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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JERRY'S HOMES, INC. and CENTENNIAL PLACE, L.P.,	)	
Plaintiff,	)	Civil No. 4-98-cv-30461
v.	)	RULING ON TAMKO'S THIRD MOTION FOR SUMMARY JUDGMENT
TAMKO ROOFING PRODUCTS, INC.,	)	
Defendant.	)	

The above-resisted motion (#165) is before the Court following hearing. As it indicates, this is the third time TAMKO has filed a motion for summary judgment. The present motion addresses itself to the promissory estoppel and fraud claims in Counts I and III of Jerry's Third Amended and Substituted Complaint which the Court permitted Jerry's to plead after the earlier summary judgment rulings, and Jerry's damages claims. With each succeeding motion the underlying facts have evolved, or been summarized somewhat differently. Thus, this ruling should be read in conjunction with the prior summary judgment rulings of September 14, 1999, and July 12, 2000. The fact that the parties need a prompt ruling in light of the upcoming final pretrial conference and trial presents another reason for viewing this ruling together with the prior two as at this point there is neither time nor necessity for a more full discussion of all of the many issues raised in the present motion. The Court has, however, carefully

considered the parties' motion papers, briefs and arguments and now rules as follows on the issues presented.

I. PROMISSORY ESTOPPEL

Jerry's is a tract builder of single family homes. Between about 1990 and August 1996 it put TAMKO's shingles on the homes it built. There were some "blow-off" problems with the homes from time to time which came to a head with a windstorm in February 1996. In a series of conversations which followed, TAMKO representatives told Jerry's president, Ron Grubb, "they were going to take care of the situation so that this problem would go away, so I would not suffer any damage . . ." which Grubb took as a promise "to pay to re-install the shingles that were coming off back on the roof." On several occasions in early spring of 1996 TAMKO representatives (Mr. Shaner and Mr. Canty) repeated assurances to the effect that "we're going to take care of you, we're going to take care of this problem. . . ." Allegedly TAMKO also told Jerry's to prepare a list of the affected homes, indicating that "they were going to take care of those customers by paying to re-install shingles on their roofs."

The requested list was prepared and given to TAMKO. On May 13, 1996, a TAMKO representative, Mr. Canty, wrote to Mr. Grubb pointing out that shingles may not seal or stay sealed for a number of reasons and advising that the industry standard was to handseal

the affected roofs. He concluded "TAMKO subscribes to this standard and has agreed to handseal loose shingles in your subdivision in Des Moines, Iowa."

In the summer of 1996 TAMKO hired Jerry's roofer, Bret Robben, to handseal the problem roofs. As the Court understands the record all or nearly all of the 104 roofs on the list were handsealed by Robben over the summer. TAMKO paid Robben for his work.

According to Jerry's many of the same homes (plus others) experienced more problems. Mr. Grubb has testified that when he met with TAMKO representative Dan O'Connell in April 1997 about the continuing problems he was told "if you're sued over the failure of our product, we're going to defend you." Another list of about 112 homes experiencing roof problems was given by Jerry's to TAMKO about a month later. Thirty-six of the homes had been on the first list. TAMKO sent settlement offers to the homeowners on the second list and made settlements with about 100 of them in the form of a cash payment, or, in the case of most, a re-roofing. The total cost to TAMKO was about $170,000.

Jerry's contends that the problems with the homes continued and that by late 1997 TAMKO washed its hands of the

matter and, for the most part, has refused to pay for any further repairs or settlements.

A promissory estoppel plaintiff must prove four elements:

> (1) a clear and definite promise; (2) the promise was made with the promisor's clear understanding that the promisee was seeking an assurance upon which the promisee could rely and without which he would not act; (3) the promisee acted to his substantial detriment in reasonable reliance on the promise; and (4) injustice can be avoided only by enforcement of the promise.

Schoff v. Combined Ins. Co. of America, 604 N.W.2d 43, 49 (Iowa 1999). TAMKO alleges that the first and second elements are lacking with respect to the promises made between February and April 1996 to the effect that TAMKO would re-install shingles on the damaged roofs and take care of the problem. It argues that there is insufficient evidence of the second and third elements concerning the promise to defend.

Clear and Definite Promise to Repair

The Iowa Supreme Court distinguishes between a "promise" and a mere "representation." A "promise" is "a declaration . . . to do or forbear a certain specific act." Id. at 50-51 (quoting Black's Law Dictionary 1213 (6th ed. 1990)). A representation is "a statement . . . made to convey a particular view or impression of something with the intention of influencing opinion or action." Id. at 51 (quoting Webster's Third New International Dictionary 1926

(unab. ed. 1993)). An "impression or understanding of a certain fact" is a representation, not a promise. Id. (emphasis original).

As noted, the promise must be "clear and definite." Again relying on Webster's definitions, the Schoff court opined that "[a] promise is 'clear' when it is easily understood and is not ambiguous . . . [and] is 'definite' when the assertion is explicit and without any doubt or tentativeness." Id. See also Simmons Poultry Farms, Inc. v. Dayton Road Dev. Co., 82 F.3d 217, 220 (8th Cir. 1996)(quoting National Bank of Waterloo v. Moeller, 434 N.W.2d 887, 889 (Iowa 1989)); Fredregill v. Nationwide Agribusiness Ins. Co., 992 F. Supp. 1082, 1092-93 (S.D. Ia. 1997); Neely v. American Family Mut. Ins. Co., 930 F. Supp. 360, 372-74 (N.D. Ia. 1996), aff'd, 123 F.3d 1127 (8th Cir. 1997).

The entire context has to be considered in assessing the transaction. Here, viewing the summary judgment record favorably to Jerry's, there was a definite and specific problem, shingles were blowing off. Jerry's sought TAMKO's assurance that the problem would be fixed. TAMKO said it would take care of the problem, first by re-installing shingles and later by handsealing in a communication in which it said it had "agreed to handseal loose shingles" on the homes. TAMKO thereafter undertook the handsealing, and when further problems developed, re-roofed some homes and made cash settlements with other homeowners. In short, there was a

problem, an assurance sought and given that it would be taken care of, TAMKO promised to make repairs of its selection, and at least partially performed the promise. The words spoken between Jerry's and TAMKO would not alone make a case for a clear and definite promise under the authorities cited, but the overall circumstances in which they were made, and subsequent correspondence and performance by TAMKO, might, to the factfinder, supply the clarity and definiteness which would otherwise be lacking. In short, the jury could conclude TAMKO made a promise to repair the loose or blown-off shingles, that it was clearly understood and not ambiguous between Jerry's and TAMKO at the time and, as Mr. Canty's May 13, 1996 letter and TAMKO's subsequent performance evince, that it was definite. There is a question here for the factfinder which cannot be determined as a matter of law.

Assurance and Reliance on the Promise to Repair

As to the second element, the jury could find from the circumstances under which the promises were made that TAMKO had a clear understanding that Jerry's was seeking an assurance upon which it would rely. The focus of TAMKO's argument here is on the fact that "Jerry's never told or even indicated to TAMKO that it was going to fix the roofs if TAMKO did not." TAMKO Memorandum at 12. In its answers to interrogatories, Jerry's has said its detrimental reliance was that it refrained from contracting with

its roofer, Robben, to repair the roofs. The absence of an express statement from Jerry's to TAMKO that that is what it would do is not essential or determinative. In view of the nature and breadth of the problem, Jerry's expressed concerns and demand for assurance, and Jerry's statements to TAMKO that its reputation was suffering, the jury may infer that TAMKO clearly understood Jerry's was seeking an assurance that it would repair the roofs so that Jerry's would not have to.

The Promise to Defend

The Court agrees with TAMKO that the second and third elements of promissory estoppel are lacking on the alleged promise to defend. Jerry's did not do anything differently in responding to homeowner concerns about the shingles after the promise was made. There is, therefore, no evidence upon which the jury could base a finding of detrimental reliance. Schoff, 604 N.W.2d at 49. Though the promise to defend is not a stand-alone promissory claim, in the Court's judgment evidence of it is not for this reason rendered irrelevant as it may bear on TAMKO's understanding of the alleged promise to repair, and the cost of defending claims resulting from TAMKO's failure to keep a promise of repair may be recovered as an item of damage for breach of that promise.

II. FRAUD

"The essential elements of an action for fraud are well established: materiality, falsity, representation, scienter, intent to deceive, justifiable reliance, and resulting injury and damage." Plymouth Farmers Mut. Ins. Ass'n v. Armour, 584 N.W.2d 289, 291 (Iowa 1998); see Midwest Home Distributor, Inc. v. Domco Indus., Ltd., 585 N.W.2d 735, 738 (Iowa 1998). Each element of a fraud claim must be established by a preponderance of the clear and convincing evidence. Hagarty v. Dysart-Geneseo Comm. Sch., 282 N.W.2d 92, 95 (Iowa 1979). Because of the number and nature of the alleged fraudulent representations and nondisclosures discussed in the motion papers it is best to discuss each in turn from this point.

In resisting the motion Jerry's alleges that TAMKO made material false representations of fact about the quality and performance of its shingles on product specification sheets and shingle wrappers. This is an entirely different subject than the fraud allegations pleaded in the Third Amended and Substituted Complaint. The pleaded frauds involve misrepresentations and nondisclosures in connection with TAMKO's alleged promises to repair the problems homeowners were having with the shingles, and the promise to defend Jerry's. Under the pleading rules "all averments of fraud . . . [and] the circumstances constituting fraud

. . . shall be stated with particularity." Fed. R. Civ. 9(b). The required circumstances "include the time, place, and contents of the alleged fraud; the identity of the person allegedly committing fraud; and what was given up or obtained by the alleged fraud." Roberts v. Francis, 128 F.3d 647, 651 (8th Cir. 1997). The complaint is silent on the subject of product literature fraud. Accordingly, it is not part of the case and, for that very reason, there is no need to grant summary judgment on the issue.

Jerry's contends that TAMKO's various statements in the early part of 1996 that it would take care of the problem, stand behind its product and make repairs were fraudulent. A promise to do something in the future can be fraudulent only if at the time the representations were made the speaker had an existing intent not to perform. IBP, Inc. v. FDL Foods, Inc., 19 F. Supp. 2d 944, 951 (N.D. Iowa 1998); Robinson v. Perpetual Services Corp., 412 N.W.2d 562, 565 (Iowa 1987). The "mere fact that the parties did not complete the agreement does not prove the promissor did not intend to keep the promise." IBP, Inc., 19 F. Supp. 2d at 951; see Magnusson Agency v. Public Entity Nat'l Company-Midwest, 560 N.W.2d 20, 28-29 (Iowa 1997). The evidence is insufficient to afford a clear and convincing basis for a reasonable factfinder to conclude that at the time TAMKO made statements to the effect that it would stand behind its product, take care of Jerry's, take care of the

problem, make repairs and the like, it had no intention to do so. It is uncontroverted that TAMKO in fact attempted to make repairs by resealing and, when problems continued, by making settlement offers to those on the list supplied by Jerry's. That TAMKO fell short in its remedial efforts and ultimately broke its promises to Jerry's is not probative of the requisite intent at the time the representations were made. Broken promises are not ordinarily actionable as fraud. Brown v. North Central F.S., Inc., 987 F. Supp. 1150, 1156 (N.D. Iowa 1997). If it were otherwise, every breach of contract could potentially be converted to a tort claim for fraud.

Jerry's argues that TAMKO's Mr. Shaner or Mr. Canty misrepresented that TAMKO would test shingles in May 1996 and use the test shingles to determine the means of repair. Mr. Grubb testified, "Mr. Canty merely indicated we'll not be looking at any roofs. I just need to take some samples and we'll go back, we'll have those tested, and we will offer a means of repair." (Grubb Depo. 51). Apparently Mr. Canty has disappeared and no one knows what he did with the shingles or whether they were tested or not. The evidence that Mr. Canty's statement was made with a present intent not to test the shingles is that there is no evidence the shingles were in fact tested. It is doubtful that this is sufficient affirmative evidence of the necessary intent, see IBP,

Inc., 19 F. Supp. 2d at 951, but at the summary judgment stage the Court will assume the lack of any evidence of testing permits an inference of present intent.

Materiality is also doubtful in connection with the statement about testing.

> A fact is material if it substantially affects the interest of the party alleged to have been defrauded. . . . Materiality has been found where a fact influences a person to enter into a transaction, where it deceives him or induces him to act, or where the transaction would not have occurred without it.

Smith v. Peterson, 282 N.W.2d 761, 765 (Iowa 1979). It is difficult to see that the representation about testing could have had any influence on Jerry's decision to participate in the transaction or its conduct in connection with it. At the time the statement was made Jerry's had sought and received TAMKO's assurance that it would make repairs. TAMKO told Jerry's that under its warranties it was TAMKO's right to select the means of repair. Jerry's acquiesced in the resealing despite its belief that handsealing was not an adequate method to accomplish the repairs.

If intent and materiality are doubtful, there is affirmative evidence that Jerry's did not rely on Canty's statement about testing. Reliance requires proof that the representation was a "substantial factor in bringing about the action." Iowa Civil Jury Instruction No. 810.8; Sedco Int'l, S.A. v. Cory, 683 F.2d

1201, 1206 (8th Cir.), cert. denied, 459 U.S. 1017 (1982). Jerry's president, Mr. Grubb, testified that he did not believe handsealing would work and told TAMKO so. The roofer doing the work, Mr. Robben, also did not believe handsealing would work. In light of their testimony a reasonable factfinder could not conclude that Canty's statement about testing substantially affected the decision to let TAMKO proceed with the repairs it selected.

Evidence of reliance is similarly lacking on Jerry's claim that TAMKO's representation that handsealing was an appropriate repair and nondisclosure of the alleged fact that handsealing was only a short-term solution were fraudulent. It may well be that TAMKO, like Jerry's, did not have much faith in the efficacy of handsealing, but Jerry's, an experienced construction firm, cannot claim it was defrauded by statements it did not believe.

Finally, the summary judgment record indicates Jerry's cannot establish the element of reliance with respect to the representation that it would defend TAMKO. As noted in the discussion above with respect to promissory estoppel, there is no evidence Jerry's did anything, or forbore doing anything, in reliance on the representation.[1]

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[1] Plaintiff's Memorandum in Resistance to the motion includes an additional alleged fraudulent misrepresentation. Jerry's alleges (continued...)

For the reasons indicated, TAMKO is entitled to summary judgment on Jerry's fraud claims.

III. DAMAGES

TAMKO moves for summary adjudication of a number of Jerry's claimed damages items. Rule 56 does not permit the Court to grant a summary judgment, as such, on specific items of damages. See Antenor v. D & S Farms, 39 F. Supp. 2d 1372, 1375 n.4 (S.D. Fla. 1999). However, since the case has not been fully adjudicated on TAMKO's motion, it is appropriate for the Court to indicate what facts are not in controversy "including the extent to which the amount of damages or other relief is not in controversy," and direct the proceedings accordingly. Fed. R. Civ. P. 56(d). It is helpful to the parties in this case to know where they are heading in terms of submissible damage items. The Court will therefore address the damage issues presented by TAMKO, however, the Court stresses that "an order issued pursuant to Rule 56(d) has no preclusive impact, since the trial court retains jurisdiction to modify the order at any time prior to the entry of a final judgment." 10B C. Wright, A. Miller & M. Kane, Federal Practice &

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[1](...continued)
TAMKO falsely represented that "it would make re-roof settlements with the customers." (Corrected and Substituted Memorandum at 25). Jerry's did not plead this representation as one of the particulars of its fraud claim, but the Court views it as a part of the alleged fraud in connection with TAMKO's promise to take care of Jerry's customers. See Third Amended Complaint ¶ 75.

Procedure: Civil § 2737 at 323. The Court cannot make a final and conclusive determination of what remedies justice requires until the proof of the promissory estoppel claim is presented. The parties, therefore, should take this part of the ruling as in the nature of a limine ruling which, to the extent the motion is granted, prevents the receipt of evidence or reference to the items of damage indicated unless and until Jerry's establishes a basis to modify this ruling.

The fourth element of promissory estoppel requires proof that "injustice can be avoided only by enforcement of the promise." Schoff, 604 N.W.2d at 49.[2] The equitable concerns which underlie the fourth element also extend to the remedy. "The remedy granted for breach may be limited as justice requires." Restatement (Second) of Contracts § 90(1). Accordingly, full contract damages may be appropriate in a given case, while in another, "relief may . . . be limited to restitution or to damages or specific relief measured by the extent of the promisee's reliance rather than the terms of the promise." Id. cmt. d. Under the Restatement, which the Iowa Supreme Court has historically relied on in promissory estoppel cases, Schoff, 604 N.W.2d at 48, the court has discretion to determine what damages may be considered in the interests of justice. See Walser v. Toyota Motor Sales, U.S.A., Inc., 43 F.3d

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[2] In Neely the equitable element was decided by the Court. See 930 F. Supp. at 365-66 n.7.

396, 401 (8th Cir. 1994). Reliance is a key factor in determining the scope of the remedy for an enforceable breach of promise as "[t]he promissor is affected only by reliance which he does or should foresee." Id. cmt. b.

Jerry's has claimed damages totaling about $13 million (inclusive of interest). Twelve items of damage are summarized in a letter from Jerry's accountants to plaintiff's counsel dated November 6, 2000 and incorporated by reference in Jerry's supplemental answer to the damages interrogatory. TAMKO asserts that Jerry's cannot recover lost gross profits on home sales (Item No. 2), lost profits on lost market share (Item No. 4), the cost of carrying unsold inventory (Item No. 9), and home office overhead (Item No. 11) because the calculations purport to be "the amount of damages . . . that have been and will be sustained by Jerry's Homes as a result of the poor quality Tamko shingles installed on homes built by Jerry's Homes." Subject to the comments made previously, the motion is granted with respect to these calculations reflected in the accountants' summary. The number and nature of the problems with the shingles raise serious questions about their quality. However, Jerry's is not entitled to recover damages for the poor quality of TAMKO's shingles under its promissory estoppel claim. Any claim about the quality of the shingles belongs to the homeowners under TAMKO's limited express warranty. See July 12,

2000 Ruling on Second Motion for Summary Judgment at 3; September 14, 1999 Ruling on Motion for Summary Judgment at 7-10. Jerry's damages are limited to those from breach of the promise of repair. The blow-off problems in the first instance do not give rise to an actionable claim by Jerry's based on promissory estoppel.[3]

In addition, with respect to Item No. 11, home office overhead, which the accountants have calculated at $1,233.650, TAMKO notes the calculation was made using the "Eichleay Formula" which, it argues, is inapplicable here because the formula has been applied only in the case of construction delays. The Federal Circuit has observed that the Eichleay Formula is "the appropriate method to calculate recoverable (that is, unabsorbed and indirect) costs after a suspension of performance caused by the government." West v. All State Boiler, Inc., 146 F.3d 1368, 1372 (Fed. Cir. 1998). There are two prerequisites: "(1) that the contractor be on standby and (2) that the contractor be unable to take on other work." Id. at 1373 (quoting Interstate Gen. Gov't Contractors, Inc. v. West, 12 F.3d 1053, 1056 (Fed. Cir. 1993)). The contractor is on

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[3] This ruling does not exclude evidence of a decline in sales volume during the relevant time period in support of Jerry's claim of loss of business reputation. See G & H Soybean Oil, Inc. v. Diamond Crystal Specialty Foods, Inc., 796 F. Supp. 1214, 1217 (S.D. Iowa 1992). That loss (if appropriate to consider in the interests of justice) cannot be measured by lost profits from the installation of poor quality shingles for the reasons noted in the text.

"standby" when work is suspended and "the contractor can at any time be required to return to work immediately." West, 146 F.3d at 1373. Clearly, any breach of promise by TAMKO did not place Jerry's in a situation where it could be contractually required to return to work immediately and was unable to take on other work. The motion with respect to use of the Eichleay Formula is granted.

Damage Item Nos. 6 and 10 claim, respectively, legal and accounting fees incurred in prosecuting this case. In a supplemental answer to the damages interrogatory Jerry's has indicated it is not seeking its attorney's fees with regard to the pending litigation. It apparently still seeks the accounting fees. Under well-established principles neither the legal fees nor the accounting fees are recoverable as items of damage and the motion is granted in these regards.

Damage Item No. 7(b) seeks approximately $800,000 for the "[c]ontingent liabilities of buyers." As explained by Jerry's in its resistance, the contingent liabilities are potential claims by homebuyers for breach of an implied warranty of "fitness for habitation where a buyer purchases a house already built in a tract development." See Kirk v. Ridgway, 373 N.W.2d 491, 495 (Iowa 1985). In view of the applicable limitations period, Jerry's argues it "could be found liable for damages stemming from the shingles problems; both blow-offs and premature aging, for 15 years after

the problem should reasonably have been discovered." Corrected Memorandum at 41.

"Damages are denied where the evidence is speculative and uncertain whether damages have been sustained." Olson v. Nieman's, Ltd., 579 N.W.2d 299, 309 (Iowa 1998); see Sun Valley Iowa Lake Ass'n v. Anderson, 551 N.W.2d 621, 641 (Iowa 1996)(same). As Jerry's notes, damages which are a "mere possibility" are not recoverable. See C. L. Maddox, Inc. v. Benham Group, Inc., 88 F.3d 592, 604 (8th Cir. 1996)(applying Missouri law). Jerry's own argument demonstrates that future liability to homeowners has not been determined and is, at best, merely possible. Apparently it has not to this point been sued for breach of the homeowners' implied warranty. That it will be successfully sued under this theory at some point because of shingle problems is speculative. Moreover, this item is in reality a claim for indemnity which Jerry's seeks to recover without its liability to homeowners having been alleged or established. This it cannot do. See Ke-Wash Co. v. Stauffer Chemical Co., 177 N.W.2d 5, 11 (Iowa 1970). The motion is granted with respect to the contingent liability claim.

Damage Item No. 8 seeks recovery of a $57,522 claim of Bret Robben. Apparently this is money TAMKO owes Robben for work Robben performed but has not been paid. Jerry's cannot sue for

Robben's damages as it is not the real party in interest. The motion is granted with respect to this item.

Damage Item No. 1 seeks recovery of $36,630 for "[p]ersonnel time and expense to deal with homeowner complaints." TAMKO moves for adjudication on this item because it never told Jerry's that it would pay these expenses. The Court cannot determine from the summary judgment record whether or not these expenses are causally related to the alleged breach of promise and, accordingly, the motion is denied with respect to this item.

Finally, on November 14, 2000 Jerry's accountants forwarded to plaintiff's counsel a calculation of "the additional amount of damages for the 1995 calendar year, if any, that have been and will be sustained by Jerry's Homes as a result of the poor quality Tamko shingles installed on homes built by Jerry's Homes." The letter has also been incorporated in Jerry's supplement to its answer to the damages interrogatory. The motion is granted with respect to damages for the 1995 calendar year as these could not have been caused by breach of the promises in question (which were made in 1996) and for the reason, as stated previously, that Jerry's action is not for damages resulting from the poor quality of shingles furnished by TAMKO.

TAMKO's third motion for summary judgment is granted in part and denied in part in conformity with the foregoing discussion.

IT IS SO ORDERED.

Dated this 16th day of January, 2001.

ROSS A. WALTERS
CHIEF UNITED STATES MAGISTRATE JUDGE