

STATE OF MICHIGAN
COURT OF APPEALS

GRAND SKY ENTERPRISE CO,

Plaintiff-Appellee,

UNPUBLISHED
March 19, 2013

v

FUTURE FINANCIAL INVESTMENTS and
ROMEL CASAB,

No. 307851
Oakland Circuit Court
LC No. 2010-112097-CK

Defendant-Appellants.

Before: CAVANAGH, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

Defendants Future Financial Investments (FFI) and Romel Casab appeal the portion of the trial court's opinion and order granting summary disposition in favor of plaintiff on claims that defendants defrauded plaintiff of \$1.4 million. The trial court also granted summary disposition in favor of plaintiff on breach of contract claims against FFI, but defendants do not contest that portion of the lower court's decision. We affirm because plaintiff has provided evidence sufficient to prove each element of fraud, and defendants have not provided any evidence sufficient to raise a genuine issue of material fact.

I. FACTS

Plaintiff Grand Sky is a company that buys scrap metal and resells it overseas. Defendant Casab is the sole owner of FFI. Defendants deal in foreclosed properties. On April 8, 2008, Grand Sky and FFI executed a sales contract under which FFI would demolish a building in Hamburg, Michigan, and provide plaintiff approximately 7,000 metric tons of scrap steel. The contract provided that demolition would be completed within 45 days after plaintiff furnished a prepayment of \$800,000. Plaintiff made the requisite payments by April 16, 2008. The parties then entered a second contract, an investment agreement under which plaintiff would contribute \$1,000,000 and FFI \$200,000 to demolish a building on Livernois Avenue in Detroit. After the costs of demolition were recouped, the parties would split the profits from scrap metal sales, with an extra \$100,000 going to plaintiff and FFI retaining ownership of the land. Plaintiff paid

\$600,000, but was unable to raise the remaining \$400,000. However, plaintiff has produced an email from defendant Casab stating that he would supply the remaining money required.

Although plaintiff paid FFI a total of \$1.4 million under the two contracts, plaintiff only ever received about 66 tons of metal, worth around \$30,000.¹ Defendants did not demolish the Hamburg property within 45 days of receiving plaintiff's money. In fact, neither defendant even owned the property at the time. As defendants concede on appeal, the Hamburg property was not acquired until 2010, at which time Casab purchased it through another of his businesses. FFI has never owned the Hamburg property. Defendants argue that they did purchase the property from foreclosure in the 2006, prior to entering the contract with plaintiff. However, that sale was cancelled by the State of Michigan due to failure by the title company to provide proper notice of the sale, and Casab was notified in a letter dated August 22, 2006 that he would receive a full refund. Nonetheless, Casab maintained in his deposition that he owned the property in 2008.

Defendants also did not own the Livernois property at the time the relevant contract was executed. This property was purchased on June 10, 2008, by the same entity that eventually purchased the Hamburg property in 2010.

The only steel ever received by plaintiff was about 66 tons of loose steel from the Hamburg property. Defendant Casab claims that the reason no substantial amounts of steel were delivered is that plaintiff's owner told him to stop all activity after scrap steel prices plunged from between \$400-600 per ton down to \$65 per ton. However, plaintiff has provided documentation of scrap metal prices during the relevant time frame that shows no such plunge in price.

At his deposition, Casab testified that FFI has no assets of any kind. He stated that he had just begun to demolish the Hamburg property, but that he was going to sell the steel rather than deliver it to plaintiff. He testified that he had already sold the steel from the Livernois property for \$290,000. Casab claimed that he couldn't remember what he had done with plaintiff's money. He testified that he had no intention of returning plaintiff's money or delivering any further steel.

Both parties moved for summary disposition in the trial court. The court found that plaintiff had presented sufficient evidence to support a claim for fraud, and that defendant had not refuted any of those facts. The court therefore granted summary disposition in favor of plaintiff. Defendants then filed this appeal.

II. ANALYSIS

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). When reviewing a motion brought under MCR 2.116(C)(10), this Court considers the pleadings,

¹ Indeed, plaintiff claims that the reason it was unable to raise the full \$1 million for the second contract is that defendants had failed to timely deliver the steel from the first contract.

admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007).

This Court described the elements of a claim of fraud in *Roberts v Saffell*, 280 Mich App 397, 403; 760 NW2d 715 (2008), *aff'd* 483 Mich 1089 (2009):

To prove a claim of fraudulent misrepresentation, or common-law fraud, a plaintiff must establish that: (1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) the defendant made it with the intention that the plaintiff should act upon it; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff thereby suffered injury.

Defendants argue that the alleged misrepresentations all involve future promises—i.e., that defendants *would* demolish the two buildings and *would* provide the scrap steel to plaintiff. This was also the basis of the trial court’s opinion. Defendants argue that future promises cannot support a claim of fraud, but this is incorrect. While the general rule is that the material representation must relate to a past or present fact, a misrepresentation may also be grounded “upon a promise made in bad faith without intention of performance.” *Hi-Way Motor Co v Int’l Harvester Co*, 398 Mich 330, 337-338; 247 NW2d 813 (1976). To fit this exception, there must be evidence of fraudulent intent by the actor “at the very time of making the representations, or almost immediately thereafter.” *Id.* at 338-339.

However, this Court need not address whether there plaintiff has shown beyond dispute that defendants never intended to deliver the contracted-for steel. As plaintiff points out, defendants also misrepresented present facts regarding their ownership of the subject properties. On appeal, plaintiff alleges that defendant Casab represented that he owned the properties. Casab now denies this allegation, but as recently as during his deposition, Casab maintained that he did own the Hamburg property in April of 2008. All evidence in the record, as opposed to arguments in briefs, is that defendants represented that they owned the subject properties. Defendant cannot create a genuine issue of fact on this point simply by changing his story on appeal. Moreover, even if defendants did not affirmatively assert ownership, the contracts involved here contain an implied statement that defendants may legally provide the scrap metal from the properties to plaintiff.

These statements were, in fact, false. The deed provided by defendants for the Hamburg property is dated October 18, 2010. The deed for the Livernois property is dated June 10, 2008. Further, while the entity that eventually bought both subject properties is controlled by Casab, it is not FFI, which is the entity that contracted with plaintiff to supply scrap metal.

Defendants also knew these statements were false. They suggest that there was some confusion regarding the Hamburg property because they had attempted to purchase the property but the sale was cancelled. However, the letter from the state announcing the cancellation and informing Casab that he would receive a full refund is quite clear. Defendants do not allege, for example, that they never received the refund.

Under the circumstances, there is no doubt that defendants intended for plaintiff to rely upon their misrepresentation of fact, and that plaintiff did rely on it. Plaintiff surely would not have paid \$1.4 million up front for materials to be obtained from property that it knew defendant did not own. The record does not reveal any reason to doubt that defendant made this misrepresentation in order to induce plaintiff to give up its money, or that plaintiff relied on defendants' assertions in signing the contracts.

Finally, plaintiff suffered injury. Plaintiff expected to receive scrap steel worth over \$2 million dollars, and instead received only \$30,000 worth. Defendants do argue that the price of scrap metal dropped precipitously, but they have no evidence for this assertion. Plaintiff, on the other hand, has provided evidence that the prices for scrap steel remained steady during the relevant period of time.

Plaintiff has provided evidence to prove each element of its fraud claim, and defendants have failed to rebut any of this evidence. Therefore, the trial court correctly granted summary disposition in favor of plaintiff.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Douglas B. Shapiro