

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

STARK 1350, LLC)	CASE NO: CV 10 718157
)	
Plaintiff,)	JUDGE JOHN P. O'DONNELL
)	
vs.)	<u>JOURNAL ENTRY</u>
)	
JOHN PAPPADAKIS, et al.)	
)	
Defendants.)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

Plaintiff Stark 1350, LLC, filed this lawsuit against defendants John Pappadakis and 1350 West 3rd Street, LLC, on February 11, 2010. The complaint alleges causes of action for breach of contract, promissory estoppel, and fraud. The plaintiff also claims that the defendant Pappadakis, a member of the defendant 1350 West 3rd Street, LLC, should be subject to personal liability for fraud.

The case was tried to the court on December 15, 2010, and this entry follows.

STATEMENT OF FACTS

John Pappadakis is a self-described restaurant consultant who owns the right to the name "Captain Frank's." Captain Frank's was a restaurant in downtown Cleveland in the middle portion of the last century. Around 2004, Pappadakis was working for a company that operated a corporate dinner yacht when he met Sako Satka. At the time, Satka owned the building at 1350 West 3rd Street, Cleveland, on the southwest corner of the intersection of West 3rd and St. Clair Avenue. Satka was then operating a restaurant called Titanic in the building. Like its nautical

namesake, Titanic sank. Pappadakis decided to buy the building to port the new Captain Frank's.

Pappadakis and partner Donald Kowalski formed Metropolitan Restaurant Systems, Inc., and, in late 2004¹, Metropolitan bought the building from Satka. Pappadakis claims that the sale price was \$700,000.

A deed conveying the property from F & S Satka Enterprises, LLC, to Metropolitan Restaurant Systems, Inc., was recorded on November 5, 2004. That deed, and a "receipt for payment of conveyance fee" also dated November 5, 2004, show the consideration paid for the property as \$3 million. Before that sale, the property was assessed by the county auditor's office for tax purposes at \$469,000.

Pappadakis testified that he has no idea how the \$3 million figure as the purchase price came to be. In fact, he testified that he ultimately paid Satka only \$300,000 for the building. Moreover, he claims that he was not aware until early 2005 that the deed and the conveyance fee receipt listed the consideration as \$3 million.

After buying the building, Pappadakis began to try to recruit investors to help the new Captain Frank's set sail. He testified that Kowalski's involvement was of no benefit to him, so he formed 1350 West 3rd Street, LLC, and Metropolitan Restaurant Systems, Inc., then quit-claimed the property to the new limited liability company on December 16, 2005.

Pappadakis is the sole member of 1350 West 3rd Street, LLC. Its only asset was the building.

Meanwhile, after the sale from F & S Satka to Metropolitan, the Cleveland Municipal School District Board of Education filed a complaint with the Cuyahoga County Board of

¹ The date of sale was not unequivocally established by the evidence because Metropolitan and Satka did not use a written purchase agreement.

Revision seeking to have the property revalued from \$469,000 to \$3 million effective November 5, 2004. The board of education based its complaint on the argument that the fair market value of the building is best represented by the most recent price at an arm's-length sale, and that the evidence established that price as \$3 million. The board of revision agreed and set the value of the property at \$3 million.

Pappadakis then retained attorney Edward L. Morris to appeal the board of revision's decision to the State of Ohio Board of Tax Appeals. That appeal was filed July 13, 2006, and was not decided until August 25, 2009.

In the meantime, Pappadakis's effort to launch Captain Frank's foundered and he charted a course to sell the building. Toward that end, he began negotiating with Robert L. Stark Enterprises, Inc. in late 2006. Stark Enterprises is the trade name for that corporation, which is an umbrella company for various property owning and managing limited liability companies.

On January 10, 2007, 1350 West 3rd Street, LLC, and Warehouse District SA, LLC (a Stark company) entered into a purchase agreement for the building. That contract included the following provisions:

REAL ESTATE PURCHASE AGREEMENT

The parties agree as follows:

2. Purchase Price. Purchaser shall pay to Seller . . . the sum of One Million Three Hundred Thousand Dollars (\$1,300,000.00) for the Premises . . .

5. Taxes and Assessments; Prorations; Closing Costs.

(a) Real estate taxes . . . shall be prorated between the parties as of the date of Closing, such that credits and charges for all days preceding the Closing Date shall be allocated to Seller . . .

14. Seller's Warranties and Representations.

(a) ***

(v) Seller has not received any notice or order of any governmental authority having jurisdiction over the Premises not fully and duly complied with, affecting the use or operation of any part of the Premises . . .

(vi) ***

(vii) Seller has received no written notice of action or governmental proceeding relating to . . . tax assessments . . . which would affect the Premises.

(viii) There is no . . . legal, administrative, or other proceeding . . . existing or pending which affects the Real Property . . .

(ix) To Seller's Actual Knowledge: . . . there are no pending actions or proceedings . . . regarding the condition or use of the Premises . . .

(xiii) . . . Seller has no Actual Knowledge of any tax increase or proposed or pending assessments . . . with respect to the Premises . . . There are no . . . appeals . . . pending which have been undertaken for the reduction of the real estate taxes . . . To Seller's Actual Knowledge, there is no Litigation pending relating to any real or personal property taxes for any period prior to the date hereof.

(c) For purposes of this Agreement, the term "Actual Knowledge of Seller" . . . means the actual knowledge, without further inquiry or investigation, of John Pappadakis.

19. Enforcement and Attorneys' Fees. In the event suit or other action is instituted to enforce . . . any of the terms or obligations under this Agreement, the prevailing party shall be entitled to recover its costs and reasonable attorneys' fees from the other party as determined by a court of competent jurisdiction.

28. Successors and Assigns. This Agreement shall be binding upon, and inure to the benefit of the parties hereto and their respective successors, personal representatives and permitted assigns.

The sale was completed when 1350 West 3rd Street, LLC, deeded the property to Warehouse District SA, LLC, on May 2, 2007.

The property was then transferred to the plaintiff here, Stark 1350, LLC. It was not until January, 2010, that the plaintiff received notice from the county treasurer of \$150,165.22 in past due taxes for the tax years 2004 and 2005. As the owner of the property, the plaintiff is now liable for that amount.

LAW AND ANALYSIS

I. Breach of Contract.

A contract is generally defined as a promise, or a set of promises, actionable upon a breach.² A failure to perform a contractual duty constitutes a breach.³ By contract, the defendant 1350 West 3rd Street, LLC undertook the duty to represent the existence of real estate tax proceedings, if any. The limited liability company failed to perform its duty when it falsely represented that there were no pending or potential tax liabilities. There is no doubt that 1350 West 3rd Street, LLC breached the contract and caused damage to the plaintiff in the amount of

² *Minster Farmers Coop. Exchange Co., Inc. v. Meyer*, 117 Ohio St. 3d 459, 2008-Ohio-1259, ¶ 28.

³ *Kotyk v. Rebovich* (1993), 87 Ohio App. 3d 116, 121.

its back tax liability, \$150,165.22.⁴ Additionally, a lawsuit was necessary to recover for the limited liability company's breach of contract. An agreement to pay attorneys' fees incurred to recover after a contract breach is enforceable⁵ and the defendant 1350 West 3rd Street, LLC is liable for the plaintiff's fees.

II. Promissory Estoppel.

A claim for promissory estoppel applies only in the absence of a contract.⁶ A contract exists here and the court has found that the defendant limited liability company breached the contract, therefore the claim for promissory estoppel is moot.

III. Fraudulent Misrepresentation.

A. By the defendant limited liability company

The elements of a fraudulent misrepresentation are: (1) a representation, or where there is a duty to disclose, concealment of a fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into relying on it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance.⁷

In this case, 1350 West 3rd Street, LLC, through its sole member and agent, John Pappadakis, misrepresented at least: that it had no written notice of an action relating to tax assessments; that there was no pending proceeding which affected the real property; that there was no proposed or pending tax assessment; that no appeal had been undertaken for the reduction of real estate taxes; and that there was no litigation pending relating to real estate taxes.

⁴ Defense counsel agreed at the opening of the trial that a judgment against 1350 West 3rd Street, LLC in the amount of \$150,165.22 for breach of contract is warranted.

⁵ See, e.g., *Goldfarb v. The Robb Report, Inc.* (1995), 101 Ohio App. 3d 134, 147.

⁶ See, e.g., *Glenmoore Builders, Inc. v. Smith Family Trust*, 2009-Ohio-3174, Ninth District App. No. 24299, ¶ 42.

⁷ *Pedone v. Demarchi*, 2007-Ohio-6809, Cuyahoga County App. No. 88667, ¶ 28.

In a fraud context, a misrepresentation of fact is material when, under the circumstances, it would likely affect the conduct of a reasonable person in determining whether to enter into the transaction at issue.⁸ The corporate defendant's representations here satisfy this standard and are material. Steven K. Rubin, Stark Enterprises's chief operating officer, testified at the trial that if the plaintiff had known of the pending tax appeal it would have either set up an escrow account funded by the defendant to cover the possible tax liability in the event the appeal was denied or negotiated the purchase price down by the amount of the unpaid taxes.

As for falsity, there is no question that Pappadakis knew of the board of revision's revaluation and the tax appeal, and there is no question he knew it was false to assert, to his personal knowledge, that no such revaluation had occurred and that no proceeding of any kind was pending. His argument that the tax case did not have to be disclosed because it did not "affect" the premises (Section 14(a)(vii) of the purchase agreement says that "seller has. . .no notice of action or governmental proceeding. . .or tax assessments. . .which would *affect* the premises" and section 14(a)(viii) provides that "there is no suit, action. . .or other proceeding. . .which *affects* the real property.") is unpersuasive. A real estate tax assessment always affects the real property because it is an obligation that attaches to the land and stays with it, regardless of a change in ownership, until paid.⁹

Additionally, the plaintiff justifiably relied on the misrepresentations. Stark 1350, LLC would not have paid \$1.3 million if it had known of the likely tax liability of more than \$150,000, an amount that represented over ten per cent of the purchase price. Such reliance was justifiable because a buyer must be able to rely on a property owner to know about, and reveal, pending tax assessments or appeals. Sales of commercial property would be unnecessarily

⁸ *Saxe v. Dlusky*, 2010-Ohio-5323, 10th Dist. App. No. 09-AP-673, ¶ 48.

⁹ *Southern Ohio Sav. Bank & Trust Co. v. Bolce* (1956), 165 Ohio St. 201, 208.

complicated if every buyer had to scour available public information for possible outstanding tax liabilities instead of being able to rely on a seller's promise that no liabilities exist. Besides, the defendant did not offer evidence that there was available to the plaintiff a readily accessible docket of pending board of tax appeals cases.

As for causation, the injury resulting from the plaintiff's justifiable reliance is self-evident: an undisclosed tax liability of \$150,165.22.

The last element is the intent to mislead. The corporate defendant argues that there is no evidence that it intended to mislead the plaintiff into relying on the false representations. Essentially, Pappadakis claims that because he was so confident of prevailing on the tax appeal that he didn't think it was worth mentioning. It is true that the record is devoid of a damning admission by Pappadakis that he purposely chose not to disclose the tax situation. However, it is often difficult to present direct evidence of fraudulent intent, and actual fraud is usually inferred from circumstantial evidence.¹⁰ The circumstantial evidence that Pappadakis did not disclose a tax liability of over \$150,000 – or 25% of the amount he personally stood to gain on the transaction – that he was actively litigating leads only to the conclusion that he intended to mislead Stark.

For these reasons, the court finds on the evidence presented that the defendant 1350 West 3rd Street, LLC fraudulently misrepresented to the plaintiff that no tax appeal was pending that might affect the buyer's liability, thereby causing damage to the plaintiff in the amount of \$150,165.22.

B. By the defendant John Pappadakis individually

Defendant Pappadakis acted in the sale transaction as the agent for his principal, defendant 1350 West 3rd Street, LLC. In the course of his agency he made fraudulent

¹⁰ *Schluter v. PSL, Inc.* (Feb. 3, 1998), Fifth Dist. App. No. 96-CA-110, 1998 WL 172770, unreported.

misrepresentations that damaged the plaintiff. An agent acting for an openly identified principal is ordinarily not liable in a contract action for the principal's breach of contract, because the claimant has presumably relied solely on the known principal's credit and performance.¹¹

Under that usual principle, Pappadakis would not be personally liable for the limited liability company's breach of contract. But that analysis is inapplicable here, where Pappadakis personally undertook a duty pursuant to contract to disclose the potential tax liability by offering his *individual* assurance that, to his own actual knowledge, there were no pending proceedings relating to real estate taxes. That individual misrepresentation resulted in the same damages to the plaintiff as the corporate entity's misrepresentation for the same reasons outlined above, and the court finds on the evidence presented that the defendant John Pappadakis fraudulently misrepresented to the plaintiff that no tax appeal was pending that might affect the buyer's liability, thereby causing damage to the plaintiff in the amount of \$150,165.22.

CONCLUSION

Judgment is hereby entered in favor of the plaintiff Stark 1350, LLC and against the defendants John Pappadakis and 1350 West 3rd Street, LLC, jointly and severally, in the amount of \$150,165.22, interest at the statutory rate beginning on the date of this entry, court costs and the plaintiff's reasonable attorneys' fees. If the amount of attorneys' fees is not stipulated to by the parties the court will hold an evidentiary hearing upon the request of the plaintiff to determine the amount of its reasonable attorneys' fees.

IT IS SO ORDERED:

JUDGE JOHN P. O'DONNELL

Date: _____

¹¹ *Stuart v. Nat'l. Indemn. Co.* (1982), 7 Ohio App.3d 63, at 67.

SERVICE

A copy of this journal entry was sent by regular e-mail, this _____ day of January, 2011,

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JUDGE JOHN P. O'DONNELL