

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-261

DECEMBER TERM, 2001

Leslie Trager	}	APPEALED FROM:
	}	
v.	}	Lamoille Superior Court
	}	
Baraw Enterprises, Inc.	}	
	}	DOCKET NO. 177-9-00 Lecv
	}	
	}	Trial Judge: Alan W. Cook
	}	
	}	
	}	

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals the Lamoille Superior Court's entry of summary judgment in defendant's favor on plaintiff's claim that defendant fraudulently induced plaintiff to forego his rights to participate in municipal zoning and Act 250 proceedings relating to defendant's construction of condominiums adjacent to plaintiff's property. We affirm the dismissal, but remand for entry of judgment with prejudice.

The undisputed facts establish that defendant owns and operates the Stoweflake Resort in Stowe, Vermont. In September 1999, defendant filed an application for a conditional use permit for the construction of condominiums on property next to plaintiff's. Plaintiff received notice of the hearings on defendant's application, which took place between October 5, 1999 and January 18, 2000. Plaintiff did not participate in the proceedings. In December 1999, defendant applied for an Act 250 land use permit with the District #5 Environmental Commission, and plaintiff was provided with notice of the hearing, but again, did not participate. On March 22, 2000, defendant was granted a zoning permit. The following day, defendant received the requisite Act 250 land use permit.

Defendant commenced construction of the project in April 2000. The walls and roof of the first building in defendant's project were substantially complete by the first week of June 2000. According to plaintiff, the buildings completely obstruct his view of the surrounding landscape. By letter dated August 14, 2000, plaintiff requested that the Town of Stowe's zoning administrator determine whether the buildings' height complied with the town's zoning ordinance and defendant's permit application. After reviewing the project plans and inspecting the site, the administrator informed plaintiff by letter dated August 18, 2000 that the project complied with zoning requirements. The zoning administrator's letter notified plaintiff that he could appeal the decision under section 23.6 of the town's zoning ordinance.

Plaintiff did not appeal the zoning administrator's August 18 decision, but, rather, filed suit in Lamoille Superior Court the following month against defendant alleging fraud. In his complaint, plaintiff alleged that he did not participate in the zoning or Act 250 proceedings because defendant's oral and written representations to him concerning the project's design led him to believe he did not need to appear in either permit proceeding. In particular, plaintiff's complaint alleged that defendant told him that the buildings would be two-story buildings. Plaintiff sought injunctive and

declaratory relief nullifying the zoning and Act 250 permits, enjoining defendant from completing construction and compelling defendant to modify the structures to conform to the height defendant allegedly represented to plaintiff previously. In the alternative, plaintiff sought compensatory and punitive damages.

Defendant moved for summary judgment arguing that plaintiff did not exhaust available administrative remedies and the court should therefore decline to exercise jurisdiction. Plaintiff opposed defendant's motion with a memorandum of law, an affidavit, and a statement of undisputed facts further clarifying the alleged fraudulent representation giving rise to plaintiff's complaint. In that response, plaintiff states that defendant's buildings are actually three-story buildings, with a height of twenty-four feet, not two stories as defendant represented to him. In support of his contention that the buildings are actually three stories not two, plaintiff offered the following affidavit testimony:

There is no question that what was built is a three-story building. This is shown by the recent approval for the Golden Eagle Resort in Stowe to add a third story on its property which will make it a zoning "24 feet high" building - precisely the same height as the defendant's building, as applied for, in front of my home. (See attached article from Stowe Reporter, dated September 21, 2000).

The newspaper article concerning the Golden Eagle Resort in Stowe attached to plaintiff's affidavit describes a one-story addition to an existing hillside building with two stories in the back of the building and one story in the front. Once the additional story is added to that building, the measured height from the now single-story front will be twenty-four feet. Thus, when completed, the front of the building at the Golden Eagle Resort will have two stories, with a height of twenty-four feet. Plaintiff offered nothing more to support his claim of fraud.

Framing plaintiff's claim as one to enforce the height restrictions in defendant's conditional use and Act 250 permits, the trial court agreed with defendant and dismissed plaintiff's complaint without prejudice. The trial court held that plaintiff must first prosecute his permit compliance claim with the appropriate administrative bodies before proceeding on his fraud claim. The court also held that plaintiff's failure to appeal the zoning administrator's August 18, 2000 determination that defendant's construction did not violate Stowe's zoning ordinance barred his claim in superior court due to 24 V.S.A. 4472(d)'s exclusivity provision. See 24 V.S.A. 4472(d) (precluding indirect attacks of zoning administrator decisions that interested parties fail to appeal). The court's order allows plaintiff to refile his fraud claim for compensatory damages if plaintiff is successful in subsequent administrative proceedings. Plaintiff timely appealed to this Court.

Plaintiff argues here that the trial court erred by requiring him to pursue administrative remedies before prosecuting his claim for fraud in superior court. He asserts that defendant's permit compliance is irrelevant to his fraud claim, and that he is not seeking to overturn the zoning or Act 250 permits. Plaintiff argues that defendant's fraud deprived him of his right to participate in the zoning and Act 250 proceedings. Relief for that harm, plaintiff argues, should consist of an order directing defendant to modify the structures to conform to the two-story representation defendant made to plaintiff. If equitable relief is unavailable, plaintiff claims he is entitled to damages.

On appeal, we apply the same standard as the trial court when reviewing motions for summary judgment. State v. G.S. Blodgett Co., 163 Vt. 175, 180 (1995). Summary judgment is appropriate where no genuine issue of fact exists and any party is entitled to judgment as a matter of law. Id. We will regard the opposing party's properly supported allegations as true. Hodgdon v. Mt. Mansfield Co., 160 Vt. 150, 159 (1992). But if the opposing party does not come forward with specific facts to establish an essential element of that party's claim on which it has the burden of proof at trial, the moving party is entitled to summary judgment. Blodgett, 163 Vt. at 180.

Fraud cannot be presumed, but must be proved by the one alleging it by clear and convincing evidence. Bardill Land & Lumber, Inc. v. Davis, 135 Vt. 81, 82 (1977). To succeed on his fraud claim, plaintiff must show that defendant (1) intentionally misrepresented an existing fact; (2) the misrepresentation affected the essence of the transaction between the parties; (3) the misrepresentation was false and defendant knew it was false; (4) the fact at issue was not open to plaintiff's knowledge; and (5) plaintiff relied on the misrepresentation to his detriment. Silva v. Stevens, 156 Vt. 94, 102 (1991).

Defendant is entitled to summary judgment on plaintiff's fraud claim because plaintiff has failed to come forward with specific facts demonstrating that a genuine issue for trial exists concerning the falsity of defendant's representation to

plaintiff. ⁽¹⁾ The only evidence plaintiff cited to support his claim that defendant falsely represented to him the number of stories defendant planned to build was his affidavit and a newspaper article which attempts to equate a three-story building with one that is twenty-four feet in height. Even assuming the article were admissible evidence on the element of falsity, the article does not support plaintiff's claim that a building twenty-four feet in height is a three-story building. The article shows that twenty-four feet is equivalent to a two-story building because twenty-four feet is the height of the building as measured from its new two-story front, not its new three-story back. Thus, defendant's representations to plaintiff were not false according to plaintiff's own evidence. Summary judgment for defendant was therefore appropriate, although the complaint must be dismissed with prejudice because plaintiff cannot meet an essential element of his fraud claim.

Affirmed as to dismissal but remanded to the trial court for entry of dismissal with prejudice.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

1. We note that plaintiff's complaint did not meet the specificity requirement for fraud claims under V.R.C.P. 9(b), which requires that plaintiff set forth "the circumstances constituting fraud . . . with particularity," and aver intent or knowledge generally. V.R.C.P. 9(b). Plaintiff's complaint does not contain an allegation whether general or specific concerning defendant's knowledge that its representations were false as required, Ranney v. Munro, 133 Vt. 523, 524 (1980); see also Cunningham v. Miller, 150 Vt. 263, 266 (1988) (knowledge that representation is fraudulent cannot be presumed from falsity of representation alone), and does not identify what corporate agent of defendant made the representations, when they were made, or why the representations were false. See Rich v. Touche Ross & Co., 68 F.R.D. 243, 246 (S.D.N.Y. 1975) (Rule 9(b) requires pleader to state time, place and content of false representations, the fact misrepresented and consequence of fraud).