

IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

APR 26 1979

MILLS COUNTY STATE BANK,

)

Appellee,

)

Filed April 26, 1979

vs.

)

STANLEY FISHER,

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2-61790

Appellant.

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Appeal from Mills District Court - Leo F. Connolly, Judge.

Defendant appeals from judgment entered for plaintiff bank in a suit upon a promissory note and from judgment against defendant on his counterclaim against bank. AFFIRMED.

Raymond Pogge of Pogge, Root and Steege, Council Bluffs, Iowa; and Clayton H. Shrout of Omaha, Nebraska; for appellant.

Gregory Barntsen of Smith, Peterson, Beckman & Willson, Council Bluffs, Iowa; and Michael O. Johanns of Peterson, Bowman, Larsen & Swanson, Lincoln, Nebraska, for appellee.

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

Defendant appeals from judgment entered for the plaintiff bank (hereinafter called the bank) in a suit upon a note executed by defendant and from judgment against defendant on his counterclaim against the bank. Several errors are assigned and we consider them separately.

I. Defendant contends the trial court erred in its ruling on the bank's motion for adjudication of law points when it concluded that defendant could not claim rescission of the contract. This ruling of the trial court was based on two grounds: (1) election of remedies by defendant in filing a counterclaim for damages, and (2) failure of defendant to allege tender of the proceeds of the loan transaction as a condition of rescission. As to the first ground we must agree that the filing of the counterclaim without more would not constitute an election against the remedy of rescission by later amendment to the pleadings. Defendant's effort to make such amendment was timely. But we think the second ground of the trial court's ruling (failure to allege tender) was sound.

In resolving this issue we must distinguish between defendant's arguments on appeal and the issues which were presented to the trial court at the time of the ruling. Defendant now asserts that the bank fraudulently induced him to purchase a business in order that the former owner could pay off a bad loan held by the bank. The effect of this transaction, according to defendant, was to substitute a solvent debtor for an insolvent debtor all to the benefit of the bank. Under these circumstances it is urged that defendant is not relieved of the consequences of the fraud practiced against him if he must restore the status quo by repaying the loan. While this argument is certainly appealing, we must take cognizance of the fact that this was not the way the matter was presented to the trial court at the time of the motion to adjudicate law points. At that time there was no allegation that the bank benefited by using the loan proceeds to pay off another uncollectable loan or that it benefited in any way from the transaction. On the state of the pleadings before the trial court defendant failed to state a valid claim for rescission and the trial court was correct in so ruling.¹

All of the foregoing becomes academic, however, because of the fact that the trial court did submit defendant's claim of fraud to the jury in instruction 6A as a

¹ In the absence of special circumstances not alleged by defendant one who rescinds a contract must restore or offer to restore the status quo of the other party and must return or offer to return what he has received. *Sjulin v. Clifton Furniture Co.*, 241 Iowa 761, 41 N.W.2d 721 (1950); *Kilpatrick v. Smith*, 236 Iowa 584, 19 N.W.2d 699 (1945).

complete defense to the bank's claim without in any way requiring defendant to establish restoration of the status quo. In effect this instruction cured any claim of error with respect to the court's prior ruling and placed defendant in a more favorable position than he had a right to expect.²

II. Defendant also asserts that the trial court erred in peremptorily instructing the jury that the balance due on the note sued on by the bank was \$31,917. This claim is premised on the fact that a ledger offered in evidence reflected a lesser unpaid balance on the note. The amount of the note is alleged in the amended and substituted petition of the bank and it is also alleged that no payments have been made thereon. These allegations are admitted by the defendant. These were the pleadings upon which the case was tried. Under such circumstances there was no issue as to the amount owing and the trial court was correct in so instructing the jury.³ See Granthum v. Potthoff Rosene Co., 257 Iowa 224, 229, 131 N.W.2d 256, 259 (1964); Iowa R. Civ. P. 102. Defendant's objection to the instruction was based upon an alleged conflict in the evidence, but for the reasons stated, no evidence was necessary to establish the amount of the bank's claim.

III. Next defendant contends that the trial court's instructions 6A and 7 on the elements of fraud are erroneous with respect to the element of scienter. He also contends that the trial court erred in failing to give defendant's proposed instruction II on this element. These arguments lose force when the court's instructions 6A and 7 are considered together with instruction 10. Although the latter instruction purports to deal with the element of intent to deceive, it also adequately apprises the jury of the essential elements of scienter which defendant claims are lacking in instructions 6A and 7. Instructions must be considered as a whole, not piecemeal in artificial isolation. Wiedenfield v. Chicago & N.W. Transp. Co., 252 N.W.2d 691, 698 (Iowa 1977). When so considered, the trial court's instructions on scienter are sufficient to withstand the instant claim of reversible error.

² Not only did the court's instruction 6A submit a complete affirmative defense of fraud when such was not authorized as a result of the previous ruling on the motion to adjudicate law points, but that instruction also omitted several elements of fraud which defendant should have been required to establish in order to avail himself of the defense under any circumstances.

³ The amount due on the note as admitted in the pleadings was \$8 more than the balance which the jury was peremptorily instructed to allow.

IV. Next defendant claims the trial court erred in its instructions on the quantum of proof required to establish fraud. The trial court, in instruction 9, advised the jury that with respect to both defendant's affirmative defense and his counterclaim, the elements of fraud must be established by a preponderance of the evidence that is clear and convincing. This accords with the standard of proof approved in Manson State Bank v. Tripp, 248 N.W.2d 105, 107 (Iowa 1976) and Hall v. Wright, 261 Iowa 758, 767-68, 156 N.W.2d 661, 667 (1968). To the extent that the definition of clear and convincing evidence contained in the trial court's instructions is questioned on appeal, we note that it is consistent with that which has been approved in analogous situations. See In re Estate of Crozier, 232 N.W.2d 554, 558 (Iowa 1975). The trial court did not err in its instructions on the quantum of proof.

V. Defendant also complains of exception to instruction 12 given by the trial court which relates to commendation. This concept is a well recognized corollary to the principle that expressions of opinion as to the value of property offered for sale are not to be relied upon as statements of fact. See, e.g., State Bank of Iowa Falls v. Brown, 142 Iowa 190, 119 N.W. 81 (1909); 67 Am. Jur. 2d Sales, section 444 at 607. The trial court's instruction was carefully limited to "general assertions" regarded as "expressions of opinion" and as such did not misstate the applicable law. We know of no reason why a third party's representation should be treated differently from those of the owner of the property with respect to statements of commendation. The trial court did not err in giving instruction 12.

VI. Next defendant contends the trial court erred in giving instruction 13 with respect to circumstances under which defendant may have waived his right to assert a claim for fraud. The principal thrust of defendant's objection to the instruction was that the evidence did not support any instruction on waiver. We disagree. Clearly there was evidence of actions by defendant subsequent to the alleged fraud which the jury could have found was a ratification of the transaction sufficient to preclude a claim of fraud. See Hanson Silo Co. v. Bennett, 254 Iowa 928, 932-33, 119 N.W.2d 764, 767 (1963). With respect to the form of the instruction, the trial court narrowly applied the

doctrine of waiver to a factual situation which would fully support such an affirmative defense.⁴

In addition, the trial court limited its instructions on waiver to the allegations of fraud made in defendant's counterclaim. No such instructions were given as to the claim of fraud raised as an affirmative defense to the bank's claim. The jury's verdict on the bank's claim dispels any assertion of prejudice from the trial court's instruction on waiver.

VII. Defendant seeks to predicate reversible error on the trial court's failure to instruct upon the duties of one who enjoys a position of trust and confidence vis-a-vis another. Initially the trial court attempted to incorporate an instruction on this duty in instruction 14 of the final draft submitted to counsel. Defendant objected to the giving of this instruction on the ground that the trial court failed to include a reference in the instruction to the specific evidence defendant relied upon to establish the duty. Said objection was lacking in merit because such reference, if given, would have constituted an improper comment on the evidence. Boyer v. Iowa High School Athletic Ass'n., 260 Iowa 1061, 1072, 152 N.W.2d 293, 299 (1967). After the defendant objected to this instruction and perhaps as a result thereof, the trial court advised counsel it was deleting instruction 14 in its entirety. Defendant objected to this course of action on the ground that "we object to the court removing all of 14. We think 14 should be given, but you should include in there the fact that the bank had executed the deed from the corporation to Bichel under the control of the bank." We hold this objection either alone or in conjunction with the previous objection is lacking in the specificity required to serve as a basis for a claim of error on appeal. Crist v. Iowa State Highway Commission, 255 Iowa 615, 123 N.W.2d 424 (1963).

VIII. Next defendant urges that the trial court erred in failing to instruct that all defenses available to defendant on the original note would be available on a renewal note. We find this contention is without merit. The trial court's instruction 6A did advise the jury that the only affirmative defense alleged by defendant was sufficient, if

⁴ The trial court limited the defense of waiver by requiring the bank to show a change in the essential terms of the agreement to the benefit of the defendant and that the defendant at the time of such change had full knowledge of the facts constituting the fraud and the damages resulting therefrom. Defendant can claim no error in the giving of such an instruction.

established, to defeat the bank's claim based on a renewal note. The instruction thus provided for the result which defendant now advocates.

IX. Defendant urges the trial court erred in not giving his requested instruction 14. That instruction would have applied the law of fraudulent misrepresentation to certain evidence relied upon by the defendant to establish same. In the form proposed, it would have constituted an unwarranted comment by the trial court on the evidence. See Boyer v. Iowa High School Athletic Ass'n., 260 Iowa 1061, 1072, 152 N.W.2d 293, 299 (1967). It was properly refused.

X. Defendant's next assignment of error relates to the overruling of his motion for mistrial based upon alleged misconduct of counsel for the bank in persisting in asking questions after an objection had been sustained. We believe the denial of a mistrial based upon the conduct in question was a matter within the discretion of the trial court. See Christianson v. Kramer, 257 Iowa 974, 980, 135 N.W.2d 644, 648 (1965). No abuse of that discretion appears. To the extent that defendant complains of the trial court's failure to give an instruction admonishing the jury to disregard the questions propounded by counsel no error has been preserved in the manner required by Rule of Civil Procedure 196.

XI. Lastly, defendant complains of the trial court's refusal to permit amendment of his counterclaim to assert a detailed breakdown of alleged elements of damage. As a result of the jury's verdict finding against defendant on the issue of liability, this ruling was without prejudice.

We have carefully considered each of the several contentions advanced and conclude that defendant's claims were fully and fairly presented to the jury. The jury rejected said claims. There is no basis for a new trial.

AFFIRMED.

Oxberger, C.J., and Snell, J., concur. Donielson and Johnson, JJ., dissent.

JOHNSON, J. (dissenting)

I respectfully dissent from the majority's conclusion in Division IV. While instruction 9 correctly states that defendant has the burden of proving fraud by a preponderance of evidence that is clear, satisfactory and convincing to overcome the presumption of fair dealing, I believe instruction 11 is sufficiently confusing and likely to have mislead the jury to require reversal.

Instruction 11, although not an inaccurate statement of the law, is incomplete. The instruction should have been expanded to instruct the jury that the quantity of evidence required of defendant is no more than will outweigh the plaintiff's evidence (a preponderance of proof) but that the quality of that evidence must be clear, convincing and satisfactory in character. Hall v. Wright, 261 Iowa at 767-68, 156 N.W.2d at 667. Nowhere in the court's instructions was this highly relevant distinction made. Defendant is entitled to have his case considered by a jury which has been given instructions that clarify rather than confuse defendant's burden.

Donielson, J., joins in this dissent.