FILED
JUN 28 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

SIOUXLAND CATTLE COOPERATIVE,)
Plaintiff - Appellee,) Filed June 28, 1979
vs.)
OMAHA BANK FOR COOPERATIVES,)
and)
ROBERT ZUBER,) 112 / 2-61837
Defendants - Appellants.)

Appeal from Plymouth District Court - George F. Davis, Judge.

Defendants appeal judgment in favor of plaintiff in its action for false representation alleging that parol evidence rule barred plaintiff's reliance on contemporaneous oral assurances and that trial court erroneously instructed the jury on plaintiff's burden of proof. - Reversed and remanded.

Robert J. Banta & Gerald P. Laughlin, of Baird, Holm, McEachen, Pedersen, Hamann & Haggart and L. W. Rosebrook, of Ahlers, Cooney, Dorweiler, Haynie & Smith, Des Moines, for Defendants - Appellants.

Steven A. Carter, of Carter & Sar, Sioux City, for Plaintiff - Appellee.

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

OXBERGER, C. J.

Defendants, Omaha Bank for Cooperatives and Robert Zuber, appeal judgment awarding damages to plaintiff, Siouxland Cattle Cooperative, in its suit for false representations. Defendants raise several points of error. We reverse.

I. Defendants initially contend trial court erred by failing to direct a verdict in their favor. Their argument on this point depends upon the applicability of the parol evidence rule to the instant facts. In 1975, the incorporators of Siouxland entered into negotiations with the defendant bank to obtain loans for the establishment of a commercial feedlot. At that time, defendant Zuber was a vice president of the bank and was responsible for supervising loans made in the state of Iowa. After various proposals had been submitted to and rejected by the bank's loan committee, Siouxland secured three loans from the bank totalling $1,400,000. The loan documents and accompanying security agreements were all executed in the latter part of August, 1975. Witnesses from Siouxland testified that prior to the execution of these loans, they received oral assurances from Zuber to the effect that funds for completing the feedlot would be made available through a provision in the mortgage agreement and that once the bank became involved in a project it did not back out. In 1976, Siouxland sought additional money from the bank ostensibly for the purpose of completing construction, but no further loans were made. At trial, Siouxland's theory of recovery was that the above oral statements constituted false representations. Defendants argued strenuously below and assert on appeal that the writings in which the bank committed itself to lending $1,400,000 to Siouxland comprised the final and complete expression of the parties' agreement and that the terms thereof may not be added to or varied by parol evidence.

Defendants correctly posit that the parol evidence rule is not a rule of evidence but of substantive law which prohibits variance of the written agreement by parol evidence. See Salsbury v. Northwestern Bell Telephone Co., 221 N.W.2d 609, 611 (Iowa 1974). They then maintain that the alleged oral statements of Zuber cannot serve as the basis for Siouxland's recovery because under the rule, the written memorial of the parties' understanding constituted their full agreement as a matter of law. There are

several so-called exceptions to the parol evidence rule which must be considered to resolve this issue. Transactions between parties can sometimes produce two successive contracts, one of which is written and the other unwritten. If the part which was not reduced to writing consists of a promise given for separate consideration, it may be considered a separate contract, and the parol evidence rule has no application. 3 A. Corbin, Contracts § 594 (1960). In the instant case, the stockholder's initial investment of $500,000 in equity capital was a condition precedent for the bank's agreement to make any loans to Siouxland. Since there was no new consideration given for the oral promise to make future loans, that promise cannot be said to constitute a separate contract, and the above exception is inapplicable. Notwithstanding the absence of separate consideration, an oral promise can be shown if it is a collateral agreement and not in conflict with the terms of the written document. The court below concluded that the oral assurances of future loans were part of the entire loan transaction and that they did not vary the written provisions of the agreement. The difficulty with this rationale, however, is that Siouxland neither pled nor proved the existence of a contractual obligation on the part of the bank to loan Siouxland additional funds. Plaintiff's action was in tort, not contract. We believe the trial court reached the correct result but for the wrong reason. Although plaintiff's petition failed to specifically mention the word "fraud", all of the elements of fraudulent misrepresentation were pled and ultimately instructed upon. An exception to the parol evidence rule exists in a case such as this where recovery is sought on account of fraud. In International Milling Co. v. Gisch, 258 Iowa 63, 137 N.W.2d 625 (1965), the plaintiff sued on a series of promissory notes and sought to foreclose a chattel mortgage, and defendant counterclaimed for damages for fraud. A provision of the mortgage executed by defendant provided that he would remain liable for any deficiency. Defendant contended that he had been orally assured by plaintiff's agent that he would not be personally liable for any deficit. In discussing the claimed bar of the parol evidence rule, the court stated:

> The trial court properly admitted oral testimony to prove fraud. It is well settled that parol evidence is admissible to prove fraud. The admission of evidence for this purpose is not in conflict with the parol-evidence rule which renders such evidence inadmissible to contradict or vary the terms of a written contract. Parol evidence is admissible to prove fraud that induced the writing. (citations).

> '[W]here there is evidence of fraudulent misrepresentations in the inception of a contract such misrepresentations can be the basis for . . . an action . . . for damages, despite the limiting provisions of a contract.' (citation)

International Milling, 258 Iowa at 71, 137 N.W.2d at 630. The court then noted that " a simple promise of future conduct is not a representation of an existing fact and as such, in the absence of conditional delivery, does not constitute fraud", but "a false promise may constitute fraud when made for the purpose of deceiving the party to whom made and when the latter justifiably relies thereon." Id. at 72, 137 N.W.2d at 631. The resolution of this question is ordinarily one for the jury to determine. Id. at 73, 137 N.W.2d at 631. In the instant case, there was testimony that prior to the execution of the $1,400,000 loan, Siouxland stockholders expressed their concern to Zuber that additional loan money would be needed to complete the feedlot. It was at this time that Zuber allegedly remarked there would be no problem with securing more loan money and there was authorization for up to $7,000,000 in loans. "If material misrepresentations are made before a contract is executed the complainant may always show that he was induced thereby to enter into the contract and he has suffered loss and damage. This is not an attempt to impeach a written contract, and consequently it is competent to prove the fraud . . ." Joseph v. Mangos, 192 Iowa 729 at 731-32, 185 N.W. 464 at 465 (1921). Based on our review of the record, we find the evidence of fraud in the inducement was sufficient to present a jury question and that trial court properly overruled defendants' motions for directed verdict. Cf. Qualley v. Citizens Savings Bank, 188 Iowa 1212, 1216, 177 N.W. 539, 541 (1920). (Evidence of fraudulent representations is not to be excluded for being a parol variance of a writing.)

II. Defendants next assert the trial court erred by failing to instruct the jury that the elements of fraud must be proved by a preponderance of evidence that is clear, satisfactory, and convincing which is the language contained in Uniform Jury Instruction 26.6. Instead, the court submitted Instruction 15 which set forth the seven elements of fraudulent representation and then stated "if the plaintiff has established all of the foregoing propositions by a preponderance of the evidence, then your verdict should be for the plaintiff." In Instruction 6, preponderance of evidence was defined as "the greater weight or strength of the proof" which "should produce the stronger impression

upon the mind and be more convincing when weighed against the evidence introduced in opposition thereto." In Hall v. Wright, 261 Iowa 758, 156 N.W.2d 661 (1968), an action at law for the recovery of damages for fraud, the court noted:

> The jury was given the correct rule concerning plaintiff's burden of proof.
>
> In instruction 4 the jury was told that to recover the burden of proof was upon plaintiff to establish by a preponderance or greater weight of the evidence each element we have set out, supra; . . . In instruction 5 the jury was advised that fraud is never presumed but must be proved by evidence that is clear, satisfactory and convincing.
>
> . . .
>
> Here the presumption in favor of fair dealing requires evidence that is clear and satisfactory in character to preponderate against it.

Hall, 261 Iowa at 767, 156 N.W.2d at 666-67. In the instant case, the jury was never informed that the quality of plaintiff's evidence must be clear, convincing, and satisfactory. Plaintiff insists that the only quantum of proof in a law action is preponderance of the evidence and that the instructions as given were proper. In Hall v. Crow, 240 Iowa 81, 34 N.W.2d 195 (1949), however, the court drew the following distinction:

> The jury was first given the general rule applicable to all the issues upon which the appellee had the burden. These included not only fraud, but also reliance by appellee upon the representation, the resulting damage and its amount. The jury was then in effect admonished that the evidence to establish fraud must, in order to preponderate, be clear, satisfactory and convincing in character. This proposition, couched in varying language, is frequently said to be based on the necessity of overcoming the general and reasonable presumption in favor of honesty. . . . In other words it does not relate to the quantum of proof required but rather to the kind of evidence necessary to constitute a preponderance.

Hall v. Crow, 240 Iowa at 92, 34 N.W.2d at 201. We conclude the jury should have been instructed that fraud must be proved by evidence which is clear, satisfactory and convincing. A misstatement of the law in a jury instruction is reversible error. Heldenbrand v. Executive Council of Iowa, 218 N.W.2d 628, 637 (Iowa 1974).

III. We have examined all of the issues raised by defendants and find no grounds for reversal other than that noted in Division II above. This case is therefore remanded for a new trial.

REVERSED AND REMANDED.