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# Fraud: Defense to the Action of Specific Performance

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support in the better reasoned and more modern view of the Wisconsin Court. Here there is an undertaking whereby an employer sends out an agent to work upon a commission basis. This is in the nature of a joint adventure, from which both hope to profit. The employer profits by the development and enlargement of its business and the agent by his compensation. The undertaking may prove a success or a failure. But the agent will have the burden of the entire adventure if he is required to repay all the advances made in excess of commissions earned. Consequently the Wisconsin Court will not indulge in such construction where there is no agreement on the part of the agent to repay such excess.

The rule of law is aptly stated in 2 *Corpus Juris,* page 787, which is cited in the Wisconsin decision and in the case of *Roofing Sales Co.* v. *Rose,* 103 N.J. Law 553; 137 A. 211.

"In the absence of a special agreement an agent who receives advances on account of commissions cannot be held to a personal liability for such advances, although the commissions earned by him do not equal the advances, and although his employment has ceased."[4]

EDWARD L. METZLER

**Fraud: Defense to the Action of Specific Performance.**

On October 8, 1928, our Supreme Court handed down their decision in the case of *Gloede* v. *Socha,* — Wis. —, 226 N.W. 950. Madeline Socha, a widow, owned a piece of land adjoining Lake Michigan. Her son sold sand from the beach. His competitor, Henry Gloede, Jr., knew that Mrs. Socha would not sell her land to him so he got Blessinger, a real estate agent and old neighbor of his, in whom she reposed confidence to approach her. Blessinger told her he was buying the land for a party in Chicago, that he would not disturb her son's sand business and when he (Blessinger) returned a second and third time after conferring with the plaintiff, said he had been talking to the Chicago party by telephone. A land contract for the sale of the land was made and part of the money was paid by the plaintiff. When the defendant became aware of the fact that the plaintiff was the purchaser she tendered the money paid her back to the plaintiff and refused to complete the sale. Gloede then brought an action to enforce specific performance of the land contract. The municipal court of Racine County gave judgment for the defendant and plaintiff appealed.

[4] Accord: *Luce* v. *Consolidated Ubero Plantations Co.,* 195 Mass. 84, 80 NE 793; *Northwestern Mutual Life Insurance Co.* v. *Mooney,* 108 N.Y. 118, 15 N.E. 303; *Schnabel* v. *American Educational Alliance,* 79 Misc. Rep. 624, 140 N.Y.S. 848; *Lester C. Hebberd and Co.* v. *Blake* (Sup.) 175 N.Y.S. 478; *Goldberg* v. *Kleinberg* (Sup.) 179 N.Y.S. 364.

Justice Fritz writing the opinion of the court said, "Under the circumstances the plaintiff is chargeable with all of Blessinger's misconduct and "sharp practice" in dealing with the defendant up to November 3, 1927, when the contract was assigned to the plaintiff. Consequently plaintiff is in court with unclean hands." He went on to say that specific performance lies within the "sound discretion of the court."[1] Quoting further from the same case, "The plaintiff's claim for a deed must be fair, just, and reasonable." Even though these may not be actual frauds on plaintiff's part, there may be what might be called "sharp practice" not pleasant to contemplate and not calculated to appeal with favor to the conscience of the chancellor. Then the court cited several cases from other jurisdictions which are closely in point as to facts and which supported his decision. After declaring that the defendant was not guilty of laches[2] and that the testimony of Blessinger's misrepresentations were admissable.[3]

The case really should provoke very little discussion, as it seems to state the law as it should be and as it is. However, it gives a starting point for a discussion of fraud. Actionable fraud is sometimes defined as any representation or concealment of a material fact made by a knowing party for the purpose of inducing another party to act or omit to act to that party's damage. Usually in order to constitute fraud relievable at law or in equity all these must be present. Where a person makes a positive statement which he should have known was untrue, the fact that he had no intent to deceive will not prevent the result from being fraud. The hardest questions to answer in cases of fraud are: When is the representation false? And when is it material?

There is also a distinction between fraud as a ground for damages or rescission of a contract and fraud as a defense in an action for specific performance. 36 Cyc. pp. 600 says, "That the contract was procured by a false representation of a material fact is a defense to specific performance at the suit of the party who made the representation. In general a less flagrant case of fraud is required to prevent specific performance than to recover damages or to obtain rescission." This rule appears very reasonable when we consider that in order to prove fraud we must have "clear and convincing" proof while the

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[1] *Engberry* v. *Rousseau* 117 Wis. 52, 57, 93 N.W. 824, 826.

[2] *Seiss* v. *Anderson,* 159 Mo., App. 656, 139 S.W. 1788; *New York Brokerage Co.* v. *Wharton,* 143, Iowa 61, 119 N.W. 969; *Ellsworth* v. *Randall,* 78 Iowa, 142, 42 N.W. 629, 16 Am. St. Rep. 425; *Cowen* v. *Curren* 216 Ill. 598, 75 N.E. 322; *Brett* v. *Cooney,* 75 Coun. 338, 53 A. 729. 1124; *Kelly* v. *C.P. R.R. Co.,* 74 Cal. 557 11P 386. 5Am. St. Rep. 470.

[3] Jones, *Com. on Evidence* (2d ed. 1926) 903, 908.

maxim of equity "applies not only to fraudulent and illegal transactions but to any unrighteous, unconscientious, or oppressive conduct by one seeking equitable interference in his own behalf."

In the following cases there was sufficient showing of fraud for rescission of the contract or the recovery of damages:

In *Kushkamp* v. *Hidding* 31 Wis. 503, the plaintiff an illiterate German, came home to find his wife unconscious on the floor. She soon died from an injury to her head. There was a post mortem and a corner's examination which, with the death of his wife, excited the plaintiff. The defendant claiming friendship told him he was in danger of arrest for murder and induced him to sell his land for $1,500, a very low price. The plaintiff sued for the rescission of the contract. The defendant demurred, was overruled, and appealed. Chief Justice Dixon upholding the lower court said:

"Courts of equity watch with extreme jealousy all contracts made by persons when there is any ground to suspect impositions, oppression or undue advantage being taken by one of the parties; or when one trusts to another with a blind and credulous confidence; or when one of the parties, from whom an advantage has been obtained was in circumstances of extreme necessity and distress." The court concluded, "We have no hesitation in saying that the complaint states a strong case for equitable interposition and for relief against the conveyances and that the demurrer was properly overruled." Following this case down we find it cited in three comparitively late cases. In *Olson* v. *Laun,* 170 Wis. 106, damages were allowed plaintiff because defendant made fraudulent statements in regard to the amount of taxes he paid, the amount of plow land on his farm, etc. Then in the *Wachowski* v. *Lutz,* 184 Wis. 584, money damages were allowed to plaintiff in the sum of $4,450 where he was led to exchange farms by misrepresentation of defendants and by his (plaintiff's) father-in-law who dwelled on an adjoining farm to the defendant.

In considering the relationship of father-in-law and son-in-law in this case Judge Owen said, "John Zywiki (the father-in-law) stood in a fiduciary relationship to the plaintiffs, not because of his personal relationship but because as a matter of fact they reposed trust and confidence in him." . . . . "A fiduciary relationship exists when confidence is reposed on one side and there is resulting superiority and influence on the other, and the relation and duties involved in it need not be legal but may be moral, social, domestic, or merely personal."[1]

And in *Weber* v. *Mylie,* 191 W. 263, the defendant sold store of goods and good will in business to plaintiff for $5,000. He represented

[1] *Miranovitz* v. *Gee,* 168 Wis. 246, 252; 157 N.W. 790.

to plaintiff that landlord had promised five years lease with option for five years and that lease was executed ready for plaintiff to sign. After the sale had been made plaintiff found that the defendant had not made the agreement with the landlord and the landlord refused to give a lease. The court held that this was a misrepresentation of a material fact and that plaintiff have damages. These are but a few of the cases of fraud in Wisconsin. They are referred to merely show that it has been the practice of our court not only to deny specific performance where the plaintiff has been guilty of fraud and "sharp practice" but in many cases it has rescinded the contract or given damages to the plaintiff where the defendant was guilty of fraud. You will also note from the few cases summarized that any kind of a misrepresentation may be material, that it need not be the only inducement for the act of the other party, that the person making the statement generally knows the falsity of it and makes it to induce the other party to act.

However a mere statement of opinion is not a fraudulent misrepresentation. Read *Farmers Co-Operative Packing Co.* v. *Boyd,* 175 Wis. 544. Boyd was running an unsuccessful packing plant in LaCrosse and he told the prospective stockholders the plant was worth a certain amount and induced them to buy shares. It was held that the purchasers of the shares could not recover as this was a mere statement of value, and opinion, and purchasers had a fair opportunity to investigate and have it appraised. The rule in regard to opinion is stated in *Suessenguth* v. *Bengenheimer* 40 Wis. 370. "Mere exaggerated statements by the vendor of land as to its value and purchase by the vendee and such valuation are not sufficient ground for rescinding the contract, where both parties had equal opportunities for ascertaining the value and there is no proof of fraudulent intent in the vendor." I think we can extend that rule to personalty and other property. However, where a dealer in flour said flour was going up when it really was going down, it was held to be a fraudulent misrepresentation.[4]

There is still another doctrine which will prevent relief for fraud, that is; there can be no misrepresentation of a future fact or a promise to do something in the future is not fraud.

**Fraudulent Promises.**

If deceit in order to be actionable must relate to existing or past facts, it is evident that the fact that a genuine promise made in the course of negotiations, is never performed, it is not in itself either a fraud or the evidence of a fraud.[5] *Nevertheless a promise is some-*

[4] *International Milling Co.* v. *Preim,* 179 Wis. 622.

[5] See cases cited which include *Warner* v. *Benjamin,* 89 Wis. 290, *J. H. Clark Co.* v. *Rice,* 127 Wis. 458. It is held that false representation of an existing intent to do certain things which will benefit the property sold may be actionable.

*times the very device resorted to for the purpose of accomplishing the fraud and the most apt and effectual means to that end.*[6]

However in Wisconsin we have this doctrine of "no misrepresentation of a future fact" carried to an extreme in *Tufts* v. *Weinfeld,* 88 Wis. 647; *Pratt* v. *Darling,* 125 Wis. 93. In *Deerbeck* v. *Albright,* 188 Wis. 515, a woman bought an automobile on a conditional sales contract. She paid $600 down and wanted to make payments of $35 per month. Sharon, the defendant's salesman, told her he would see the President of the Acceptance Co. who was advancing the money, seeing if he would allow an extension of the time limit which was one year. Sharon went in to see the president. He said $35 a month would be insufficient, that whole amount must be paid within a year, which would come to $61 per month. Sharon came back, told plaintiff it was all fixed, that she could pay $35 a month. When contract was signed, plaintiff noticed it called for $61 per month but Sharon told her this was merely the method of doing business but the $35 would be accepted. When she offered the Acceptance Company the $35 they refused claiming the right to get $61. She sued the garage company for rescission of the contract on the ground of fraud but court held it was a moral but not a legal fraud and refused belief. This case says nothing about the representation made being of a future fact or a promise but rather turns on the fact that you cannot introduce oral evidence to vary the terms of a written contract. That may be true, but how did the court get around the fact that Sharon induced her to sign the contract by a downright lie and that fraud at inception will vitiate the most formal contracts and most sacred documents. Justice Crownhart dissenting said that this was "a moral fraud upon the plaintiff." It was that and more. It was criminal fraud. He goes on to say that in none of these cases was fraud more evident than in the instant case, yet a conviction for fraud was sustained in each of them. This case has been cited as late as *Pisfalski* v. *Winkel Garage Co.,* 190 Wis. 64 as authority for the proposition that you cannot introduce oral evidence to vary the terms of a written contract. Nothing has been said about it on the proposition. What is mere promise and what a misrepresentation of a present fact?

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*Albitz* v. *Minneapolis Rwy. Co.,* 40 Min. 476 Contra: *History Co.* v. *Dougherty,* — Ariz. — 387, 29 Pac. 649.

[6] See *Jones* v. *Jones* 40 Misc. 360, 82 N.Y.S. 325; *Sweet* v. *Kimbell,* 166 Mass. 332, 44 N.E. 243, 55 Am. St. Rep. 406; *Wilbur* v. *Prior,* 671-508; 32 Atl. 474; *National Bank* v. *Mackey and Kamapp,* 437, 49 Pac. 324, *James Dickinson Farm Mortgage Co.* v. *Harry,* 273 U. S. 119.

[7] *Palotta* v. *State,* 184 Wis. 290; *Corscot* v. *State* 178 Wis. 661; *Stecher* v. *State,* 168 Wis. 183.

However, even this case throws no doubt on the decision in the case of *Gloede* v. *Socha, supra,* for in this case we had not only a plaintiff tainted with fraud attempting to compel specific performance, but the perpetrator of the fraud might be considered in a fiduciary relationship to the defendant. I have already quoted a definition of a fiduciary relationship from *Miranovits* v. *Gee,* 163 Wis. 246, 252. In that case one Ginsberg, a fellow country man of the plaintiffs, made representations regarding the value of certain farm lands and thus induced the plaintiffs purchase of them for an excessive price. The court in deciding regarding the value of certain farm lands and thus induced the plainthat case said, "the distinction between opinion and statements of fact are very fine but the court looks to the effect such representations had upon the parties deceived and that such representations need not be sufficient to deceive an ordinary prudent person; if they deceived the parties to whom they were made, and further, that whether or not a statement is an opinion or a purported fact is dependent upon the circumstance of the case, the knowledge and mental agility of the parties, and the faith with which the party to whom the representations were made takes them.

The materiality of this credulity of the party deceived is brought out in *Olson* v. *Skroch,* 182 Wis. 448 where the defendant turned in a worthless bond on the purchase price of a tractor and it was shown that plaintiffs had heard of no bonds except Liberty Bonds, and the case held that defendant's concealment of the fact that this was not a Liberty Bond, when he knew that plaintiff expected to get a Liberty Bond, amounted to a fraud. After reading this case I realized the legal inefficency of the horse traders evasion when he told the prospective purchaser that the blind horse was sound but "He doesn't look well." This from the case might or might not be fraud depending upon the circumstances of the case and the mental agility or reputation for mental agility of the purchaser.

Knowing that equity has always insisted that he who comes into equity comes in with clean hands while law required clear and convincing proof before giving relief on account of fraud we can see that very little showing of fraud is necessary in order to be a defense against specific performance.

The court has probably always noted this and as far back as 1859 in *Kelly v. Sheldon,* 8 Wis. 258, we find them refusing specific performance because of the fraud of the plaintiff. In this case Kelly had entered into a contract with Sheldon to buy his land situated in Cook-County, Illinois. Kelly went to see the lands and while there made some preliminary negotiations to sell the lands for from $12.50 to $15 per acre. He returned and told Sheldon that the land was worth about

$7.00 per acre. Sheldon rescinded the contract and a new contract was made setting the price at $8.00 per acre. Afterwards Sheldon discovered the fraud and refuse to go on with the bargain. Kelly had made part payment and sued to compel Sheldon to perform the contract. It was held that Kelly could not compel specific performance of the contract but that the court would do complete equity and hence Sheldon must return the money he had received.

In *Wells* v. *Mitletk,* 23 Wis. 64, the circuit court refused specific performance of a contract to convey lands in exchange for a barge and a half interest in a steamboat. The owner of the steamboat made false representations regarding the financial responsibility of his partner and these were held sufficiently fraudulent to be a defense against specific performance.

Again in *Engberry* v. *Rousseau,* 117 Wis. 52, specific performance was refused and the opinion of Chief Justice Ryan in *Williams* v. *Williams,* 50 Wis. 311, is cited, "A court of equity must be satisfied that the claim for a deed is fair, just, and reasonable, and the contract equal in all its parts, and founded on an adequate consideration before it will interpose with this extraordinary assistance. If there be any well founded objection on any of these grounds, the practice of the court is to leave the party to his remedy at law for compensation in damages."

Hence, we can conclude that in Wisconsin "Specific performance of a contract will not be decreed in favor of a party who has been guilty of misconduct in making the contract and that the rule as stated by Chief Justice Marshall in *Cathcart* v. *Robinson*[8] is at present the law in Wisconsin. "Omission or mistake in the agreement or that it is unconscientious or unreasonable or that there has been concealment, misrepresentation, or any unfairness, are enumerated among the causes which will induce the court to refuse its aid.[9]

JOHN WALSH

**Joint Stock Companies: Joint Adventures: Limitation of Actions.**

*Reinigethal* v. *Nelson, et al.,* Wis., Sup. Ct., Oct., 1929, 227 N.W. 14 is an action on a note by trustees of the estate of the deceased against Nelson and others of a syndicate formed to purchase lands in Montana. The members of the syndicate signed an agreement by which two of them were designated trustees who were to take title to the land and were given power "to enter into all contracts necessary to carry this agreement into effect." The trustees were governed by the decision of

[8] 5 Pet. 264, 270, 82 Ed. 120, 124.

[9] Quotation taken from *Eaton on Equity* (2nd. Ed.) PP. 501.