IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX AT KINGSHILL

WALTER E. PREISS, Plaintiff v. R. D. SEVERE and BAKER'S, INC. Defendant	CIVIL NO. 380/1985 ACTION FOR BREACH OF CONTRACT

KEVIN A. RAMES, ESQUIRE
35 King Street
Christiansted, St. Croix
U.S. Virgin Islands 00820
(809) 773-7725
(Attorney for Plaintiff)

GEORGE W. CANNON, JR., ESQUIRE
Mars Hill
Frederiksted, St. Croix
U.S. Virgin Islands 00840
(809) 772-4444
(Attorney for Defendant)

PETERSEN, Judge

MEMORANDUM OPINION
August 16, 1985

This matter is before this Court after a bench trial pursuant to Rule 59(d) of the Federal Rules of Civil Procedure for a redetermination of the issues of damages.

FACTS

Plaintiff, Walter Preiss, made representations to Defendant, R.F. Severe, that the business of Baker's Inc. was netting between $75,000 and $80,000 before taxes; that the business was selling two and a half container loads of juices per month, and that the business represented about sixty five per cent (65%) of the juice market on St. Croix. Based on these representations, the defendant purchased Baker's Inc. for $119,010.00. The defendant paid the sum of $75,000.00 at the closing. The balance was to be paid in promissory notes of $25,000.00 and $19,010.00 respectively.

After purchasing the business, the defendant obtained the balance sheet from the plaintiff which showed that the maximum net profit during the preceding eleven (11) months to be $11,483.00. The defendant also discovered that the business was selling One and a half (1½) container loads of juice per month and that the business did not represent sixty five (65%) per cent of the juice market on St. Croix. After making about two payments on the installment promissory note, the defendant defaulted. The plaintiff filed this action for breach of contract as well as a petition for foreclosure on the security interest, pursuant to 11A V.I.C. 9-504. The defendant filed a motion for a temporary Restraining Order to preclude the sale of the assets of the business, and a counterclaim for damages alleging fraudulent misrepresentations.

This Court found that the representations made by the plaintiff were false and misleading and that such false representations induced the defendant to purchase the business. The Court dismissed the plaintiff's action to recover the balance of the purchase price in the amount of $35,586.11. No other relief was awarded to the defendant on his counterclaim for compensatory damages. In addition, the Court denied the defendant's request for punitive damages. As additional relief, the Court dismissed the foreclosure of the plaintiff's security interest.

DISCUSSION

The defendant contends that he is entitled to a recission of the contract as well as compensatory and punitive damages. The plaintiff argues that the plaintiff would be severely prejudiced by a recission of this transaction inasmuch as the defendant failed to disaffirm the contract and had made a knowing election to proceed on his counterclaim for damages.

In Abdallah v. Abdallah, 359 F.2d170, 270, (3rd Cir.1966), the Court stated:

> "The doctrine of election of remedies is regarded as being an application of the law of estoppel, upon the theory that a party cannot in the assertion of his right occupy inconsistent positions in relation to the facts which form the basis of his respective remedies; it is based on the proposition that, when a party has two remedies proceeding upon opposite and irreconcilable claims of

> right, the one adopted exludes the other."

The plaintiff correctly recognized that the defendant's counterclaim stated a cause of action in tort for damages caused by a fraudulent misrepresentation. However, as one legal scholar states of this area of the law:

> "There has been a good deal of overlapping of theories, and no little confusion, which has been increased by the indiscriminate use of the word 'fraud', a term so vague that it requires definition in nearly every case. Further difficulty has been added by a failure to distinguish the requisites of the action in tort at law from those of equitable remedies, and to distinguish the different forms of misrepresentation from one another, and misrepresentation itself from mere mistake. Any attempt to bring order out of the resulting chaos must be at best a tentative one, with the qualification that many Courts do not agree."

W. Prosser, The Law of Torts, pp.684-85, (4th ed., 1971). This difficulty has led to the conclusion that "by cross-pollinating cases dealing with one cause of action based on fraud with principles drawn from other cases dealing with different causes of action based on fraud, Courts have obscured at this time the distinct character of the underlying causes of action." Mother Earth Ltd v. Strawberry Camel Ltd., 390 N.E. 2d 393 (1979).

An analysis of the defendant's counterclaim supports the conclusion that the defendant's underlying cause of action is one in tort for damages. Morever, any remaining doubt that the defendant intended his counterclaim to be an action to recover in damages was resolved at the trial wherein the defendant specifically stated "that had he known of the true condition of the business, that he would still have purchased it--the only distinction being that he would have paid less for it." As the Court aptly noted in Kingsley Truck Lines, Inc. v. Beardsley, 331 F. 2d 14 (8th Cir. 1964), a case cited by both attorneys herein,

> "When one is induced through false and fraudulent representations to enter into an agreement upon discovery thereof, he has an election to either rescind in which event he must tender back that which was received or he may affirm the agreement and maintain his action in damages for deceit, but his election must be promptly made and when once made, is final."

The defendant having made his election to proceed on the damage claim cannot, at this late hour, proceed on the theory of recission. The defendant will be restricted to his action for damages.

Section 549 of the Restatement of Torts (second) establishes the measure of damages to be awarded to one who has been the victim of a fraudulent misrepresentation. This section provides that:

> (1) That recipient of a fraudulent misrepresentation is entitled to recover as damages in an action of deceit against the maker the pecuniary loss to him of which the misrepresentation is a legal cause, including
>
> (a) the different between the value of what he has received in the transaction and its purchase price or other value given for it; and
>
> (b) pecuniary loss suffered otherwise as a consequences of the recipient's reliance upon the misrepresentation.
>
> (2) The recipient of a fraudulent misrepresentation in a business transaction is also entitled to recover additional damages sufficient to give him the benefit of his contract with the maker, if these damages are proved with reasonable certainty."

Thus, it is well settled that the general rule in awarding damages in a case of this nature is that the purchaser is entitled to recover the difference in value between the property actually conveyed and the value of the property as it would have been if there had been no false representation i.e., the "benefit of the bargain" damages together with damages resulting directly from the fraudulent representation. See also Dobbs, Remedies, Section 9.2 p.595.

The damages to be recovered in an action of this character are such as are the natural and proximate consequences of the fraudulent representation complained of and those which must be presumed to have been within the contemplation of the wrongdoer as the probable consequence of his fraudulent representation. Stated another way, the defendant is entitled to the difference between the actual value of the business and its value had it been as represented.

In arriving at the value of the business, no one method of valuation need be followed. The testimony at trial by Mr. Roy Megnin, a qualified accountant, and one who was previously offered the business of Baker's Inc, revealed that after a consideration of the assets, such as the inventory and the account receivables, that the remainder of the purchase price would be considered good will. Morever, Mr. Megnin stated:

> "Now normally, I do not recall ever seeing anybody pay more than three times annual income... and that is in extreme cases. Sometimes, it is one, sometimes one and a half, sometimes two and a half net earning in the way of good will to buy a business that has demonstrated superior earning ability".

The credible evidence reveals that the maximum net income before taxes was in the vicinity of $11,483.59. Since there was insufficient evidence presented to indicate that the business had demonstrated superior earning ability, the Court will utilize the figure of two and a half times the net income to arrive at a fair and reasonable price. This figure of $28,908.97 added to the undisputed total assets of $32,166.07 yields a figure of $60,875.04 which more accurately reflects the highest possible value of the business at the time of the sale. The defendant made a downpayment of $75,000.00 and installments payments totalling $9,158.84 for a total payment of $84,158.84. The defendant is entitled to recover as compensatory damages the sum of $23,283.80 as well as pre-judgment interest from November 12, 1984 to the present.

In addition, the Court finds that an award of exemplary damages is warranted. The unrebutted evidence indicated that the defendant relied on the plaintiff for guidance and direction; that the defendant, a newcomer to this community, was young and inexperienced in this business venture; that the plaintiff failed to show the defendant the business records which was maintained by the plaintiff's wife; that the plaintiff advised the defendant that the books and records would not reveal the true financial picture of the business; that the plaintiff's actions were willful and done with reckless disregard of the defendant's rights. Therefore, the Court finds that punitive damages should be awarded in the amount of $15,000.00.

In view of the above discussion, this Court's judgment is revised accordingly.

Eileen R. Petersen

EILEEN R. PETERSEN, JUDGE