

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-20837
Summary Calendar

ROBERT EVANS, ROBERT EVANS TOURS, INC.,
Individually and d/b/a EVANTOURS and SKI-WEST,

Plaintiffs-Appellants,

VERSUS

UNITED AIR LINES, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 87 3249)

July 5, 1995

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:¹

Robert Evans was a wholesale ticketing agent who packaged and marketed ski vacations to Colorado, including air fare, lodging, and lift tickets. Evans relied on United Air Lines to sell him bulk air fares at a discount. During a price war in the 1985-86 ski season, United lowered its retail ("published") fares to compete with Continental Air Lines, but did not reduce the fares it offered Evans below its reduced published fares. Evans sued United

¹ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Air Lines alleging promissory estoppel, fraudulent misrepresentation, negligent misrepresentation, and tortious interference with contract. From an adverse summary judgment in favor of United, Evans appeals. We affirm.

Reliance is an element of three of Evan's claims: promissory estoppel, fraudulent misrepresentation, and negligent misrepresentation. See Wheeler v. White, 398 S.W.2d 93, 97 (Tex. 1965) ("foreseeable, definite and substantial reliance" as an element of promissory estoppel); Traco, Inc. v. Arrow Glass Co., Inc., 814 S.W.2d 186, 190 (Tex. App.) San Antonio 1991, writ denied) (reasonable or justifiable reliance required for estoppel); Holmes v. P.K. Pipe & Tubing, Inc., 856 S.W.2d 530, 541 (Tex. App.) Houston [1st Dist.] 1993, no writ) (reliance as an element of fraud); Estate of Lee v. Ring, 734 S.W.2d 123, 126 (Tex. App.) Houston [1st Dist.] 1987, no writ) (proof of reliance upon a misrepresentation as an essential element of fraud); Federal Land Bank Ass'n v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991) (justifiable reliance as an element of negligent misrepresentation). Each of these three of Evans' claims fails for lack of an issue of material fact as to his justifiable reliance on United's statements.

United promised Evans that it would provide competitive fares and "take care of him" and told him to "trust us." In the context of his past relationship with United, Evans relied on these promises to mean that United would offer him bulk air fares at rates lower than its published fares. Neither the promises alone nor the promises in context of the relationship between the parties

justify Evans' reliance on United to offer him fares below its own published fares.

Regarding the history of the relationship between the parties, the undisputed evidence established that during the previous ski season, Evans and United never entered a wholesale contract, but United had on request provided blocks of seats for agreed prices. Upon lowering its published fares United offered Evans *either* lower fares or a reduced minimum seat requirement. During the price war of the next ski season, when United matched the fares of competitors without offering Evans lower fares, it did in fact reduce his minimum seat requirement as it had done before. In this context Evans could not justifiably expect United to also lower the fare it offered him. The lack of evidence of justifiable reliance is ground for summary dismissal of Evans' claims of promissory estoppel, fraudulent misrepresentation, and negligent misrepresentation.

Alternative grounds for dismissal of these claims exists. Promissory estoppel is not available if there exists a legally valid contract between the parties. Barker v. Brown, 772 S.W.2d 507, 510 (Tex. App.)Beaumont 1989, no writ). As we recognized in an earlier appeal, the contract that Evans ultimately signed was valid. Evans v. United Air Lines, 986 F.2d 942, 944, 946 (5th Cir. 1993) (affirming district court's finding that there was no duress sufficient to undo otherwise valid contract). When based on a promise of future performance, a claim of fraudulent misrepresentation requires proof that the defendant lacked

intention to perform at the time the promise was made. See Crenshaw v. General Dynamics Corp. 940 F.2d 125, 128 (5th Cir. 1991); Evans, 986 F.2d at 946. To prevail in a claim for negligent misrepresentation, a plaintiff must show misrepresentation of an existing fact. Airborne Freight Corp. v. C.R. Lee Enters., Inc., 847 S.W.2d 289, 298 (Tex App.) (El Paso 1992, writ denied). Thus both fraudulent and negligent misrepresentation require more than mere proof that promised future conduct was ultimately not performed. Id. (promise of future conduct insufficient for negligent misrepresentation) (citing Sloane, 825 S.W.2d at 442); id. at 294 (failure to perform promised act insufficient to prove fraudulent misrepresentation). Evans has shown no genuine issue of fact regarding these elements of the misrepresentation claims.

The elements of Evans' final claim, tortious interference with contract, are (1) a willful and intentional act of interference, (2) with a contract (3) proximately causing (4) actual loss or damages. Victoria Bank & Trust Co. v. Brady, 811 S.W.2d 931, 939 (Tex. 1991). Interference with a contract is tortious only if intentional. Southwestern Bell Tele. Co. v. John Carlo Texas, Inc., 843 S.W.2d 470, 472 (Tex. 1992). There is no evidence to suggest that United lowered its published fares with the intention of inducing Evans' customers to cancel their ski packages, or that United was substantially certain that such cancellations would occur. Cf. Southwestern Bell, 843 S.W.2d at 472 (a finding that defendant's actions were intentional is insufficient without a finding that defendant desired to interfere with contract or

believed that interference was substantially certain to result from its actions). Evans has therefore failed to raise a fact issue regarding willful or intentional interference as is necessary to support a claim of tortious interference with contract.

The summary judgment dismissing these claims is
AFFIRMED.