

Maine Supreme Court Finds Fraud Claim Available Where LLC Members Execute Operating Agreement With No Intention To Perform

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In *Cianchette v. Cianchette*, 209 A.3d 745 (Maine 2019), the Supreme Judicial Court of Maine ruled that a plaintiff can recover for fraud where a defendant enters into an LLC agreement with no intention of performing. This was a significant change of prior law, which held that a breach of a promise to do something in the future was not actionable in fraud.

In *Cianchette*, the plaintiff Tucker Cianchette sued his stepmother Peggy and father Eric, asserting claims for breach of an operating agreement and fraud concerning an LLC established to own and operate a car dealership. In the fraud claim, Tucker alleged that at the time they signed the LLC operating agreement, Peggy and Eric had no intention of performing it. In their defense, Peggy and Eric argued that a false promise to perform some future act was not a material misrepresentation of an existing fact and, thus, could not support a fraud claim. This defense was rejected, when the Court expressly rejected law established 88 years prior, in the case *Shine v. Dodge*, 157 A. 318, 319 (1931).

In *Shine*, the Maine Supreme Court stated that it was “well settled ... that the breach of a promise to do something in the future will not support an action of deceit, even though there may have been a preconceived intention not to perform.” *Id.* However, over the years, Maine courts had moved away from that “well-settled” position and applied the Restatement (Second) of Torts’ broader rule, which states: “One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.” Restatement (Second) of Torts § 525 (Am. Law Inst. 1977).

Noting that the Maine courts had not explicitly adopted the Restatement, but only cited it with approval, the *Cianchette* court took the opportunity “to explicitly adopt the Restatement’s formulation of fraudulent misrepresentation and overrule the contrary rule stated in *Shine*.” *Cianchette*, 209 A.3d at 753. The court added that the Restatement position included the notion that “a representation of the maker’s own intention to do or not to do a particular thing is fraudulent if he does not have that intention.” *Id.*, (citing Restatement (Second) of Torts § 530(1) (Am. Law Inst. 1977).) Every promise contains an implied assertion of the intent to perform. *Id.* § 530(1) cmt. c. Accordingly, in *Cianchette*, where the jury found that when Peggy and Eric entered into the LLC membership agreement with no intention of actually performing the agreement, they made a false misrepresentation.

The court further found the misrepresentation to be a “material fact” which is required to prove fraud. The court recited a comment to the Restatement explaining that a “fact” includes “the state of mind, such as the entertaining of an intention.” *Cianchette*, 209 A.3d at 753 (citing Restatement (Second) of Torts, § 525 cmt. d). Because the intent to never perform the contract is

something that a reasonable man would attach importance to in determining whether to enter into the transaction, the existence of that intent is material.

At the same time, the court cautioned that not every false representation of intent is actionable and it is only actionable on a theory of fraudulent misrepresentation if the intent to not perform was present at the time the parties were entering into the contract. *See* Restatement (Second) of § Torts 530(1) cmt. b. If the intent not to perform arises after the contract is executed, then the remedy is for breach of contract, not fraudulent misrepresentation.

In *Cianchette*, the court found that the evidence and all justifiable inferences supported the jury's finding that Peggy and Eric entered into the membership agreement with the intent of never performing their contractual obligations, and Tucker justifiably relied on that false representation to his detriment. Accordingly, there was no error in denying Peggy and Eric's motion for judgment as a matter of law.

This is somewhat at odds with Illinois law. Under Illinois law, "promissory fraud" is a form of fraud based on a false representation of intent concerning future conduct, e.g., a promise to perform a contract when there is no intent to perform. As a general rule, in Illinois, promissory fraud based on future acts is not actionable unless the false promise to perform is part of a larger "scheme to defraud."

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