FILED
FEB 25 1992
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-435 / 90-1842

RICHARD G. (GRANT) THOMAS and **RODNEY A. HIBBS**, Partners, d/b/a **THE OIL WELL**,

Appellees,

577

vs.

EXPRESS LANE, INC., an Iowa Corporation and **MICHAEL CUNNINGHAM** and **LINDA CUNNINGHAM**, Husband and Wife, Individuals,

Appellants.

Appeal from the Iowa District Court for Story County, Paul E. Hellwege, Senior Judge.

Buyers appeal district court judgment awarding sellers damages for breach of a contract to sell a convenience store. **AFFIRMED.**

C.A. Pasley of Pasley, Singer, Pasley, Holm, Timmons & Mathison, Ames, for appellants.

Glenn C. Sedgwick, Ames, for appellees.

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

SCHLEGEL, P.J.

This case concerns the contractual sale of plaintiffs' convenience store in Ames, Iowa, to defendants. The store's business included gasoline sales, video rentals, and rentals of trucks. Financial records for 1987 and 1988 indicated the store had a gross sales volume of $52,000 per month with net monthly profits of $6100.

In November 1988 sellers opened a video rental business and removed a substantial number of tapes from the convenience store to the video rental business. In February 1989 sellers decided to sell the convenience store and obtained a sales agent to effectuate the sale. Ads for the sale of the store indicated that it had a net income of $70,000 per year. It appears by March 1989, however, the sales volume for the convenience store had decreased to about $31,000 per month with net monthly profits of around $1300. The sales decline appears to have resulted from the reduction of the video inventory.

In late 1988 buyers, who had owned and operated a residential care facility, started looking for an additional business investment. They state they were looking for a business which was profitable because they did not intend to manage it themselves. They read the newspaper ad for the sale of the convenience store and requested financial information from the sales agent. They received business income tax returns from 1986, 1987, and an income statement for calendar year 1988. No financial

information or documents showing sales volume for the business in early 1989 were given to buyers. Buyers claim they were not informed of the removal of videotapes or the decline in sales volume in early 1989. Sellers presented testimony conflicting this claim, including testimony of the sales agent, indicating one of the buyers realized the video inventory needed to be enlarged. In addition, one seller indicated he attempted to tell buyers the video inventory must be increased.

After the sale was completed buyers noted the sales volume was less than expected. Buyers concluded the store did not produce sufficient revenues to pay the bills and contract installment payments, and they felt the business had been misrepresented to them. Buyers failed to make payments under the contract.

Subsequently, sellers brought an action against buyers seeking payment of the installments due. Buyers filed an answer containing a denial and a counterclaim asserting they were fraudulently induced into making the contract and requesting the contract be rescinded. In a ruling entered on November 5, 1990, the district court determined buyers failed to prove their claim of equitable fraud in the inception of the contract. In addition, the court concluded because defendants were in default under the contract, rescission would not be available to them even if fraud had been proven. On this basis, the district court granted sellers a judgment against buyers for the amount

due under the contract for the sale of the convenience store. Subsequently, buyers filed a notice of appeal.

In this equity action our review is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). To establish fraudulent misrepresentation, buyers must show by a clear and convincing preponderance of the evidence:

> (1) a material misrepresentation (2) made knowingly (scienter) (3) with intent to induce [them] to act or refrain from acting (4) upon which [they] justifiably rel[y] (5) with damages.

Beeck v. Kapalis, 302 N.W.2d 90, 94 (Iowa 1981) (citing Hall v. Wright, 261 Iowa 758, 766, 156 N.W.2d 661, 666 (1968)). See Restatement (Second) of Torts § 525 (1977). Proof of scienter is not required for equitable fraud. Pickford v. Smith, 215 Iowa 1080, 1082, 247 N.W. 256, 257 (1933).

Defendant buyers claim the trial court erred in finding they failed to prove equitable fraud in the inception of the contract. They state they had no knowledge of the change in business, and they relied on the sellers' financial records. After thorough review of the record, we affirm the trial court finding that the buyers have not proven fraudulent misrepresentation in the inception of the contract.

Attached to the buyers' offer to buy was a list of inventory and fixtures. This list included "3 VCR's [sic]

with cases; 150 movies (approximate)." One buyer also mentioned he had several hundred tapes at home that he would move to the store and that he would buy others. From the beginning, buyers were aware of sellers' new video rental business. For approximately three weeks after the sale was final, one seller assisted in the operation of the convenience store pursuant to an agreement. Evidence shows that during that time discussions were had concerning the lack of videotapes in the enterprise.

There is no evidence sellers misrepresented the convenience store business to buyers. Buyers knew of the smaller number of videotapes, and they could have asked for more recent financial records before purchasing the store. We find buyers have failed to prove fraudulent misrepresentation in the inception of the contract. See International Milling Co. v. Gisch, 258 Iowa 63, 72-73, 137 N.W.2d 625, 630 (1965).

Because we find there is no fraud involved here, we do not address rescission of the contract. Sellers' actions were not fraudulent, so there is no defense or bar to their recovery. We affirm the district court judgment in favor of the sellers, Richard Grant Thomas and Rodney A. Hibbs, for $17,684.68 with interest at the rate of nine percent from November 7, 1990. Costs of this appeal are taxed to Express Lane, Inc., Michael Cunningham, and Linda Cunningham.

AFFIRMED.