

IN THE COURT OF APPEALS OF IOWA

No. 7-254 / 94-1968

000295

**PEOPLES FEDERAL SAVINGS & LOAN
ASSOCIATION d/b/a STATESMAN BANK FOR
SAVINGS,**

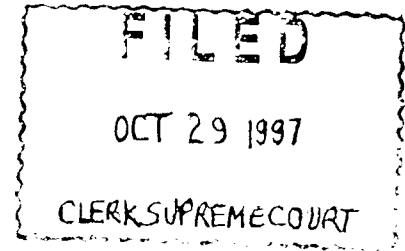
Plaintiff,

vs.

LARRY J. COHRT, Individually and as Trustee of
the Leo Cohrt Family Trust, and **CONNIE COHRT**,
Defendants-Third-Party Plaintiffs/Appellants,

vs.

LARRY L. MOSER and LOYD D. HANSEN,
Third-Party Defendants-Appellees.



Appeal from the Iowa District Court for Black Hawk County, Ronald H.
Schechtman, Judge.

Larry Cohrt, individually and as trustee of the Leo Cohrt family trust, and
Connie Cohrt, appeal a district court ruling dismissing their amended and substituted
petition against Larry Moser and Loyd Hansen for fraud in connection with the
construction and purchase of homes and apartments. **AFFIRMED.**

Larry L. Cohrt of Swisher & Cohrt, P.L.C., Waterloo, for appellants.

Larry L. Moser, Waterloo, pro se, appellee.

Loyd D. Hansen, Waterloo, pro se, appellee.

Heard by Cady, C.J., and Huitink and Vogel, JJ.

CADY, C.J.

Larry Cohrt, individually and as trustee of a family trust, and Connie Cohrt appeal from a ruling by the district court following a bench trial dismissing their third-party action for breach of fiduciary duty, fraud, and negligence. They claim the evidence supports an award of damages. We affirm the district court.

Larry Cohrt is a partner in the Waterloo law firm of Swisher & Cohrt. In 1974, he became the trustee of a testamentary family trust following the death of his father. His sister, Connie Cohrt, is a beneficiary under the trust. Cohrt has practiced law in Waterloo since 1969.

In 1979, a local building contractor, Joe Minard, approached Cohrt about investing in an eight unit apartment complex Minard was constructing on a parcel of land in Waterloo known as 233 Brookeridge. Minard and Cohrt were friends and had discussed real estate investments in the past. Cohrt was an active and experienced investor. Minard was an experienced contractor and had constructed other similar apartment units in Waterloo involving other investors. Peoples Federal Savings and Loan Association generally financed Minard's construction business. Minard was a major customer of the association. The president of Peoples Federal was Larry Moser. Loyd Hansen was an employee, and generally handled Minard's transactions.

Minard and Cohrt discussed the details of the investment, including the expected market value of the apartment and the expected monthly rental value. Cohrt indicated he was interested in an investment that would provide a tax shelter. At the time, the law permitted a passive investor such as Cohrt to deduct depreciation

expenses in computing personal tax consequences. Minard suggested Cohrt visit with Hansen.

Cohrt met with Hansen in September 1979. Hansen told Cohrt eight-unit apartments in Waterloo were a "good investment" and were "functioning well." Hansen also said Peoples Federal would loan Cohrt \$180,000 to facilitate the deal, which Hansen indicated was 80% of the value of the apartment.

Cohrt executed a contract to purchase the apartment on October 19, 1979, which was later assigned to Cohrt as the trustee of the family trust. Prior to signing the contract, Minard told Cohrt he would take the property back if the investment did not work out. The parties closed on the transaction in February 1980. Cohrt financed the purchase with a \$150,000 loan from Peoples Federal.

Cohrt subsequently noticed Minard constructing another apartment on the lot adjacent to Cohrt's apartment. This lot was known as 221 Brookeridge. Cohrt approached Minard to inquire about purchasing this apartment. Cohrt previously told Minard he would be interested in purchasing the lot to control any future construction. On September 19, 1980, Cohrt executed a contract to purchase the eight-unit apartment for \$224,000. He then obtained a loan of \$181,000, and the deal was closed on December 17, 1980. Unknown to Cohrt, Peoples Federal had approved Cohrt for a loan for the construction of the apartment in May 1980.

At the time Cohrt purchased the second apartment building, the 233 Brookeridge property had started to show a negative cash flow. The monthly rental collections were less than the monthly expenses. Although Cohrt did not maintain the

books and was not immediately aware of the negative cash flow on the property, he knew adverse economic conditions began to weaken the real estate market. There were several responsible factors for the change.

The Federal Reserve Board instituted tight money controls in an effort to slow inflation on October 9, 1979. Interest rates then began to rise and continued to rise for several years. This unexpected change was the first of several factors which also adversely impacted the banking industry. The higher cost of money reduced bank profits, including the profits of Peoples Federal. In response, Peoples Federal urged customers like Minard to reduce their existing loans because they were no longer profitable due to the increasing costs of money. New loans at higher interest rates were preferred.

The local economy was further weakened by a depressed agricultural climate. Before long, Deere and Company, the area's largest employer, began substantial reductions in their work force. Unemployment soared, and the prosperous economy of the previous decade vanished. In particular, real estate investments suffered, as did the construction industry. Minard soon reached his lending limits, and Hansen suggested he find other investors to help reduce his liabilities.

The two apartment buildings owned by Cohrt continued to experience deficits, and Cohrt had to infuse additional funds into the investments. In January 1983, Cohrt requested Minard take the 233 Brookeridge property back. The two men reached an agreement which called for an exchange of the 233 Brookeridge property for six lots on a development known as Heartland Hills. Minard agreed to construct homes on

the lots within three years, and Cohrt would be entitled to the future profit on the sale of the homes. Minard assured Cohrt he could find buyers for the homes. Although Hansen was present at the meeting, he made no representations or assurances.

Cohrt continued to lose money on his investments with Minard over the years that followed. Minard also failed to construct the homes on the six Heartland Hills lots. Cohrt responded by filing a lawsuit against him. A flood of additional litigation followed, including the present third-party claim by Cohrt against Moser and Hansen.

Cohrt claimed breach of fiduciary duty, civil conspiracy, negligence, and fraud. In essence, Cohrt claimed Moser and Hansen lured him and others into the investments with Minard knowing they would not be profitable, in an effort to reduce the mounting financial problems of the savings and loan association.

Following a bench trial, the district court found Cohrt failed to establish each claim. In particular, the district court found Cohrt did not rely on any information or statements by Moser and Hansen in making his investment decision, but relied instead on Minard and never considered himself as dealing with Hansen or Moser. It also found Moser and Hansen had no intent to deceive Cohrt.

On appeal, Cohrt asserts the evidence supported his claims. He particularly relied on evidence that Hansen and Moser violated several lending standards of the industry, used a substandard appraiser to manipulate property values, told Minard to find investors, and encouraged him to invest in Minard's construction projects.

I. Scope of Review.

This is an action tried in equity. Our review, accordingly, is de novo. Iowa R. App. P. 4. Nevertheless, we give weight to the findings of the district court. Iowa R. App. P. 14(f)(7).

II. Fiduciary Duty.

Our law recognizes a claim for breach of fiduciary duty. *See Kurth v. Van Horn*, 380 N.W.2d 693, 695 (Iowa 1986); Restatement (Second) of Torts § 874 (1979). The claim, however, is predicated upon a fiduciary relationship existing between the plaintiff and the defendant. *Id.* Generally, a fiduciary relationship does not arise from a banker-customer relationship. *Manson State Bank v. Tripp*, 248 N.W.2d 105, 108 (Iowa 1976).

Cohrt asserts he established the existence of a fiduciary relationship because Moser and Hansen acknowledged in their testimony they had a fiduciary duty to a borrower. We conclude this does not establish a fiduciary relationship. There was no evidence Moser and Hansen understood the legal elements of a fiduciary relationship. Moreover, the presence of a fiduciary relationship must be evaluated on the particular facts and circumstances of each case. *Kurth*, 380 N.W.2d at 696.

We agree with the findings of the district court that no fiduciary relationship existed in this case. Hansen and Moser did not exercise influence or dominance over Cohrt, nor did Cohrt necessarily place confidence in Hansen and Moser. Cohrt was a competent, knowledgeable investor and stood on equal ground with Moser and

Hansen. Cohrt did not depend upon the association or either employer for investment guidance.

III. Fraud.

To prevail on a claim of fraud, a plaintiff must prove a material misrepresentation made knowingly with the intent to induce the plaintiff to act or refrain from acting, upon which the plaintiff justifiably relies. *Hoefer v. Wisconsin Educ. Ass'n Ins. Trust*, 470 N.W.2d 336, 340 (Iowa 1991). The representation does not need to be an affirmative misstatement, but includes concealment or failure to disclose. *Clark v. McDaniel*, 546 N.W.2d 590, 592 (Iowa 1996).

The trial court found Hansen and Moser had no intent to defraud Cohrt and did not rely on any representations. We agree.

Our review of the evidence does not support a finding of intent to defraud. Instead, Moser and Hansen had legitimate interests in reducing the loan obligations of Minard and in continuing to assist in financing his business operation. Moreover, Cohrt relied on Minard, not the activities or comments of Hansen or Moser. See *Lockard v. Carson*, 287 N.W.2d 871, 878 (Iowa 1980)(subjective standard applied to determine reliance). Cohrt trusted Minard in making his investment, and merely viewed Hansen and Moser as a financing tool.

IV. Civil Conspiracy.

Conspiracy is an agreement or understanding between two or more persons to commit a wrong against another. *Ezzone v. Riccardi*, 525 N.W.2d 388, 398 (Iowa 1994). It involves some mutual mental action coupled with an intent to commit an act

which results in injury. *Id.* However, it does not give rise to a civil action unless something is done pursuant to the conspiracy which would give rise to a right of action without the conspiracy. *Nelson v. Melvin*, 236 Iowa 607, 608, 19 N.W.2d 685, 687 (Iowa 1945).

We again agree with the district court that there was insufficient evidence to establish a conspiracy between Minard, Hansen, or Moser to defraud Cohrt. Furthermore, Cohrt failed to establish the existence of the necessary underlying wrongful conduct.

V. Negligence.

A claim for negligence may exist against a lending institution when it provides misinformation to others. *See Greatbatch v. Metropolitan Federal Bank*, 534 N.W.2d 115, 117-18 (Iowa App. 1995). Cohrt asserts the misinformation provided by Hansen and Moser, including the profitability of the apartment and the appraised value of the Heartland Hills property, established the claim for negligence. Cohrt also argues the violation of lending policies by Hansen and Moser established negligence.

Even assuming the evidence in the case supported the finding of a duty of care to Cohrt and a breach of that duty, we agree with the district court that Cohrt failed to establish any breach was the proximate cause of any damages. We agree Cohrt relied on himself and Minard, not Hansen and Moser, in making his investment.

VI. Conclusion.

We have reviewed each claim raised by Cohrt. We affirm the district court.

AFFIRMED.