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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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Filed August 27, 1986

CLINTON LAND COMPANY, A Partnership, RICHARD REIMERS, CHARLES MAXWELL and JOHN CAMPBELL,

Plaintiffs-Appellants,

vs.

FIRST NATIONAL BANK, in Clinton, Iowa, a National Banking Association, CHARLES GUSTAVESON, an individual, and MYRON WEIL, an individual,

Defendants-Appellees.

6-115
85-804

Appeal from the Iowa District Court for Polk County (CL 44-25613) - Rodney J. Ryan, Judge.

Plaintiffs appeal a judgment for defendants in an action for fraud and breach of warranty. **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.**

Melody Hanes and Robert B. Scism of Scalise, Scism, Sandre & Uhl, Des Moines, Iowa, for plaintiffs-appellants.

Gene R. LaSuer and William J. Koehn of Davis, Hockenberg, Wine, Brown & Koehn, Des Moines, Iowa, for defendants-appellees.

Heard by Oxberger, C.J., Donielson, and Schlegel, JJ.

SCHLEGEL, J. 52

Plaintiffs Clinton Land Company, a partnership which includes Richard Reimers, Charles Maxwell and John Campbell, appeal a judgment for defendants in an action for fraud and breach of warranty. We affirm in part, reverse in part, and remand the case for retrial.

Plaintiffs are successors to the partnership that purchased the Holiday Inn in Clinton, Iowa, from The First National Bank of Clinton, Iowa, on April 30, 1975. Defendant bank had taken possession of the motel from a delinquent creditor in September, 1974. The partnership operated the motel for five years and then sold it in January, 1979. On January 6, 1980, one of the partners and an attorney inspected the bank's motel records.

On January 4, 1982, the partnership brought suit against defendants alleging that the bank's warranties as to the financial status of the motel were false and that the bank had fraudulently induced the plaintiff to enter into the purchase contract. The plaintiffs named both First National Bank and two bank officers who had been involved in the negotiation and sale, Myron Weil and Charles Gustaveson. The defendants said that no fraudulent misrepresentations were made and that all information and documentation requested were made available to the partnership at the time of the purchase of the motel. As an affirmative defense, the defendants claimed that the plaintiffs' suit was barred by Iowa Code section 614.1.

The case was tried before a jury on October 26, 1984. At the close of plaintiffs' evidence, the trial judge dismissed Weil and Gustaveson as defendants, finding that they had no ownership interest in the motel. He also dismissed Division III of plaintiff's petition, stating that the evidence was insufficient to support a finding that a fiduciary relationship existed between the parties. The jury returned a verdict for defendants. The partnership appeals, asserting

that the individual defendants who acted as agents of the bank should not have been dismissed from the case and that the third count of their petition should have been submitted to the jury as an equitable claim of fraud.

I.

We first address the dismissal of Myron Weil, president of the bank, and Charles Gustaveson, executive vice-president, as defendants to the fraud claims. The district court dismissed Weil and Gustaveson as defendants assuming that they could be held liable only if they had "any individual ownership of any nature at all" in the property being sold. The jury was subsequently given the issue of the bank's potentially fraudulent activity but not the issue of the officers' potentially fraudulent activity. This action is a proceeding at law and therefore our scope of review is on assigned error only. Iowa R. App. P. 4.

There is extensive authority in Iowa which holds that the corporate device cannot insulate owners or officers from personal liability when that owner or officer participates in or commits fraudulent corporate acts. See Newberry v. Barth, Inc., 252 N.W.2d 711, 714 (Iowa 1977). The exemption from personal liability of corporate directors or officers is subject to the qualification of good faith and honesty of intent and purpose. Briggs Transport Co. v. Starr Sales Co., 262 N.W.2d 805, 808-09 (Iowa 1978). The eighth circuit in a diversity case, Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc., 519 F.2d 634, 638 (8th Cir. 1975), applied Iowa authority in reviewing the propriety of a federal district court decision to pierce the veil of a corporation. The eighth circuit said that under Iowa law fraud is one factor to be considered when deciding on the propriety of piercing the corporate veil. Id. Our courts have favorably cited the rule that fraud constitutes a sufficient basis for piercing the corporate veil for purposes of substantive liability. State ex rel. Miller v. Internal Energy, Etc., 324 N.W.2d 707, 714 (Iowa 1982). If the bank officers

made the fraudulent representations alleged by appellant, they are liable for the resultant damages whether or not they acted for themselves or as agents of the bank. See Iowa State Bank v. Frankle, 197 Iowa 1177, 1180, 197 N.W. 298, 299 (1924). The premise behind holding officers liable for their tortious acts is rooted in agency law which provides that an agent may be liable for damages resulting from the performance of fraudulent acts: "An agent who fraudulently makes representations or knowingly participates with the principal in a transaction which is fraudulent is liable therefor, although no benefit accrues to him, unless there is an understanding that he assumes no responsibility for representations, or the third party is not injured thereby." C.J.S. Agency § 382 (1973). Furthermore, if it were shown that an agent acted for his own benefit and contrary to the interests of his principal, the agents knowledge is not imputable to the corporation. Charles v. Epperson & Co., 258 Iowa 409, 426, 137 N.W.2d 605, 615 (1966); Anita Valley, Inc. v. Bingley, 279 N.W.2d 37, 41 (Iowa 1979). Therefore, it is at least possible that agents could be liable without a finding of liability on the part of the corporation.

We find the trial court erred in dismissing defendants Weil and Gustaveson and in the submission to the jury of only the bank's liability. Defendants could be held liable even if they did not have an ownership interest in the motel. The jury should have been fully informed of the relationship between the corporation and its officers, the effect of fraud as a basis for inflicting substantive liability on a corporation's officers, and that officers acting fraudulently do not have to personally benefit to be held liable for the fraud. The dismissal of Weil and Gustaveson made it impossible for the jury to consider such issues.

Defendants contend that even if an error was made, such error was harmless. We do not agree. Under Iowa law where error is found, prejudice is assumed unless there is an affirmative showing to the contrary. Lewis v. Kennison,

278 N.W.2d 12, 15 (Iowa 1979). Defendants claim that the jury's decision in favor of defendants constitutes the affirmative showing that the error was not prejudiced. We do not believe that the jury verdict in itself is enough to overcome the presumption of prejudice. A jury needs an adequate explanation of the law in order to reach the correct verdict. The dismissal of the two officers charged with the fraud may have prejudiced plaintiffs' right to have the case fairly tried and determined.

In support of the contention that the trial court's alleged error was harmless, defendant relies upon Olson v. Truaf, 250 Iowa 1040, 97 N.W.2d 900 (1959), and Rasmussen v. Thilges, 174 N.W.2d 384 (Iowa 1970). In Olson, the Iowa Supreme Court said that direction of a verdict for defendant on plaintiff's claim was not prejudicial error, where the jury returned a verdict for the defendant on his counterclaim. Olson, 97 N.W.2d at 903. In Rasmussen, the supreme court said that where the jury found against defendant on his counterclaim and also against plaintiff on his claim, and must therefore have concluded both parties were negligent, there was no prejudice to plaintiff in the court's refusal to submit another specification of negligence on the part of the defendant. Rasmussen, 174 N.W.2d at 388. However, these cases are distinguishable from the present case since both Olson and Rasmussen involved counterclaims and the finding for one party precluded a finding for the other. In the present case, the question is whether or not the dismissal of Weil and Gustaveson prejudiced the proceedings and possibly influenced the jury's decision for one of the parties. Under these circumstances, we do not agree that the jury's decision alone is sufficient to constitute an affirmative showing that the error was not prejudicial. We remand for a new trial against all defendants.

II. 56

Plaintiffs also contend that the trial court erred in dismissing the partnership's Division III claim. The partnership claims that a confidential relationship arose between the partnership and the bank during negotiations that led to the purchase of the motel. Plaintiffs partially based this conclusion on the fact that the bank had retained J. Q. Masteller and Inns Management to manage the Holiday Inn on its behalf and required by its contract of sale that the partnership retain Masteller and Inns Management. Plaintiffs further argued that the bank gained the confidence of the partnership and purported to act with the partnership's interest in mind.

The trial court dismissed Division III of plaintiff's petition at the conclusion of plaintiffs' case finding that there was no substantial evidence of a fiduciary relationship with any member of the partnership to submit to the jury. The partnership appeals the dismissal of Division III alleging that the trial court erred in characterizing Division III as a breach of fiduciary duty. Instead, plaintiffs contend that recovery in Division III was based on a theory of fraud in equity, not a fraud at law.

We are asked to decide if Division III was properly dismissed and, if not, whether or not the dismissal was harmless error. The sustaining of a motion to dismiss at close of plaintiff's evidence is a ruling on matters of law. Our duty on this issue is to determine if the trial court applied erroneous rules of law which materially affected the decision. Henschel v. Hawkeye-Security Insurance Co., 178 N.W.2d 409, 414 (Iowa 1970).

Iowa Rules of Civil Procedure 69(a) provides:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or cross-petition, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which

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> he deems himself entitled. Relief in the alternative or of several different types may be demanded.

If, indeed, the trial court made a mistake in ruling on Division III as a breach of fiduciary duty claim rather than a fraud in equity claim, the pleading itself must bear the blame. Paragraphs 3-6 stress that the confidential relationship and the representations that took place within the context of this confidential relationship were the basis for the claim for relief. Furthermore, Division III of the petition, though filed in equity, asks only for actual damages of $810,000 and exemplary damages of $1,000,000. These are the same damages requested in the petition at law, Division I and Division II. Regardless of whether or not a confidential relationship must be established to maintain a suit for fraud in equity, plaintiffs asked for no more than was asked for in the suit for fraud at law. This court agrees with the proposition that a court in equity will not act on a claim for fraud unless the remedy at law is inadequate:

> Where the parties are entitled to a trial by a jury to determine questions of fact, it is the policy of equity not to take jurisdiction, but to relegate the parties to that remedy at law where their constitutional right to have the facts in dispute submitted to a jury can be afforded them. Accordingly, Plaintiff will ordinarily be relegated to an action at law if his bill seeks only damages or the payment of money which might be recovered in such action, or if the bill seeks or shows no right to relief other than that obtainable at law.

C.J.S. Equity § 49 (1965). Plaintiffs asked for no more in equity than they asked for at law. The dismissal of Division III for recovery in equity against the defendant was not error.

Although plaintiffs do not appeal any statute of limitations issue, if we accept, arguendo, defendant's assertion that the purpose for plaintiff's bringing Division III was to take advantage of the different statutes of limitation provided by Iowa Code section614.1(4), we must conclude no harm was done to plaintiffs

by dismissing Division III of the petition. Iowa Code section 614.1(2) provides two years within which to bring an action for damages at law:

> **614.1 Period.** Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:
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> * * *
>
> 2. Injuries to person or reputation--relative rights--statute penalty. Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years.

Iowa Code section 614.1(4) provides five years within which to bring equitable actions formerly cognizable in chancery:

> 4. Unwritten contracts--injuries to property--fraud--other actions. Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years, except as provided by subsections 8 and 10.

See Cole v. Hartford Accident & Indemnity Co., 242 Iowa 416, 425, 46 N.W.2d 811, 816 (1951); Tietjen v. Hastie, 342 F.Supp. 1195, 1199 (S.D. Ia. 1972). As plaintiffs point out, whether the action at law was barred was not fully resolved by the submission of the action to the jury even though a special interrogatory was submitted. Furthermore, even though Division III had been dismissed by the court, the court gave the following jury instruction:

INSTRUCTION NO. 19

> With regard to the plaintiff's fraud claim, defendant has alleged as an affirmative defense that plaintiff has failed to commence this action within five years after it has accrued. This action is barred unless it was commenced by plaintiff within five years after it has accrued. You are instructed that the plaintiff commenced this action on January 5, 1982.
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> The law requires that an action of the type commenced by this plaintiff must be commenced within five years

after it accrues. An action of this type does not accrue until the date plaintiff discovered, or should have discovered, the alleged fraud of the defendant.

The burden of proof is on the plaintiff to show that it commenced its action within the time required by law. The plaintiff must show by a preponderance of the evidence:

a) The defendant, by affirmative acts, concealed the alleged fraud from plaintiff; and that

b) the plaintiff could not have discovered the alleged fraud in the exercise of due diligence prior to January 5, 1977.

If you find that, based on the foregoing, plaintiff did not commence this lawsuit within five years after discovery of the fraud, then plaintiff cannot recover upon its claim of fraud.

It appears, therefore, that the jury was instructed as to the statute of limitations applicable to the claim made in Division III, Iowa Code section 614.1(4) rather than the appropriate section 614.1(2). Nevertheless, the facts set forth in plaintiffs' brief as to relevant dates are agreed to by defendants as essentially correct. If plaintiffs inspected the bank's records on January 6, 1980, and after that time discovered the alleged fraud and, thereafter, brought suit on January 4, 1982, plaintiffs fall within the statute of limitations even under section 614.1(2). Even if we were to accept the "or should have" language of jury instruction 19, the record does not support that plaintiffs should have discovered the alleged fraud prior to January 6, 1980. Therefore, as a matter of law, we conclude that plaintiffs' action is not barred by the statute of limitations and the statute of limitations issue should not be submitted to the jury on retrial.

III.

On appeal, defendants contend that the only proper parties to the lawsuit were the original members of the partnership who signed the April, 1975, purchase agreement: Richard Reimers, Stephen Avery, J. Q. Masteller, Dale Nelson,

and Saunders Miller. Defendants claim that the later members of the partnership, John Campbell and Charles Maxwell, did not obtain any rights under the contract with the bank simply by becoming members of the plaintiff partnership. We agree with the trial court's conclusion of law that the partnership which bought the motel from the bank was the same partnership that brought the action. The court ruled on this issue on the bank's motion for summary judgment, on the bank's motion at the conclusion of plaintiffs' evidence, and on the bank's motion after all evidence was submitted. We believe that Iowa Code section 544.23 (1985) provides the basis for this conclusion:

> A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs is prima facie evidence of the continuation of the partnership.

Mr. Reimers was at all times a person who "habitually acted," while other members of the partnership changed. Even if we consider the first partnership dissolved under the terms of the original partnership agreement, Iowa Code section 544.30 (1985) provides:

> On dissolution the partnership is not terminated but continues until the winding up of partnership affairs is completed.

Since the affairs of Clinton Land Company are not wound up the partnership is not terminated. See Gibson v. Deuth, 270 N.W.2d 632, 635 (Iowa 1978). Pressing the partnership's claim for fraud must be considered part of the winding up of its affairs.

Moreover, we agree with plaintiffs' contention that since the bank did not cross-appeal, the failure to do so deprives this court of jurisdiction over that issue. See Dolezal v. City of Cedar Rapids, 326 N.W.2d 355, 360 (Iowa 1982); Musch v. Frost, 319 N.W.2d 286, 288 (Iowa 1982). One party cannot avail himself of an appeal prosecuted by the other party to ask a review of that portion

of the judgment adverse to him. Brutsche v. Incorporated Town of Coon Rapids, 220 Iowa 1295, 1301, 264 N.W. 696, 699 (1936). Defendants did not cross-appeal the trial court's ruling against them on the partnership issue. We have no jurisdiction to review that portion of the judgment adverse to defendants. We affirm on the issue of the trial court's dismissal of the Division III petition. We hold that the statute of limitations did not prevent plaintiffs from bringing the action. We hold that defendants may not now raise on appeal the partnership issue decided adversely to them at trial. We conclude that the trial court erred in dismissing the individual defendants and we remand for a new trial.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.