FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

THORWALD R. SOLVERSON and **SHIRLEY M. SOLVERSON**, Plaintiffs-Appellees, vs. **LORENTZEN AND LoBIANCO**, a partnership, and **JOHN C. LORENTZEN, JOEL E. LORENTZEN** and **SALVATORE L. LoBIANCO**, Defendants-Appellants.	)	237 8-298 87-1467

Appeal from the Iowa District Court for Scott County (71812), Margaret C. Briles, Judge.

Defendants appeal a district court judgment foreclosing defendants' interest in an apartment building and denying defendants' counterclaims against the plaintiffs for damages. **AFFIRMED.**

John C. Hendricks, Muscatine, for defendants-appellants.

Dennis J. Britt, Davenport, for plaintiffs-appellees.

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

SCHLEGEL, P.J.

Defendants appeal a district court judgment foreclosing defendants' interest in an apartment building and denying defendants' counterclaims against the plaintiffs for damages. Defendants contend that: (1) the plaintiffs fraudulently misrepresented the age of the apartment roof; (2) the plaintiffs fraudulently misrepresented the income and expenses of the apartment on the listing sheet; (3) the plaintiffs breached the contractual warranty since the apartment boiler failed to comply with the city building code; (4) the plaintiffs fraudulently misrepresented the condition of the boiler; (5) the plaintiffs negligently represented the physical condition and financial potential of the apartment; (6) plaintiffs were not entitled to recover attorney fees; and (7) the contract between the parties bars plaintiffs' recovery of a deficiency judgment.

On February 28, 1980, the plaintiffs entered into an installment purchase contract with defendants concerning an old apartment building in Davenport. Prior to signing the contract, defendants examined the listing sheet on the property. The sheet gave a figure for gross income, expenses, and net income for the apartment. The sheet also noted in the remarks section that the building had a "three-year roof."

The contract stated that the seller warranted that the building complied with the city code. In addition, the

parties agreed that if suit is commenced to enforce payment or notice of forfeiture is sent, the buyers had to pay reasonable attorney fees to seller as provided by law. The contract also provided that once the buyers had paid $15,000 of the principal, the contract could not be forfeited but only foreclosed in the same manner as a mortgage. Defendants contend that these last two provisions prohibited recovery of attorney fees and a deficiency judgment in this case.

The boiler in the apartment was inspected in March 1979 and March 1980 and given an "A" rating. However, the defendants had to pay nearly $4,000 to repair the boiler in 1981. The roof, which is flat, was also retarred and papered in 1982. Defendants discovered that the roof was older than three years at the time the contract was signed. Defendants' expenses generally exceeded the estimates that were provided and they lost money in most years. After February 28, 1986, the defendants stopped making payments. At some point thereafter, defendants signed a quit claim deed to the plaintiffs without the knowledge or consent of the plaintiffs.

Plaintiffs filed their petition on May 2, 1986, seeking judgment on the unpaid balance of the contract. Defendants counterclaimed based on alleged misrepresentations by the plaintiffs concerning the property. Defendants claimed damages of over $73,000 based on the money they expended on

the apartment. Plaintiffs recovered a judgment for the contract balance and for attorney fees. Defendants' counterclaims were rejected and they now appeal.

As this case was tried in equity, our review is de novo and equity standards apply. First Nat'l Bank in Lenox v. Brown, 181 N.W.2d 178, 181 (Iowa 1970).

I. **Fraud.** Recovery in a fraud action at law is premised on the ability to show by a preponderance of clear, satisfactory and convincing evidence each of the following elements: (1) representation; (2) falsity; (3) materiality; (4) scienter; (5) intent to deceive; (6) reliance; and (7) resulting injury and damage. B & B Asphalt Co. v. T.S. McShane Co., 242 N.W.2d 279, 284 (Iowa 1976) (emphasis added). The rules are less strict, however, in cases such as these, which are tried in equity. First Nat'l Bank in Lenox, 181 N.W.2d at 181. In equity cases, fraud may be constructed from circumstances, whereas the law must find it as fact. Furthermore, equity may grant relief absent a showing of scienter or pecuniary damage. Id.

In the present case, three of defendants' affirmative defenses are based upon allegations that the plaintiffs made representations to the defendants which induced them to enter into the installment purchase contract, and that such representations, upon which defendants justifiably relied, were untrue at the time they were made. As set out

in defendants' brief, it is claimed that plaintiffs misrepresented the age and condition of the roof (brief point I), the income and expenses of the property provided by the plaintiffs on the listing sheet (brief point II), and the condition of the boiler (brief point IV).

With respect to the roof, defendants claim that the "three-year roof" statement on plaintiffs' listing sheet was a fraudulent misrepresentation. They apparently claim that, although the evidence on the last repair date of the roof under plaintiffs' ownership was disputed, the "three-year roof" statement on plaintiffs' listing sheet led them to believe that the roof had been replaced the year prior to the time they entered into the purchase contract. They further claim that the age of the roof was material in their purchase decision, particularly since they were obtaining a three year down payment loan from the bank and did not want major repair bills during that time.

The trial court found that defendants failed to establish, by a preponderance of clear and convincing evidence, that there was a representation by the plaintiffs that the roof had been replaced in the prior year, and that the only representation made by plaintiffs was that within the last several years the roof had been retarred and repapered. We agree with this finding and additionally note that the record is devoid of any evidence that any of the defendants made further inquiry into the meaning of the

"three-year roof" statement on the listing sheet. We believe the record fails to substantiate defendants' claims of misrepresentation or reliance on this issue.

With respect to the income and expenses of the property as provided on plaintiffs' listing sheet, defendants claim that they were misled because the figures on the listing sheet were projections of income and not the actual figures of the expenses and income of the property at the time they were made. Although it is clear that defendants relied upon the figures on the listing sheet in preparing their offer, there is no indication that the income and expense figures on the listing sheet were anything other than actual "current" expenses, based upon the previous tax year. Furthermore, there is no testimony which indicates that any of the original defendants believed that the listing sheet had been represented to them as future projections at the time of the purchase offer. We find that defendants failed to establish by a preponderance of the evidence that there was any false representation made as to the income and expense items.

With respect to the condition of the boiler, defendants claim that the boiler was not in a safe condition at the time they purchased the property. While the evidence indicates that the boiler was repaired in 1981 due to natural corrosion which had most likely occurred over a period of years, the preponderance of the evidence

indicates that "the boiler gave every appearance of being in good condition and had been properly maintained by the plaintiffs during their ownership" as the trial court found. Although certain minor repairs were necessary, the defendants all agreed that they anticipated such repairs, and we find it significant that the boiler passed city inspection with an "A" rating. We thus find no merit to this claim, and we similarly find defendants' breach of contract warranty claim to be without merit (brief point III).

II. **Negligent Misrepresentation.** Defendants also raise the defense that plaintiffs negligently misrepresented the roof, income and expense figures, and the condition of the boiler. The elements of the tort of negligent misrepresentation as stated in Beeck v. Kapalis, 302 N.W.2d 90, 96-7 (Iowa 1981) (citing Restatement (2nd) of Torts § 552), are as follows:

> (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.
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> (2) . . . [T]he liability stated in Subsection (1) is limited to loss suffered
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> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction. (Emphasis added.)

The trial court found that with respect to the boiler, although a general representation that the boiler was in good condition was made by the plaintiffs, "an ordinary, careful, and prudent person would not be justified in relying upon the statement that the boiler is in good condition and complies with City Code as establishing that it would not, due to its age, break down in the near future. In the exercise of ordinary care, the defendants in this case should not have relied on such a representation. Further, the Court has found that they did not in fact rely on such statements." We agree, and believe the same reasoning applies to the condition of the roof. We find that no inaccurate representations were made with respect to the income and expense sheet.

We find defendants' remaining claims to be without merit and we affirm the trial court's judgment in favor of plaintiffs.

AFFIRMED.