

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

MERRILL W. KEARNEY,)	
)	
PLAINTIFF)	
)	
v.)	Civil No. 99-137-B
)	
J.P. KING AUCTION CO., INC.,)	
ET AL.,)	
)	
DEFENDANTS)	

**ORDER ON DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

This dispute between an Aroostook County businessman and a national auction company grows out of the following sequence of events. In February 1997, Merrill Kearney bought 80 acres of ocean front property in Lubec, Maine for \$90,000. Kearney advertised the property in newspapers around the world, then persuaded his friend Donald Long, to buy it from him for \$1.8 million (\$200,000 Canadian down payment, with Kearney providing owner financing). Soon after, he was contacted by Michael Keracher of the defendant J.P. King Auction Company (“King”) to list it with that company instead. Deciding he could make more money by selling it at auction through King, Kearney persuaded his friend Long to let him out of their contract, and Long reluctantly agreed. Kearney then entered into a written “Auction Marketing Agreement” with King as to how the property would be marketed and sold, including a provision that it would be sold at absolute auction. The property was advertised, and an absolute auction was held on May 14, 1997, at a hotel near LaGuardia airport in New York City. Only two bidders appeared, and the high bid was \$8,000.

Although the auctioneer then tried to change the auction from absolute to reserve bid, the high bidder sued Kearney in Maine Superior Court and succeeded in enforcing his purchase. Kearney has now sued King for breach of contract; breach of fiduciary duty; negligence; intentional and negligent misrepresentation; infliction of emotional distress; and punitive damages.¹ He has also sued J. Craig King, the President of King. The corporate King has counterclaimed for its commission and expenses. Both Kings have moved for summary judgment on Kearney's complaint. The motion is **GRANTED** as to all but Count III, Breach of Fiduciary Duty, and Count VII, negligent infliction of emotional distress, and as to those Counts, is **DENIED**.

Breach of Contract

The Auction Marketing Agreement has three specific obligations by the corporate King that Kearney maintains have been breached.

The first is King's agreement to "prepare and distribute advertising and sales literature in a manner reasonably calculated to advise persons who might be interested in the PROPERTY and in the sale thereof." As to that commitment, Kearney says that "there is no evidence before the Court whether this was done consistent with this contract term or not." Opp'n Mem. at 11. In responding to a motion for summary judgment at the close of discovery on an issue where, as here, Kearney has the burden of proof, that is insufficient. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250 (1986) ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted") (citations omitted).

¹ Kearney has dropped a claim under the Unfair Trade Practices Act.

The second provision in dispute is King's commitment to "[p]repare a full-color, descriptive sales brochure with photographs of the PROPERTY." The brochure does contain several color photographs and initially Kearney could find nothing to complain about. More recently, he has declared himself unsure whether the photo on the front of the brochure is actually his property or some other location. Again, his uncertainty is insufficient to withstand a motion for summary judgment. See id. He must have affirmative admissible evidence. See id.

The third provision is King's agreement to "[p]rovide and direct all auction personnel reasonably necessary for the purpose of promoting and conducting the AUCTION, including the auctioneer, bid assistants, bookkeepers and clerical staff." It is clear on this record that King had enough people in all categories to conduct the auction itself (indeed, only two bidders showed up). The only possible issue is whether King provided enough personnel to promote the auction. Once again, however, Kearney has provided no affirmative evidence to show that King did not provide sufficient personnel to promote the auction. All he has is his unhappiness with the number of bidders and the size of their bids. Summary judgment is **GRANTED** on the breach of contract.

Negligence

Kearney argues that King was negligent in carrying out the Auction Marketing Agreement. Any duty King owed Kearney, however, arises out of the agency fiduciary obligation that is the subject of Count III. Except for the fiduciary duty I discuss next, there is no independent duty established here. Summary judgment is **GRANTED**.

Breach of Fiduciary Duty

King's motion for summary judgment on Count III alleging a breach of fiduciary duty is **DENIED**. There is a genuine issue of material fact as to whether on the day of the auction Kearney instructed that the auction not go forward. There is also an issue whether, even if Kearney gave no such instruction, King should have advised Kearney of the inadvisability of going forward with the auction or the advisability of changing the nature of the auction before it began. King representatives have conceded that they did not advise Kearney as to what he should do about the sale when only two bidders showed up. Kearney has an expert who will testify that as a professional auctioneer, King should have advised Kearney not to go forward. King argues that the written contract with its integration clause eliminates all agency fiduciary obligations and that its commitments are limited to the three precise obligations discussed above under "Breach of Contract." I disagree. Nothing in the contract suggests that it is designed to displace the ordinary obligations under common law agency that require the agent not to act contrary to the orders of its principal,² to act with standard care and the skill that is standard for that kind of work and to exercise any special skill it has. See

² Assuming without deciding that King could insist on the absolute bid provision of the Auction Services Agreement or the date deadline of May 14, the remedy for a "breach" of that provision was at most King's commission and expenses, a far cry from what Kearney lost by going forward with the absolute auction.

Restatement (Second) of Agency §§ 379, 383, 385 and commentary; § 424 (“[u]nless otherwise agreed, an agent employed to . . . sell is subject to a duty to the principal, within the limits set by the principal’s directions, to be loyal to the principal’s interests and to use reasonable care to obtain terms which best satisfy the manifest purposes of the principal.”).³

Negligent and Fraudulent Misrepresentation

There are four assertions that Kearney says were King misrepresentations: (1) the value of the property, or King’s estimate of the value; (2) the availability of interested purchasers; (3) the selection of absolute auction as the method of sale; and (4) whether Kearney wanted to cancel the auction. See Opp’n Mem. at 6. The last two obviously are not actionable “misrepresentations.” The first two have to do with King’s expressed belief in the value of the property and the interest it would generate.

Kearney fails on his intentional misrepresentation claim because he has presented no evidence that King did not believe what it said about the property’s value in its prediction about the kinds of bidding it would generate. King clearly was wrong, but being wrong does not make its statements intentional misrepresentations. See Letellier v. Small, 400 A.2d 371, 376 (Me. 1979) (requiring “knowledge of its falsity or . . . reckless disregard of whether it is true or false”). Additionally, it is dubious whether Kearney could justifiably rely on King’s representations. See generally Eaton v. Sontag, 387 A.2d 33, 37-9 (Me. 1978) (“dealers’ talk”).

³ I recognize that under the Restatement (Second) of Agency the fiduciary breach can be treated as either a tort or a breach of contract. The counts concerning breach of contract and tort that I have discussed and rejected earlier, however, are separate claims put forward independently of the fiduciary obligation claim.

For negligent misrepresentation Kearney must be able to show that (1) in a transaction in which King had a pecuniary interest, (2) King supplied false information for the guidance of Kearney (3) without exercising reasonable care or competence and (4) that Kearney justifiably relied upon it. Binette v. Dyer Library Ass'n, 688 A.2d 898, 903 (Me. 1996). Kearney does not present evidence to satisfy requirements (2), (3) and (4). In his Opposition Memorandum of Law he has referred to three deposition excerpts. See Opp'n Mem. at 7. The first, the deposition of Joseph Michael Keracher, a King employee, establishes nothing useful to Kearney about what was said to him. (Indeed, it states that King company instructions are never to mention value.) Keracher Dep. at 75. The second deposition, that of Kearney himself, describes how he met Keracher and the numbers that Keracher assertedly discussed:

Q Did he guarantee you that he could sell this property for any particular price?

A What he said was, he felt it would bring a minimum of three million dollars.

Q But, he didn't make any guarantee to you?

A He just said many, many times, he said—he said, I'm—he said, I would—he said, I'm sure it would bring in three million dollars.

And then many times he would say six to ten million dollars.

Q And did you believe that you were being guaranteed that he would get a price like that?

A I believed that he was going to get three million dollars or more out of it.

Q But, did you understand that J. Craig Auction, through Mr. Keracher, was assuring you or guaranteeing you that they would be getting a certain price for your property?

A I felt that, sure enough, they were going to get me over—if they were going to get me over 1.8 million that it would be my interest to go with them.

Q And why did you think that?

A Well, that was the—that was a million two hundred thousand dollars more than I was getting for it.

Q What made you think he could get a price that you couldn't get?

A Because, he knew this—he had all these people that followed him, and they were—they were people that had the money to buy it, and no fooling around or—.

Like he said, he said, you've got to wait for the money here. But, he said, what we're doing, you don't have to wait for any money, you'll get your money right there.

Kearney Dep. at 85 *l*23-87 *l*5. The third reference is to the Deposition of Donald Long, Kearney's original buyer. He stated:

Q Did Mr. Keracher ever tell you how much money he could get in an auction for the Lubec property?

A He—he didn't say exactly. He said that he could— it could be up around ten million dollars. He said for sure the minimum he would get would be about 3.5 million.

It was well above what I was willing to go.

Q And you recall him saying in front of Mr. Kearney, essentially guaranteeing that he could get 3.5 million dollars at auction; is that right?

A I'm not saying he said he would guarantee it. I'm saying that he said that he would get a minimum of 3.5, and he thought up to ten million dollars.

Q What's the difference of saying you can get a minimum of 3.5 and guaranteeing him that he could get 3.5 million?

A Well, to me, a guarantee would be a written guarantee that much you're going to—and I don't think that—that was his words, that's what he said.

Q So—

A I don't think—I didn't see any written guarantee.

Q But, you took this as an opinion of a person involved in the business then?

A Well, he was—he was quite sure that he could get that out of it. But, it was an auction, so—you know—

Q There were no guarantees, right?

A Well, that was—that was, you know, my opinion. Okay?

Q What was your opinion?

A My opinion is that—I didn't think he could get ten million dollars. I did think that he might get 3.5, when he explained to me that he had all of these heavy hitters, money people.

I said, 3.5 would not be a lot of money for one of them to pay for it. So, I thought, well, maybe he could, I didn't know.

Dep. of Donald Long at 112 /22-114 /8. This is the affirmative evidence to which Kearney refers. It simply does not establish a failure to exercise reasonable care or competence, let alone that the information supplied was false or that Kearney could reasonably rely upon it. Summary judgment is **GRANTED** on the misrepresentation Counts.

Punitive Damages

Maine has a high standard for awarding punitive damages. The plaintiff must have “clear and convincing” evidence that the defendant acted with malice, either actual or implied. Tuttle v. Raymond, 494 A.2d 1353, 1363 (Me. 1983). There is no evidence here of actual malice. Implied

malice is defined as “deliberate conduct . . . so outrageous that malice toward a person injured as a result of that conduct can be implied.” Id. at 1361. Kearney has no clear and convincing evidence to support implied malice. This dispute is about a failed investment, with much emotional and financial cost to Kearney. But King also failed to realize its financial expectations. There is no evidence of deliberate conduct by King that justifies implying malice from what it did. Summary judgment is **GRANTED** on punitive damages.

Negligent and Intentional Infliction of Emotional Harm/Distress

These two claims are each based on King's efforts (or alleged lack of efforts) under the contract. To make out a case for intentional infliction of emotional distress, Kearney must show that King's "conduct was so extreme and outrageous as to exceed all possible bounds of decency and [that it] must be regarded as atrocious, utterly intolerable in a civilized community." Champagne v. Mid-Maine Med. Ctr., 711 A.2d 842, 847 (Me. 1998) (internal quotation and citation omitted). King's actions simply do not meet that standard on this summary judgment record.

I am unwilling to grant summary judgment on the negligent infliction of emotional distress, however. I have already ruled that Kearney may be able to establish a breach of duty sounding in tort under the fiduciary obligation claim. That may be sufficient to support the emotional distress claim under Maine law, see Gayer v. Bath Iron Works Corp., 687 A.2d 617, 621-22 (Me. 1996), although ultimately it may become an issue only of how to measure damages. Therefore, summary judgment is **GRANTED** on intentional infliction of emotional distress and **DENIED** on negligent infliction of emotional distress.

Claim Against J. Craig King Individually

Kearney has offered no basis for his claim against J. Craig King, the individual. Kearney has referred to the doctrine of *respondeat superior*, but that is the basis upon which King the corporate defendant can be held liable for things that King the individual did, not vice versa. Accordingly, J. Craig King's motion for summary judgment is **GRANTED**.

Conclusion

What remains for trial are Counts III and VII against the corporate defendant and the corporate defendant's counterclaim.

SO ORDERED.

DATED THIS 2ND DAY OF MARCH, 2000.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE