LUVELL L. GLANTON,	**)**	
	)	
Plaintiff/Appellant,	**)**	
	)	**Davidson Circuit**
	)	**No. 95C-2102**
VS.	**)**	
	)	**Appeal No.**
	)	**01-A-01-9606-CV-00283**
SHIRLEY BECKLEY,	**)**	
	)	
Defendant/Appellee.	**)**	

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CIRCUIT COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

HONORABLE WALTER C. KURTZ, JUDGE

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VACATED AND REMANDED

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCURS:
JERRY SMITH
SPECIAL JUDGE

CONCURS IN SEPARATE OPINION
WILLIAM C. KOCH, JR., JUDGE

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O P I N I O N

The captioned plaintiff has appealed from an unsatisfactory judgment in this suit arising from a joint real estate investment.

On March 22, 1993, the parties acquired title to a commercial building; and, on March 27, 1993 the parties executed the following instrument:

> This agreement made this 27th day of March, 1993, between Luvell L. Glanton & Shirley Beckley, concerning property jointly owned by them is as follows:
>
> 1. Both parties agree that the premises located at 915 Jefferson Street, was bought to be used as a Law Office.
>
> 2. That the building will not be sold for at least 7 years without the agreement of both parties.
>
> 3. That both parties agree that they will keep the other party informed as to any work done on the premises.
>
> 4. Both parties shall share equally in the ownership liabilities, and the income generated from the property.

Thereafter, the parties agreed to and began renovating the building. In February, 1994, the parties executed a mortgage on the property to secure a bank loan of funds to pay for the renovation.

As part of the inducement to her participation in the purchase and renovation of the property, defendant was led to believe that plaintiff and his three law associates would occupy the renovated building, thereby producing income of $1,600 per month.

In March, 1994, plaintiff moved his office to the building, but his associates did not do so.

On January 12, 1995, plaintiff filed suit in General Sessions Court against defendant for breach of the above contract by failing to share expenses of maintenance and mortgage payments.

Defendant answered denying indebtedness and counterclaiming for rent for plaintiffs occupation of the premises, refusal to rent the premises to others and failure to reimburse defendant for advertising.

The judgment of the General Sessions Court was appealed to the Circuit Court where the defendant filed a pleading entitled "Amended Counter complaint" which also amended the answer to the complaint. It stated:

> 1. She denies that a partnership was ever created between the parties but would show that the plaintiff requested her financial assistance in the purchase of real property located at 915 Jefferson Street in Nashville with the agreement it would be remodeled into a four-unit office building for the use of the plaintiff and three associates in the practice of law with offices in the Parkway Towers Building with her to receive one-half reasonable rental value estimated to be $800.00 per month, or $400.00 as consideration for advancing one-half of the purchase price of the property which she paid on the express material representation to her by the plaintiff that the property would be used by his law associates and himself. That she would not have entered into the agreement without such assurance on which she relied.
>
> 2. That the plaintiff reduced the agreement of the parties to writing, a copy of which is attached hereto as an exhibit, and she signed it upon being assured, as aforesaid, that they property would be utilized as a law office by the plaintiff and his three associates.

3. That financing was arranged for remodeling with the agreement each would pay one-half of the monthly mortgage payments.

4. That she fulfilled her part of the contract faithfully until she was advised by the plaintiff that he would not pay her the rent as agreed whereupon she advised him that he should use the rent consideration she was to have received to apply on her one-half payment on the mortgage.

And now having fully answered the complaint of the plaintiff she assumes the role of counter-complainant and sues the counter-defendant for the relief prayed for and would show:

1. That any contract or alleged partnership has been breached by the wrongful and deceitful actions of the counter-defendant in failing to rent the premises as he assured her he would in inducing her to enter into the agreement to assist in the purchase of the property.

2. That any partnership that may have existed between the parties was dissolved under the provisions of T.C.A. § 61-1-130(A) by the termination of the particular undertaking specified in the agreement, to wit: that the property would be used as law offices for the counter-defendant and his three associates at the time the agreement was entered into and/or the failure of the counter-defendant to pay rent as agreed and/or his failure to rent to other attorneys.

3. That the counter-defendant refused to mitigate the damages incurred when, as he advised, his former associates in his law office declined to occupy the property, by denying the counter-plaintiff the right to rent to other suitable tenants and/or paying her rent for his use of the entire building, including the reception area, conference area, parking area and the three other offices in which the counter-defendant used in conjunction with the offices he used primarily.

4. That the counter-defendant has unjustly enriched himself at the expense of the counter-plaintiff by using space valued at some $1,600.00 per month without payment to her of any rent.

5. That although the counter-defendant has abandoned the agreement he himself drafted without input by her, he refused to permit her access to the building or any use thereof and refused to either sell her his one-half of the property or purchase her one-half interest.

PREMISES CONSIDERED, COUNTER-PLAINTIFF PRAYS:

1. That she be allowed to amend her answer and that a copy of same be served on the defendant and that he be

required to appear and answer.

2. That any contract or agreement between the parties be nullified due to breach by the counter-defendant.

3. That she be awarded judgment for the use and occupancy of the subject property, including one-half of the specified rental value, or $400.00 per month, with set off for any obligation she may have for payment on the mortgage.

4. That partition be ordered and the property sold as provided by law and the proceeds applied to any encumbrance, expense or sale, attorney fees and costs.

On September 29, 1995, the Trial Court ordered defendant to file within 10 days an amended answer and counterclaim.

On October 6, 1995, defendant filed an "Amended Counter Complaint" (the text of which appears to be an amended answer and Counter Complaint) which contained the following in addition to that quoted above:

That the counter-defendant, an experienced attorney whose expertise was relied on by the counter-defendant made material representations of fact on which she relied which proved to be false and misleading so as to constitute fraud. These false representations included the counter-defendant's assurance that he and three associates then in his law office would rent the four private offices in the premises and the common areas, such as reception room, conference room, baths, kitchen area and parking lot at $400.00 each, for a total of $1,600.00, monthly. She was assured, again falsely, that she would receive one-half of the rental proceeds and this promise, if kept by the counter-defendant would have made the investment he persuaded her to make by such misrepresentations, worth the amount she paid. That the counter-defendant knew, or should have known, that his associates had not agreed as he lead the counter-plaintiff to believe they would and in any event he made the assurances as though they were known by him to be true when in fact they were false.

On December 9, 1995, plaintiff filed Affirmative Defenses and Answer to amended Counter Complaint stating:

> The Agreement entered into between the parties on 27 March 1993, Exhibit A to the General Sessions Complaint and Exhibit 1 to this document, operates as an estoppel against Beckley's alleged right of partition for seven years from the date of the agreement, to wit: the year 2000.
>
> The pleadings of Beckley filed in the General Sessions Court and titled "Answer and Counter Complaint" operates as a judicial estoppel against Beckley's right to now allege that no partnership was ever created.
>
> There has been no dissolution of the partnership by the termination of a definite term or particular undertaking specified in the parties' partnership agreement as the Amended Counter Complainant has alleged. The language utilized by Beckley and claimed by her to come from the partnership agreement includes language NOT in that agreement. The violation alleged by Beckley relates to language that is NOT in the agreement, and Glanton denies that any such language was part of any agreement.
>
> Glanton believes the other or second agreement to have been an oral agreement for him to lease a portion of the premises and denies that he is in any way in breach of that agreement. To the contrary, the Defendant and Counter-plaintiff is in breach thereof and was in breach thereof before the Plaintiff can even be accused of being in breach thereof.
>
> In the alternative, Glanton assumes that the Counter-Complaint filed by Beckley is an act of express will by a partner, herself, to terminate the partnership of the parties. Therefore, pursuant to T.C.A. §§ 61-1-129 and 61-1-136, Glanton has the right to wind up the partnership affairs for the unexpired balance of the seven years since 1993 before the real property located at 915 Jefferson Street is subject to sale.
>
> Set-off. Glanton has paid not only his portion of the mortgage payments due on the property, but he has also paid expenses that were those of Beckley under the terms of the oral agreement to rent an office at 915 Jefferson Street. Thus, any sums he may have owed Beckley under the terms of any oral rental agreement are more than paid by the payments he has made on these items and any claim for monies by Beckley is subject to set-off.
>
> Statute of Frauds/Parole Evidence Rule. Defendant and Counter-plaintiff has alleged terms of the partnership agreement of the parties that are not in writing, are beyond the scope of the clear and unambiguous writing that does exist and which were not fully performable with one year

if the extend of the allegations are correctly understood.

There was a non-jury trial on December 14, 1995 and on January 9, 1996, the Trial Court entered a "Memorandum and Order" holding:

> The defendant bases her claim of fraud and negligent misrepresentation on allegations that the plaintiff misrepresented the facts and circumstances surrounding the purchase of the property. Specifically that he misrepresented that his colleagues would rent the office space. The defendant also contends that she relied on this misrepresentation to her detriment.
>
> The Court finds that defendant and counter-plaintiff has sustained an action for negligent misrepresentation.
>
> As a result of the plaintiff and counter-defendant's negligent misrepresentations, the Court finds the contract signed by the parties to be void. The contract has been negated by the negligent conduct of the plaintiff and counter-defendant, Mr. Glanton.
>
> The defendant and counter-plaintiff seeks the partition of the property on Jefferson Street. The parties have have not been able to resolve their differences concerning the property and have remained in conflict to this date. Pursuant to T.C.A. § 29-27-101, tenants in common are entitled to partition or sale for division of the property. The Court denies the partition because no notice has been given to the bank, nor has the bank been made a party pursuant to T.C.A. § 29-27-109.
>
> The defendant, Ms. Shirley Beckley, seeks damages in the amount of nineteen thousand two hundred dollars ($19,200). The Court finds that the plaintiff, Mr. Luvell Glanton, should be awarded credit for the eight thousand dollars ($8,000.00) that he expended while refurbishing the property. In addition, the Court finds that the defendant, Ms. Shirley Beckley, is guilty of negligence for not checking with the plaintiff's law colleagues to determine whether they intended to rent the property. In an action based upon negligent misrepresentation the claimants own negligence maybe considered in mitigation of damages. As a result, the Court reduced the judgment for the defendant and counter-plaintiff in the amount of three thousand seven hundred dollars ($3,700.00). The Court finds that the defendant and counter-plaintiff, Shirley Beckley, should be awarded seven thousand five hundred dollars ($7,500) in damages for the misrepresentation of Mr. Glanton.

On January 11, 1996, defendant filed a "Motion to Add a Necessary Party and to Reconsider" and on January 17, 1996, plaintiff filed a "T.R.C.P. Rule 59 Motion."

On February 20, 1996, the Trial Court entered an order overruling the motion to add a party, awarding defendant $220.00 discretionary costs and reducing the judgment in her favor to $6,500.35.

On appeal, plaintiff presents the following issues for review:

> I. Whether the Trial Court erred as a matter of law in determining that a negligent misrepresentation occurred.
>
> II. Whether the Trial Court erred in voiding the contract signed by the parties on March 27, 1993, without any valid basis in law for doing so.
>
> III. Assuming arguendo that the Trial Court could determine that Glanton made a negligent misrepresentation entitling Beckley to a judgment, whether the Trial Court erred in the amount of damages awarded to Beckley.

Defendant presents the issues in the following form:

> I.
>
> The Trial Court correctly held that Beckley was induced to enter into an agreement with Glanton to purchase, remodel and rent property by his negligent misrepresentation that he and three associates in his law office would occupy it.
>
> II.
>
> The Trial Court correctly voided the alleged contract but erred in not granting Beckley's motion to amend the Complaint so as to add the mortgagee as required by T.C.A. § 29-27-109 so that partition could be considered.
>
> III.
>
> The Trial Judge correctly ordered Glanton to pay damages.
>
> IV.
>
> The Trial Judge incorrectly ruled that Beckley should not have unrestricted access to the property.

Appellants 36 page brief includes 58 decisions, 16 statutes, 1 rule and 2 treatises. The 4 appendices to said brief contain 38 pages.

Appellee's brief cites one decision and one statute and contains 4 pages.

First Issue:

Negligent Misrepresentation

Generally, the word, "misrepresentation" is used in connection with a charge of fraud or false pretenses. One who negligently supplies false information for the guidance of others is liable for pecuniary losses occasioned by justifiable reliance thereon. *Haynes v. Cumberland Builders, Inc.* Tenn. App. 1976, 546 S.W.2d 228, 232, 565 S.W.2d 887 (abridged for publication).

Generally, in an action for fraud, there must be proof of false representation of existing or past material facts. *Maddux v. Cargill,* Tenn. App. 1989, 777 S.W.2d 687, 691.

Mere expressions of opinion do not give rise to an action for fraud. *Brown v. Brown,* Tenn. App. 1993, 863 S.W.2d 432, 434.

Under the theory of promissory fraud, the plaintiff must establish that the defendant made a promise of future conduct without present intention to carry out the promise. *Oak Ridge Precision Industries, Inc., v. First Tennessee National Bank,* Tenn. App. 1992, 835 S.W.2d 25, 29.

A representation amounting to a mere expression of intention, though false, is not fraud at law, but a representation amounting to an engagement binds the party making it to make it good. *German-American Monogram Manufacturers v. Johnson,* 133 Tenn. 571, 182 S.W. 595, 596. (1916).

Fraud may negative the assent necessary to form a valid contract. *New York Life Insurance Co. v. Nashville Trust Co*., 200 Tenn. 513, 292 S.W.2d 749, 754, 59 A.L.R.2d 1086 (1956).

The evidence in this record does not show a fraudulent misrepresentation of an existing fact which would vitiate the contract ab initio.

Neither does the evidence show promissory fraud as defined above.

However, there is evidence of a promise, the breach of which could represent a failure of consideration to defeat an action on the contract, or a breach of the contract between the parties relieving the defendant of her obligation, or providing grounds of a suit for damages resulting from the failure to perform the promise.

This Court cannot agree with the Trial Court that plaintiff committed an actionable negligent misrepresentation of a present fact; but this Court does find that the plaintiff assured the defendant that $1,600 per month rent would be available to pay costs of renovation and maintenance; that such assurance was a material consideration for the execution of the March 27, 1993 agreement without which the contract would not have been executed; and that the failure of said rent to materialize represented a failure of consideration which entitled the defendant to disaffirm said contract. *U.S. for use of Pickard v. Southern Construction Co.*, 6th Circ. 1971, 293 F.2d 493. See *German-American Monogram Manufacturers v. Johnson*, 133 Tenn. 571, 182 S.W. 595 (1916); 498; 17A C.J.S. Contracts, § 422(1) p. 516.

Defendant's rescission of the contract of March 23, 1992, terminated her rights and obligations thereunder effective the date of rescission, but did not terminate her rights and obligations thereunder before the rescission, or her rights and obligations as a co-owner of the

property or as a joint obligor of the mortgage indebtedness, including the right to an accounting and partition.

The Trial Judge refused partition for failure to join the holder of the mortgage and refused to allow such joinder by amendment. It appears from T.C.A. § 29-27-212 that an equity in mortgaged property can be sold for partition subject to the mortgage without joinder of the mortgagee. However, it is more equitable and better practice to join the mortgagee.

The foregoing disposes of all the issues presented by the parties. The judgment of the Trial Court is vacated, and the cause is remanded for entry of an order consistent with this opinion; for further proceedings to ascertain what, if any, actual damages were sustained by defendant prior to disaffirmance of the contract; to take, and adjudge an accounting between the parties as co-owners of the subject property; to permit amendment of the complaint to include the mortgagee as a party; to order a partition of the equity of the parties with sale if necessary; and for orders and proceedings to completely resolve all matters of difference or controversy between the parties arising out of their joint ownership of the subject property and dealings with reference thereto. Trial Court costs should be adjudged equally between the parties. Costs of this appeal are adjudged against the plaintiff and his surety.

VACATED AND REMANDED

_____
HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

_____
JERRY SMITH, SPECIAL JUDGE

WILLIAM C. KOCH, JR., JUDGE
CONCURS IN SEPARATE OPINION