

LIBRARY

Williams v. A-1 Automotive Center

Foster v. Panera

Franklin Court of Appeal (2003)

This action was brought to recover damages for fraud. Plaintiff Danielle Foster appeals from the trial court's dismissal of the action for failure to state a claim against defendants Ted Panera and Abbey Furniture Company (collectively "defendants").

PLAINTIFF'S ALLEGATIONS

The pertinent allegations in the complaint are as follows:

On or about May 7, 2001, Foster told Panera, the store manager at Abbey Furniture Company, that she wished to purchase a certain set of bedroom furniture, which included a solid wood headboard. All of the items were present in the store except for the headboard. Panera told Foster that the headboard was at the store's warehouse and would be delivered to her with the other items.

Unknown to Foster, Panera made this representation knowing that it was false and intending to induce Foster's purchase of the furniture. Relying on this representation, Foster ordered and paid for the bedroom set, specifically including the solid wood headboard. She would not have ordered or purchased the bedroom set, nor any of its individual components, had she known that it would not include the matching headboard. When the furniture was delivered to

Foster with a brass headboard, instead of the solid wood headboard, Foster telephoned Panera, who apologized and said that the correct headboard would be delivered to her soon. However, during the ensuing weeks and months, Panera told Foster that the headboard was on order, under manufacture, in storage, or in delivery, providing various delivery dates. The solid wood headboard was never delivered.

Panera knew that these later representations were false and, in making them, intended that Foster would be induced to keep the furniture and refrain from canceling the order. Relying on Panera's statements, Foster kept the furniture and waited for delivery of the wood headboard. Had she known that the statements were false, she would have canceled the order, returned the furniture, and demanded a refund. But because she was the customer in this transaction and because Panera, as the store manager, presumably had familiarity with the whereabouts of store inventory, Foster relied on his representations as being true.

Foster has stored but has not used the furniture. Defendants have not removed it from Foster's home, nor have they refunded the purchase price. As a direct and proximate result of Panera's initial misrepresentation,

Foster was induced to purchase the bedroom set and was damaged thereby.

As a direct and proximate result of Panera's later misrepresentations, Foster was induced to store unwanted furniture, and to refrain from canceling the contract and obtaining a refund, all to her damage in the amount of \$3,500.

DEFENDANTS' MOTION TO DISMISS

Defendants filed a motion to dismiss the complaint on the ground that "the complaint fails to state a claim upon which relief may be granted against defendants." The motion was granted, and this appeal ensued.

ANALYSIS

In reviewing a trial court's grant of a motion to dismiss, we accept the plaintiff's allegations as true and give her the benefit of all fair implications therefrom. A complaint for fraud must allege the following elements: (1) a material misrepresentation of fact by the defendant, (2) made with knowledge of its falsity, (3) made with intent to deceive or induce reliance, (4) reasonable reliance by the plaintiff upon the misrepresentation, and (5) loss by the plaintiff as a proximate result of the misrepresentation.

Every element of the cause of action for fraud must be specifically pleaded and the facts constituting the fraud must be alleged with sufficient particularity to allow a de-

fendant to understand fully the nature of the charge made. It is not sufficient to allege fraud in general terms, or in terms which amount to mere conclusions.

Defendants contend that the representations were not material and therefore cannot support an action for fraud. We disagree.

A representation is material if a reasonable person would consider it important in deciding to enter into the transaction. Here, the complaint indicates that Foster asked for a solid wood headboard, and that Panera repeatedly confirmed its eventual availability. A reasonable person seeking a solid wood headboard would have considered these assertions to be an important factor in the sale. The allegations thus clearly demonstrate that the representations were material.

CONCLUSION

Foster has properly stated a fraud claim. The judgment of the trial court dismissing the complaint is reversed, and the case remanded for proceedings consistent with this opinion.

Madison v. Brooks

Franklin Court of Appeal (2005)

This action was brought by plaintiff Jean Madison to rescind, on the ground of fraud, a written contract for the sale of certain plant nursery stock. The district court granted defendant Walter Brooks's motion to dismiss for failure to state a claim upon which relief could be granted. The sole question on appeal is whether a statement that is an expression of opinion may be actionable as fraud.

The complaint alleges that prior to executing the contract, Brooks told Madison that he had grafted 52,000 dormant buds in the trees comprising the nursery stock and that Madison "would surely see 60 to 70 percent of the dormant buds growing and producing trees." The parties stipulate that in fact only 30 percent of the dormant buds grew and produced trees.

Brooks contends that the so-called misrepresentation was the mere expression of an opinion and not a statement of a fact, and therefore could not constitute actionable fraud. He insists that a vendor has the right to freely express an opinion as to what will or will not happen in the future in relation to the sale of the property under consideration, and that such statements do not constitute actionable fraud.

As a general rule, fraud cannot be predicated upon the mere expression of an opinion which is understood to be only an estimate

or a judgment. The person to whom such a statement is made has no right to rely upon the statement, and does so at his peril. For example, an auto dealer's representations that the vehicle "was a good car" and that it was "about the best one they had" were not actionable as fraud. *Bender v. Fiat Corp.* (Fr. Ct. App. 1986). Nor was the statement that certain seeds were "top quality tomato seeds" definitive enough as to how the product would perform but instead was merely the grower's opinion that the seeds were top quality. *Novotny v. Ford Farms* (Fr. Sup. Ct. 1999).

However, there is an exception to this rule where the opinion relates to a subject as to which the parties do not have equal knowledge or means of ascertaining the truth. Where the party making the misrepresentation has special knowledge of the facts underlying the opinion, or "is possessed of superior knowledge respecting such matters, with a design to deceive and mislead," the positive assertion of a matter, which stated in another form might be a mere opinion, may be actionable if the statement was false. *Novotny*. In *Novotny*, the grower also described the tomato seeds as "ones that would produce drought-resistant plants that would bear firm, uniform fruit that would not bruise during shipment." The court held that this statement could be the basis for a fraud action. *Id.* See also *Wong v. Hall Lumber*,

Ltd. (Fr. Ct. App. 2004) (statement made by salesman that windows were coated in a preservative that would “protect against rot and decay for at least 10 years” constituted an actionable statement).

The complaint’s allegations fall within the exception. In addition to alleging that Brooks told Madison that she “would surely see 60 to 70 percent of the dormant buds growing and producing trees,” the complaint alleges that Brooks knew that the dormant buds were poorly handled and would almost certainly not grow properly. The complaint also alleges that Madison relied upon Brooks’s skill in the business and that Madison, who was not an expert in the field of horticulture, did not possess reasonable means of ascertaining the truth of Brooks’s statement.

When we review the granting of a motion to dismiss for failure to state a claim, we take the well-pleaded allegations of fact as true. Taking these allegations as true, the statement that Madison “would surely see 60 to 70 percent of the dormant buds growing and producing trees” would be equivalent to a misrepresentation of fact, satisfying that essential element of common law fraud.

Accordingly, the trial court should not have dismissed the complaint. We reverse and remand.

Rogers v. Statewide Insurance Co.

Franklin Court of Appeal (1995)

Plaintiff Michelle Rogers appeals from a judgment entered after the trial court granted defendant Statewide Insurance Company's motion to dismiss her complaint for failure to state a claim upon which relief may be granted. The sole issue on appeal concerns the circumstances under which an unfulfilled promise to perform is actionable as fraud at common law. We conclude that when the promise is made with no intent to perform, it constitutes a misrepresentation of fact. If the other elements of fraud are present, a cause of action for fraud exists.

Rogers alleges as follows: She was involved in an auto accident with Andy Bosch, an insured of defendant. Bosch's liability was reasonably clear. Rogers obtained an estimate of \$3,200 to repair her vehicle. Statewide represented to her that she was authorized to have her vehicle repaired at Capitol Ford, that Statewide's obligation to indemnify her for her damages was reasonably clear, and that Statewide would pay her for all such repairs immediately upon their completion. Rogers relied on the representations and brought her vehicle to be repaired. However, Statewide refused to pay for the repairs or to indemnify her. Because Rogers lacked the funds to complete the repairs or to obtain the release of her vehicle, she was left without its use for an extended period of several weeks until Statewide eventually settled her claim.

The gist of Rogers's fraud claim is that Statewide said it would pay for her repairs immediately upon their completion, and that it failed to do so, that Rogers could not afford to have the repairs completed or redeem her vehicle, and that she lost the use of the car for several weeks. The critical alleged misrepresentation as to immediate payment upon completion did not involve a past or existing material fact. Rather, it involved a promise to perform at some future time.

A promise is a statement of intention to perform some action in the future. If the maker of a promise honestly intends to follow through on that intention at the time of the promise, the statement cannot give rise to an action for fraud. However, if at the time of making the promise the promisor has no plans to perform, he has misrepresented his present intention, which would be a misrepresentation of fact. It is that misrepresentation that can support an action for fraud. To state such a claim, one must specifically allege, among other things, that the promisor did not intend to perform at the time the promise was made. Rogers's complaint does not contain such an allegation. Therefore, the motion to dismiss was proper.

Affirmed.