

AUG 31 1978

CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

RONALD BLUME,)

Appellee,)

Filed August 31, 1978

vs.)

JOHN TOKHEIM, MARY C. TOKHEIM,)
and FARMERS STATE BANK,)
Charter Oak, Iowa,)

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2-60104

Appellants.)

Appeal from Crawford District Court - R. Kent Martin, Judge.

Defendants - bank, bank vice-president, and bank vice-president's wife -
appeal rescission of real estate contracts granted on ground the conveyances
were fraudulently induced. - Affirmed.

Raymond E. Franck & Allen K. Nepper, of Raun, Franck, Mundt & Nepper,
Denison, for Appellants.

Russell S. Wunschel, of Wunschel Law Firm, Carroll, for Appellee.

Heard by Donielson, Acting C.J., and Snell, Oxberger and Carter, JJ.

PER CURIAM

This is an appeal of the rescission of real estate contracts granted to plaintiff Ronald Blume. The trial court found Blume was fraudulently induced by defendant Farmers State Bank and the bank vice-president and cashier, defendant John Tokheim, to convey his farms to Tokheim's wife, defendant Mary C. Tokheim. We affirm.

In early January 1973, Blume approached his banker Tokheim for an additional bank loan of operating cash to keep his farming ventures solvent. Tokheim responded that he was in jeopardy of being called to task by the bank examiners for the overextension of credit to Blume and that Blume's farms were about to be "foreclosed on". Tokheim told Blume his total bank indebtedness was approximately \$17,000. In reality Blume owed Farmers State for loans totaling \$8286 in principal (plus interest of \$1193). He owed John Tokheim \$6865 principal (plus interest of \$571) on two notes negotiated with Farmers State but subsequently purchased "privately" by John Tokheim in March 1972. Tokheim did not disclose his substantial personal stake in Blume's "bank" indebtedness during the negotiations.

Tokheim reasons since Blume's total indebtedness was established at \$16,915.76 no misrepresentation occurred. The bank liability ledger showed 27 separate loans negotiated between the bank and Blume. The sum of Blume's various bank loans at any one time fluctuated markedly. It rose as high as \$13,500 on June 1, 1971, dropped to \$11,000 on February 14, 1972, further dropped to \$7990 in June 1972 and rose slightly to \$8286 in August of 1972. Obviously, Blume had exceeded a bank indebtedness of \$8286 for extended periods of time while banking with Farmers State.

Tokheim served as banker and advisor to Blume; in addition he, or his staff, dispersed funds into and out of Blume's checking account as the various loan obligations came due or new loan proceeds were granted. Tokheim accepted the duties of a fiduciary toward Blume.

... where there exists a relationship of trust or confidence, and the trusted party has superior knowledge of the facts. . . . the superior party has a duty to disclose all material facts of which he is aware, or at least those favorable to his own position and adverse to the other.

First National Bank of Lenox v. Brown, 181 N.W.2d 178, 182 (Iowa 1970). Blume ultimately relinquished his farms and crops upon Tokheim's advice that his bank credit had dried up. Under the guise of disinterested and knowledgeable banker, Tokheim convinced Blume he had to sell. In this same guise, Tokheim stepped forward as the benevolent buyer. Blume negotiated without ever knowing that Tokheim's advice to sell out was likely nothing more than a stratagem by Tokheim to recoup his own sizeable personal stake in Blume's bank indebtedness. John Tokheim's deceptions spawned the transfers. In equity this is fraud in the inducement. First National, supra at 184. The trial court properly granted rescission.

Farmers State and Mary C. Tokheim first claim Tokheim's statements were not made within the scope of his bank employment. The record defeats them. Tokheim, as the only officer with full-time banking duties, was Farmers State Bank to Blume and other customers. His deceptive conduct was indivisible from the bank's conduct in this case. Mary C. Tokheim further urges she had no knowledge that the properties were secured by fraud. Whatever knowledge Mary C. Tokheim had, she accepted the benefits of her husband acting on her behalf to secure the farms in her name. She is in no position now to avoid rescission by claiming his acts were unauthorized. Shannon v. Gaar, 233 Iowa 38, 6 N.W.2d 304 (1942).

Farmers State Bank and Mary C. Tokheim in post-judgment motions urged there was not sufficient evidence to support assessment of punitive damages against them and that the jury should have assessed punitive damages separately rather than jointly. The defendants made no request that a determination be made of the "differing degrees of culpability or the existence or non-existence of actual malice on the part of the respective defendants," before the jury responded to Special Interrogatory Six. This interrogatory submitted to the jury Blume's entitlement to punitive damages from all defendants. We find these defendants failed to timely urge that punitive damages be assessed on a comparative culpability basis. This argument first surfaced in post-judgment motions. The tardiness in urging the issue precludes our review. Jacobson v. Benson Motors, Inc., 216 N.W. 2d 396, 405 (Iowa 1974); and rule 243(b), Rules of Civil Procedure.

However, the actual malice question was urged in the motion for directed verdict and renewed at the close of all the evidence. We do, therefore consider this issue.

The bank and Mary C. Tokheim argue there was no actual malice on their part to justify such an exaction. A plaintiff claiming that the defendants' maliciousness of conduct gives rise to the assessment of punitive damages need not show actual malice. *Syester v. Banta*, 257 Iowa 613, 628-29, 133 N.W.2d 666, 676 (1965). Upon a showing that defendants acted illegally or improperly with a complete indifference to the natural consequences of their acts and the rights of others, malice to support an exemplary damage award may be inferred. *Northrup v. Miles Homes, Inc. of Iowa*, 204 N.W.2d 850, 859 (Iowa 1973). On the record at trial reasonable men certainly could conclude Tokheim acted in utter disregard of Blume's reliance upon him. Indeed, that Tokheim subverted Blume's trust to his own ends. Tokheim's malice may be inferred from this showing. To recover exemplary damages from Farmers State for these wrongful acts of its vice president, John Tokheim, Blume had to establish that Tokheim's acts were fraudulent and that they occurred within the scope of his bank employment. This showing was made. Under Northrup nothing more had to be shown to support an assessment of punitive damages against Farmers State as a corporate entity.

As for Mary C. Tokheim, on January 11, 1973, two days after the farms were transferred to her, she issued a check for delinquent real estate taxes due on one of the farms for 1971 taxes payable in 1972. Attached to this check is the Monona County Treasurer's receipt of January 12, 1973: "Received of Ronald V. Blume by Mary C. Tokheim." Whatever else Mary C. Tokheim knew, she very quickly knew that the farms had been acquired, from whom, and that she must act swiftly to protect her newly-acquired interests. Under Shannon v. Garr her conduct ratified John Tokheim's fraudulent acts. Punitive damages were properly assessed against Mary C. Tokheim upon this showing of her ratification. 22 Am. Jur. 2d Damages § 258 at p. 351.

The other issues urged for reversal are without merit. Compliance with § 639.38 is not a prerequisite to the bringing of an action for rescission. The *Dioptron Co. v. Dimmitt*, 245 Iowa 450, 62 N.W.2d 749 (1954) decision cited by the defendants deals with an equity action by a creditor seeking to collect his debtor's

overdue account by establishing a lien upon real property allegedly conveyed to defraud creditors. It has no application to a case in which a titleholder is induced to transfer his land by a creditor's fraud.

The trial court properly retained the jury for specific and distinct findings of fact when after two days at trial the legal issues were dismissed and the plaintiff elected to pursue the rescission remedy. The trial court sitting in equity has long had the prerogative to refer any question of fact to the jury. *Chamberlain v. Juppiers*, 11 Iowa 513, 515 (1861).

Rule 194, Rules of Civil Procedure, gives the trial court discretion to order a jury view of the premises involved. We do not find any support for a claim of abuse of this discretion.

We affirm the trial court. Application may be made to the trial court for determination of the amount of rentals due Blume for the period expiring during the pendency of this appeal.

AFFIRMED.