STATE OF MICHIGAN

COURT OF APPEALS

DANIEL TURVEY,

Plaintiff-Appellant,

v

ACOUSTIC CEILING AND PARTITION CO., GARRETT WICKHAM and RALPH WICKHAM,

Defendants-Appellees.

UNPUBLISHED
September 24, 2002

No. 231338
Washtenaw Circuit Court
LC No. 99-010503-CK

Before: Holbrook, Jr., P.J., and Zahra and Owens, JJ.

PER CURIAM.

Plaintiff appeals the trial court's grant of summary disposition to defendants on his claims of fraud.[1] We affirm.

I

This case arises from a sale of stock in defendant company between plaintiff and the Wickham defendants. Plaintiff and defendant Ralph Wickham had been the only shareholders in Acoustic Ceiling and Partition Company (ACP). In 1990, plaintiff sold his stock to the Wickhams for approximately $700,000 cash, a $327,000 note payable in five years, and a percentage of profits for a specified period. Before the note came due, the Wickhams informed plaintiff that ACP had lost roughly $100,000 of its cash reserves as a result of unauthorized action by ACP's chief financial officer, Perry Schechtman. Plaintiff questioned whether his note would be paid on time in light of what was allegedly characterized by defendant Garrett Wickham, ACP chief operating officer, as Schechtman's "embezzlement" which could "cripple" ACP. Consequently, in 1993, plaintiff renegotiated with the Wickhams to have the note paid off immediately. As a concession for the acceleration of the loan repayment, plaintiff agreed to forfeit any profit sharing he was to receive under the earlier agreement. After this occurred, plaintiff learned that the Wickhams did not intend to seek criminal charges against Schechtman.

[1] Plaintiff's complaint alleged fraud and breach of contract. However, plaintiff's brief on appeal only takes issue with the trial court's ruling as to the summary disposition of the fraud allegations. In this respect, plaintiff has abandoned his claim of breach of contract, and we will not address the propriety of the dismissal of that claim. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001).

Plaintiff concluded the entire "embezzlement" story was a ruse concocted to encourage him to offer concessions for an early pay off. Plaintiff filed the instant lawsuit, generally alleging fraud. Defendants' motion for summary disposition was granted. This appeal followed.

II

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition pursuant to MCR 2.116(C)(10) is proper when, except with regard to the amount of damages, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id*. "As a general rule**,** actionable fraud consists of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage." *DiPonio Construction Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 51; 631 NW2d 59 (2001), quoting *M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). At issue here is whether a genuine issue of material fact exists in regard to whether a material misrepresentation was made.

According to plaintiff, the characterization of the loss resulting from Schechtman's poor investments as "embezzlement" rather than simply as a loss due to an ill-advised or unauthorized investment strategy constituted a fraudulent misrepresentation as did the assertion that the loss had been "crippling" to ACP.[2] This Court, in *Van Tassel v McDonald Corp*, 159 Mich App 745, 750; 407 NW2d 6 (1987), held that "[a]n action for fraud may not be predicated upon the expression of an opinion . . . ." Moreover, allegations of fraud cannot be predicated on misrepresentations as to matters of law. *Krushew v Meitz*, 276 Mich 553, 558; 268 NW 736 (1936). Here, Garrett Wickham's characterization of Schechtman's actions as "embezzlement" is a statement related to whether Schechtman was authorized to make the investments. In that sense, Wickham was expressing his opinion regarding whether Schechtman acted illegally. Similarly, plaintiff fails to show how the characterization of the loss as "crippling" amounts to a representation. Wickham's comments are more a statement of his opinion as to the effect the loss of money would have on ACP than a statement of fact necessary to amount to a misrepresentation. Therefore, as a matter of law, plaintiff cannot prove fraud.

Further, no genuine issue of material fact existed as to whether the distinction between "embezzlement" and "loss of money invested without authority" was material. Regardless of how the loss is characterized, plaintiff concedes that he was presented with relevant financial statements relating to ACP's condition before he entered into the 1993 agreement and that those records clearly showed the $100,000 loss. It is the loss itself that is material not the

[2] According to plaintiff, Garrett Wickham told him that Schechtman "fraudulently took the monies in excess of a hundred thousand [dollars], the end of which was unknown and that it was crippling."

characterization of the loss. Therefore, the opinions by defendants as to the nature and effect of the loss[3] were not material to plaintiff's decision to enter into the later agreement.

Plaintiff's claim of fraud was without legal merit. The trial court's grant of summary disposition was proper.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra
/s/ Donald S. Owens

[3] Plaintiff does not contend that defendants misstated the amount of the loss. Instead, he only contends that characterizing it as embezzlement was misleading because Schechtman may have had permission to invest at least some money.