STATE OF MICHIGAN

COURT OF APPEALS

J.T. FRENCH COMPANY and JERROLD T. FRENCH, a/k/a GERALD T. FRENCH,

Plaintiffs/Counter-Defendants-Appellants,

v

FERGUSON DEVELOPMENT L.L.C.,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
June 26, 2007

No. 265997
Ingham Circuit Court
LC No. 05-000065-CZ

J.T. FRENCH COMPANY and JERROLD T. FRENCH, a/k/a GERALD T. FRENCH,

Plaintiffs/Counter-Defendants,

v

FERGUSON DEVELOPMENT L.L.C.,

Defendant/Counter-Plaintiff-Appellee,

v

JERROLD T. FRENCH TRUST,

Garnishee/Defendant-Appellant.

No. 267528
Ingham Circuit Court
LC No. 05-000065-CZ

Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's September 28, 2005 order entering judgment in favor of defendant, following a bench trial. We affirm.

This lengthy matter, with claims and counter-claims between the parties, rests essentially on a simple agreement for services, whereby defendant contracted with plaintiff to decorate and furnish defendant's office space.

Plaintiff completed interior design and furnishing of an office space for defendant based on two proposals submitted by plaintiff and accepted by defendant, one totaling $345,194, and a second totaling $213,231.

After the work was completed, plaintiff filed a complaint against defendant alleging breach of contract and requesting damages of $17,792.41 plus finance charges and statutory interest. Defendant filed a counter-claim alleging breach of contract and unjust enrichment.

With agreement of the parties, the district court removed the matter to circuit court because potential damages were in excess of $25,000; by stipulated order, both parties were allowed to amend their pleadings once.

Defendant amended its cross-complaint, asserting counts of breach of contract, unjust enrichment, fraudulent misrepresentation and concealment, and negligent misrepresentation. Defendant alleged the existence of an oral agreement that plaintiff would not mark-up the cost of furnishings in excess of 20%, and asserted that plaintiff in fact marked up some furnishings as much as 300%. Defendant also asserted that standard industry mark-up is 10 to 20%. Defendant named Jerrold French, individually, as a cross-defendant for the first time in this amended cross-complaint.

After a three-day bench trial, the court issued a ruling stating findings of fact and conclusions of law on the record, and issued an order dismissing plaintiff's complaint. The order granted two judgments on the counter-claim: a judgment of $237,711.05 in favor of defendant against J.T. French Company and Jerrold French, individually, and a judgment of $20,742.35 plus actual costs and attorney fees in the amount of $25,000 against J.T. French Company.

Defendant filed writs for garnishment. Plaintiff filed this appeal.

"This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003) (internal citations omitted).

Plaintiff argues first on appeal that Jerrold French, individually, cannot be liable for breach of a contract between J.T. French Company and Ferguson Development. Plaintiff asserts that as the agent for a disclosed principal, Jerrold French cannot be held personally liable. *Penton Publishing v Markey*, 212 Mich App 624; 538 NW2d 104 (1995). Plaintiff has correctly cited this legal principle, but plaintiff's reliance on it is misplaced. Although the trial court did find the existence of a valid contract between Ferguson Development and J.T. French Company, the individual liability of Jerrold French arises not from breach of contract, but from fraudulent misrepresentation.

Defendant's cross-claim asserted counts of fraudulent misrepresentation and concealment against Jerrold French individually. Jerrold French testified that he told Ferguson he was a wholesaler and would save him money. These statements led to the formation of a contract. Claims of fraud with respect to those statements sound in tort, not contract, and proceed independently of the breach of contract claim against J.T. French Company.

As to the claims against Jerrold French, individually, the trial court made the following findings of fact and drew the corresponding conclusion of law:

> This Court finds clear and convincing evidence that Plaintiff did commit fraud through his statement to Defendant with intent to induce Defendant to hire his company, J.T. French Company. J.T. French, the individual, based this representation on a long-standing friendship, Defendant's trust, and his express statement that he would save him money because he is a wholesaler.
>
> Therefore, Plaintiff made a material misrepresentation that he could save Defendant money. This representation was false . . .. Plaintiff knew the representation would be relied upon . . ..
>
> Plaintiff knew his statement that he would save Defendant money would cause Defendant to act upon it and subsequently retain his services. Defendant relied on the statement . . . and suffered damages.
>
> The above are all the elements for fraud, misrepresentation, and negligent misrepresentation.

The trial court relied first on plaintiff Jerrold French's own trial testimony, that he told defendant he was a wholesaler and would save him money. The trial court also relied on inconsistencies in other testimony. First, Jerrold French testified that he never charged retail; however, items on several invoices were marked up to retail amounts.[1] Next, the court noted that Jerrold French had stated that he and his designer, Nicole Nelson, had traveled to North Carolina in the course of selecting furnishing for this project; Nelson testified that they did not take this trip. The court also noted that French testified he did not charge a restocking fee to defendant, but that a "restocking fee was concealed and charged on invoice 13186." Finally, the court noted that while plaintiff told defendant that the deposits defendant made on the project were used to pay for the expenses of the project, plaintiff's Credit Manager, Kevin Barnhill, testified that the funds were in fact used to pay outstanding debts. The court concluded that these discrepancies and inconsistencies supported a finding of concealment and ongoing fraudulent billing practices.[2]

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[1] The trial court found that "Plaintiff's invoices number 11878, 11879, and 11880, that is for three wall units, clearly demonstrated and it's undisputed that Plaintiff in this instance did charge retail."

[2] The court also noted that while plaintiff charged defendant $95 an hour for design consulting in areas not covered by the two original proposals, plaintiff paid its designer, Nicole Nelson, only

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In addition, in assessing whether intent to defraud was proved, the trial court several times noted the friendship between French and Ferguson, and their prior working relationship. Ferguson testified to the trust he had in French, believing him to be a friend rather than just a vendor, and Barnhill and Nelson also testified to the apparent friendship between the parties.

We are not left with a definite and firm conviction that a mistake has been made in the findings of fact, nor do we find that the law was misapplied. Defendant needed to prove and did prove these elements:

> (1) that the charged party made a material representation; (2) that it was false; (3) that when he or she made it he or she knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he or she made it with the intention that it should be acted upon by the other party; (5) that the other party acted in reliance upon it; and (6) that the other party thereby suffered injury. [*City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254; 701 NW2d 144 (2005).]

Plaintiff argues that the trial court erred in finding fraud, because a claim of fraud may not be based on a promise as to future conduct, but may only rest on a statement relating to past or existing fact. Because the alleged statements about saving defendant money or charging defendant only a 15% mark-up were promises of future conduct only, there was no fraud.

Plaintiff is correct that "[g]enerally, a claim of fraud cannot be based on a promise of future conduct. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 378; 689 NW2d 145 (2004). However, "[a]n exception to this rule exists . . . if a promise is made in bad faith without the intention to perform it. Evidence of fraudulent intent, to come within the exception, must relate to conduct of the actor at the very time of making the representations, or almost immediately thereafter. Plaintiffs, therefore, must demonstrate that at the time defendants made promises to them, defendants did not intend to fulfill the promises." *Id.* at 378-379 (internal citations omitted).

Plaintiff argues there is no evidence of bad faith to support this exception. However, the statement that defendant would save money by working with plaintiff was allegedly made in a conversation between French and Ferguson in July of 1998, and shortly thereafter, on August 7, 1998, French submitted to Ferguson a proposal that had an average mark-up of 70%, with mark-ups on some items as high as 300%. Nicole Nelson testified that she provided French with detailed costs for each item in the proposal. However, the proposal grouped items together and presented totals, rather than itemized pricing. A draft of the August 7, 1998, proposal was admitted into evidence; this proposal included a handwritten note by French stating: "Let me know what you think about this. I don't think we should itemize costs at first until he requests – I think grouping is better." At trial, both Nelson and defendant's industry practices expert, James Baker, testified as to standard industry mark-up, setting a range of 15-30%. We find there was sufficient evidence to support the trial court's conclusion that at the time French made the statement that he would save Ferguson money, he had no intention of doing so.

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$35 an hour, presumably because she was a recent graduate with no design experience.

In addition, "[f]raud in the inducement occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." *Samuel D Begola Servs v Wild Brothers*, 210 Mich App 636, 639; 534 NW2d 217 (1995). Here the trial court found that plaintiff materially misrepresented the cost-savings benefit of working with J.T. French Company, that plaintiff reasonably expected defendant to rely on the misrepresentation, and that defendant did indeed rely on it. The friendship, trust relationship, and prior work agreement between the parties adequately support these findings.

Plaintiff next argues that any claims of cost-saving were mere sales talk, or puffing, and therefore are not actionable misrepresentations. Again, we disagree. While it is true that the expression of an opinion in furtherance of a sale may not be actionable as fraud, *Van Tassel v McDonald Corp*, 159 Mich App 745, 750; 407 NW2d 6 (1987), we reject the contention that the statements made by plaintiff to defendant were mere expressions of opinion. French testified that he told Ferguson "we were a wholesaler," and that 'he [Ferguson] could save money." In point of fact, one is either a wholesaler or one is not; this is simply not a matter of opinion. Having made that statement of fact to a potential client, the related statement that the seller would save the buyer money also becomes more than a matter of opinion. Left unsaid, it would be a logical inference for the buyer; expressly stated, however, it becomes more than implication.

Plaintiff argues finally that any reliance by defendant on plaintiff's talk of cost-saving was unreasonable and therefore is not actionable. This argument is unavailing for the same reason that the statements were not mere sales talk. French expressly stated that his company was a wholesaler, and that by doing business with his company, Ferguson would save money. Arguably, it would be unreasonable for Ferguson to not rely on these statements, particularly as made by a friend, or at a minimum, a business acquaintance with whom Ferguson had prior positive work experience.

Plaintiff's reply brief on appeal focuses on the he said-he said nature of the core issue in this matter—whether or not French ever told Ferguson he would charge only a 15% mark-up. Ferguson says French said it; French insists he did not. As plaintiff correctly notes in its reply brief, there is no direct evidence in the record to prove or disprove that the statement was made. As it happens, that is the very sort of issue that one's day in court is designed to resolve.

The trial court is in a better position than is this Court to assess the credibility of witnesses, and we therefore afford those credibility judgments significant weight. Here, the trial court stated:

> This Court finds Defendant's testimony credible and consistent with the proofs by documentation provided during trial. . . .
>
> This Court finds Plaintiff [sic] testimony regarding this disputed issue on the mark-up to be inconsistent and not credible.

The trial court's credibility determinations are supported by specific inconsistencies between French's testimony and that of other witnesses; for example, where French testified that he and Nicole Nelson traveled to North Carolina to look at furniture for the Ferguson project, and Nelson testified that they did not take such a trip. We find nothing in the record to suggest that

the trial court erred, let alone clearly erred, in its findings of facts. Nor do we find that the court misapplied the law.

Affirmed.[3]

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Janet T. Neff

[3] Plaintiff also argues that judgment against the Jerrold T. French Trust must be reversed if the judgment against Jerrold T. French, individually, is reversed. Because we affirm the judgment against French, we need not address his arguments with respect to the Trust.