

85-LW-4422 (10th)

Michael E. MIKSCH and M.I.K., Inc., Plaintiffs-Appellants,

v.

T-SHIRTS PLUS, INC., Defendant-Appellee.

No. 85AP-517.
10th District Court of Appeals of Ohio, Franklin County.
Decided on December 3, 1985.

Appeal from the Franklin County Court of Common Pleas.

Teaford, Rich, Belskis, Coffman & Wheeler, Hamilton J. Teaford and Jeffrey A. Rich, for appellants.

Lane, Alton & Horst, Jack R. Alton, and John M. Alton, for appellee.

OPINION

MCCORMAC, Judge.

This case is on appeal from the judgment of the trial court entered May 28, 1985, denying rescission and damages for violation of the Ohio Business Opportunity Purchasers Protection Act and for common-law fraud. Plaintiff-appellant, Michael E. Miksch, has appealed and asserts the following assignments of error:

"1.The trial court erred in not finding that the delivery by defendant of plaintiff's exhibit two was a per se violation of Section 1334.03(A)(2)(a)(b) and (c).

"2.The trial court erred in not finding that delivery by defendant of plaintiff exhibit four was a per se violation of Section 1334.03(A)(2)(a)(b) and (c).

"3.The trial court erred in finding an intent to deceive was a necessary element of a violation of Section 1334.03(A).

"4.The trial court erred in finding that a representation must be a guarantee before it is violative of Section 1334.03(A)(2).

"5.The trial court erred when it found that the representations made did not violate Section 1334.03(A)(2) because the representations were only intended as estimations to prepare financial proposals.

"6.The trial court erred when it found that the representation made did not violate Section 1334.03(A)(2) because the prospective franchisee had the opportunity to check the representations by asking other persons.

"7.The trial court erred in finding that appellant must have proved common law fraud by clear and convincing evidence, because only a preponderance of the evidence is sufficient to prevail in an action for fraud.

"8.The trial court erred in finding that appellee did not commit fraud upon appellant since appellee prepared and gave the appellant earnings claims which were hypothetical and without basis in fact in order to induce a sale."

Defendant-appellee, T-Shirts Plus, Inc., is a franchisor which offered retail franchises to sell T-shirts, transfers, etc. On May 7, 1981, appellant Miksch entered into a franchise agreement with appellee in which Miksch was granted a

franchise to operate a retail T-Shirts Plus store in the Olentangy Plaza Shopping Center in Columbus, Ohio. Miksch had discussed a franchise with T-Shirts Plus at a business opportunity show held in Columbus in February of 1981. Sometime prior to the execution of the franchise agreement in May, Miksch was given three documents. Appellant's exhibit two horizontally listed six columns of numbers; each column apparently representing an individual retail outlet. Listed vertically were the total sales revenues, the costs of goods sold, the gross margin, the operating expenses, and finally, the net profit before taxes. The total sales revenue started at \$100,000 and increased to \$225,000.

Appellant's exhibit four is entitled "Waco Retail Stores 1980" on which appears an income statement and a schedule of expenses for two company-owned stores. The Richland Mall's total sales were shown to be \$195,493, and the Southgate Strip Center's were shown to be \$143,214. At the trial, officers of T-Shirts Plus admitted that no real data was used to prepare the earnings claim and that the figures represented hypothetical sales levels. Miksch used these exhibits when he applied for a loan and the bank relied on these figures in granting the loan. After approximately one and one-half years in business, without realizing any of the sales figures on appellant's exhibits, Miksch shut down his store and filed suit alleging that T-Shirts Plus had failed to make the proper disclosures in connection with the sale of a franchise under R.C. 1334.03.

R.C. 1334.03 reads as follows:

"In connection with the sale or lease of a business opportunity plan, no seller or broker shall:

"(A) Make any oral, written, or visual representation to a prospective purchaser concerning potential sales, income, or gross or net profit, unless:

"(1) The seller possesses data to substantiate the representation and provides the data in writing to the prospective purchaser at least ten business days prior to the execution of an agreement selling or leasing the business opportunity plan;

"(2) The written data provided by the seller discloses at least:

"(a) The length of time the seller has been selling or leasing the specific business opportunity plan offered;

"(b) The number of purchasers known to the seller to have made at least the same sales, income, or profit, from that business opportunity plan, and the percentage that number bears to the total number of purchasers of that business opportunity plan;

"(c) The following notice in at least ten-point boldface type:

" "CAUTION

" "Some business opportunity plans have earned this amount. There is no assurance you will do as well. If you rely upon our figures, you must accept the risk of not doing as well.' "

This section then covers all representations, whether oral, written, or visual, that a franchisor makes concerning potential sales, income, or gross or net profit to a prospective purchaser. If such a representation is made, certain facts must be disclosed and the statutorily required cautionary language must accompany the representation. The trial court based its decision on the fact that it found that nothing presented at the business opportunity show violated R.C. 1334.03. The court did find that, in March of 1981 prior to execution of the franchise agreement, appellant Miksch was provided with specific information but decided that the information was only provided to show business potential and not to guarantee earning capability. The trial court found the information was "hypothetical" and the "representations" made by appellee or appellee's agent to Miksch were furnished to assist him in preparing financial proposals and that such representations were not given as guarantees of income or sales. The decision of the trial court, as reflected in its judgment entry, indicates a misunderstanding of the requirements of R.C. 1334.03. Since appellant's assignments of error one through six deal with R.C. 1334.03, they will be considered together.

After examining appellant's exhibits two and four, it is unreasonable to construe them as anything but a

representation of potential sales and gross or net profit before tax. Indeed, the trial court, itself, referred to the exhibits as representations, but then found that these figures were not intended to guarantee earning capabilities or to guarantee income or sales. We do not construe R.C. 1334.03 so narrowly. This section does not require that the representation be a guarantee. Neither is an intent to deceive a necessary element of a violation of R.C. 1334.03(A), as found by the trial court; nor does the finding by the trial court, that the representations were intended as estimations to prepare a financial proposal, affect the outcome, as R.C. 1334.03(A) applies regardless of the motive or intent of either party to the transaction. R.C. 1334.03 requires that a franchisor, which makes representations to a prospective purchaser in any form (or for any reason), concerning potential sales, income, or gross or net profit, must comply with the requirements of R.C. 1334.03(A)(1) and (2). On the face of the exhibits and from the evidence, it is clear that the disclosures were not made nor was the cautionary warning given. The fact that the franchisee, Miksch, had the opportunity to, and did check the representations, does not excuse the violation committed prior to a binding contract of purchase when T-Shirts Plus provided these exhibits to Miksch without the required disclosures and without their being substantiated. The violation exists regardless of oral notification to Miksch that the data was only provided for loan purchases, or that Miksch may have indicated an intention to purchase a franchise before the material was provided. Had the proper data been provided and substantiated, arguably no loan or purchase would have occurred. Appellant's assignments of error one through six are sustained. Since R.C. 1334.09 authorizes rescission for any violation of the chapter, rescission was a proper remedy.

In appellant's seventh assignment of error, Miksch asserts that the trial court erred in requiring that the common-law fraud be proved by clear and convincing evidence instead of preponderance of the evidence. The trial court specifically found that Miksch failed to prove by clear and convincing evidence that appellee intended to deceive him. A civil action for damages based on fraud, like any other civil wrong, requires proof by a preponderance of the evidence. Household Finance Corp. v. Altenberg (1966), 5 Ohio St.2d 190; Jones, Stranathan & Co. v. Greaves (1874), 26 Ohio St. 2; and Manning v. Len Immke Buick (1971), 28 Ohio App.2d 203. However, where fraud is the basis of an action for equitable relief, such as to set aside or reform a written document, fraud must be shown by clear and convincing evidence. Household Finance Corp., supra. The common-law fraud in this case turned upon factual issues of intent and reliance with the object being the award of money damages. R.C. 1334.03 provides the basis for rescission of the franchise agreement. Hence, the trial court erred in requiring proof by clear and convincing evidence; however, as noted in discussion of the final assignment of error, the error was harmless. Therefore, the seventh assignment of error is overruled.

In his eighth assignment of error, Miksch asserts that the trial court erred in failing to find that appellee committed fraud. Even though the trial court did apply the incorrect burden of proof, essential elements of fraud were not proved, even by a preponderance of the evidence. The trial court specifically found that Miksch failed to prove that appellee intended to deceive but, rather, that appellee's intent was to help Miksch obtain financing. An intent to deceive is a requirement of a cause of action in fraud. Friedland v. Lipman (1980), 68 Ohio App.2d 255. The trial court's finding also was that Miksch did not rely upon information provided by appellee. Reliance is also an element of fraud.

Appellant's eighth assignment of error is overruled.

Appellant's assignments of error one through six are sustained. Appellant's seventh and eighth assignments of error are overruled. The judgment of the trial court is reversed and the case is remanded to the trial court to grant appellant rescission and damages as may be applicable for violation of R.C. Chapter 1334.

Judgment reversed and case remanded.

REILLY, P.J., and MOYER, J., concur.