that Maughan's responses to Monahan's question produced a false impression in Monahan that the mechanic's lien should be no cause for alarm. We think that false impression induced Monahan to retain the building materials and proceed with construction of the building. We are convinced but for the reassurances Maughan gave Monahan, Monahan would have returned the building materials. There is no evidence Maughan did not intend Monahan to rely upon his reassurances. Since defendant has proved the elements of estoppel by clear, convincing, and satisfactory evidence, we affirm the trial court's order denying foreclosure of plaintiff's lien.

III. Negligent Misrepresentation

Defendant counterclaimed for damages caused by plaintiff's allegedly negligent recommendation of Central States. Defendant claims plaintiff (a) made false statements regarding the integrity of, and craftsmanship performed by, Central States and (b) failed to exercise reasonable care in obtaining adequate information on Central States' reputation. Defendant's counterclaim is based upon Restatement (Second) of Torts § 552 (1977), which has been recognized as stating the elements of the tort of negligent misrepresentation in Iowa. Beeck v. Kapalis, 302 N.W.2d 90, 96-97 (Iowa 1981); Larsen v. United Federal Savings & Loan, 300 N.W.2d 281, 287 (Iowa 1981). Section 552 provides in relevant part:

(1) 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.

The trial court held plaintiff communicated false information, in the course of its business, without exercising reasonable care in obtaining the information. The trial court awarded defendant \$16,634.83 for contracts entered into in reliance upon plaintiff's false statements and \$28,293.75 for profits he lost because he could not participate in the grain storage program sponsored by the federal government.

We do not believe defendant sustained his burden to prove plaintiff was guilty of negligent misrepresentation. Defendant claims the statement made by Maughan, as plaintiff's employee, that Central States had been doing an "excellent [or] real good job for [American Building]," and would "probably [be] their best bet to get done what they wanted done," were false. He also claims plaintiff was negligent in making the false statement because of the failure to exercise reasonable care and competence in obtaining information about Central States.

In summary, defendant failed to prove the elements of negligent misrepresentation by plaintiff. The trial court's order awarding damages on that theory is reversed. Plaintiff is estopped, however, from foreclosing the mechanic's lien on Monahan's property. Monahan, having paid Central States for the building materials, is entitled to possess them. Costs are to be equally divided between American Building and Monahan.

REVERSED IN PART AND AFFIRMED IN PART.