

## **Lies and Deception: Fraud Claims Based on False Assurances Regarding Security and Prior Criminal Activity**

*By Peter S. Everett, Esq.*

Trial lawyers representing crime victims in inadequate security litigation typically rely upon negligence-based claims. These claims often focus on substandard physical security devices, such as locks, lights, alarm systems, and gates, or on the amount, location, or performance of security personnel.

In an age when we are all urged to think “outside the box,” trial lawyers should carefully explore fraud-based claims in representing crime victims. At common law, fraud requires proof of a material misrepresentation, upon which the plaintiff reasonably relies to his or her detriment. Certain jurisdictions may require proof of negligence or intent to mislead.

Despite the *in terrorem* effect of litigation on behalf of crime victims, defendants continue to make representations regarding safety, security, patrols, closed-circuit-television cameras, crime levels, or any of a host of other topics.

### **Fact Patterns That Should Spur Inquiry Into Fraud Claims**

Fraud claims can arise whenever the defendant and the plaintiff have discussed security-related issues in a meeting, a phone call, or through correspondence. Counsel should be especially alert to fraud-based claims in residential landlord-tenant and commercial office building cases, since prospective tenants may have specifically inquired about security or criminal activity when looking at an apartment. For example, the former resident manager of a large apartment complex recently testified that she

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had heard leasing agents tell prospective tenants that the complex had twenty-four hour security when it did not, and that she had to instruct them to stop misrepresenting security measures:

Q. To your knowledge, was the property ever represented as having twenty-four hour security?

A. Yes.

Q. Who made that representation?

A. I heard some of the leasing consultants state it. . . . I said, things are going to change, this is a courtesy officer, you don't ever say that it's a safe area. I can honestly say that it goes on all the time.

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Q. What did they say?

A. It's a safe area, we have got courtesy, you can call them up and, you know. Now, once we had our guards, when I had on-site guards there you could call them up and be escorted.

Q. So you heard Sandra and Melissa say it's a safe area?

A. Yes.

Q. You heard Sandra and Melissa say, "We have got a courtesy officer"?

A. Twenty-four hour, they called it, security.

Q. You heard Sandra and Melissa represent that you had twenty-four hour security?

A. I have.

Misrepresentations may also arise when security or burglar alarm companies make inflated claims about the nature of their security services or the existence of certain alarm features, especially panic alarms. Clients victimized at malls, hospitals, special events, clubs, and other locations where specific inducements are less

commonly made are less likely to have fraud claims. Claims may also stem from advertising, but only if the plaintiff saw and specifically relied upon the advertisement.

### **The Advantage of Fraud Claims**

Fraud claims have at least four important advantages:

- First, if the misrepresentations are egregious, the facts may motivate the jury to award very substantial damages.
- Second, proximate cause may prove much easier to establish; “profiling” issues are less relevant, at least in landlord-tenant cases, since the causation issue arguably should be whether the victim would have rented at the complex at all, but for the misrepresentation.
- Third, in some states misrepresentations may violate state consumer protection laws or deceptive trade practice acts, and expose defendants to treble damages, attorneys’ fees, and other serious consequences.
- Fourth, in certain jurisdictions fraud does not even require proof of negligence; constructive fraud may be premised upon even “innocent” misrepresentations.

### **Cases Illustrating the Use of Fraud-Based Claims in the Security Context**

#### *Residential Landlord-Tenant*

Fraud actions are most common in landlord-tenant cases in which representations are frequently made to induce leasing. For example, in a recent case in Virginia the executor of a young woman murdered at an apartment complex sued the management company claiming, *inter alia*, that the leasing personnel had made a series of misrepresentations regarding crime and security.<sup>i</sup>

Reversing the trial court in part, the U.S. Court of Appeals for the Fourth Circuit held that:

1. The representation that the management company would advise tenants if significant criminal activity ever occurred on or near the premises could

provide the basis for a fraud claim if the company had no present intent to perform that promise; and

2. The assertion that “roaming security guards were on constant patrol” constituted a statement of material fact that could support a fraud claim.<sup>ii</sup>

The appellate court had no difficulty with proximate cause, observing that “[i]f, as the complaint alleges, Miller would not have placed herself in potentially perilous situations such as that which resulted in her death had she not relied on Smith’s assurances, a jury might reasonably conclude that Smith’s acts proximately caused her death.”<sup>iii</sup> Finally, the court also reversed the dismissal of a Consumer Protection Act claim.<sup>iv</sup>

In a similar vein, this author represented a young woman who was assured by the leasing agents of an apartment complex that no break-ins had taken place and that the complex was safe. In reliance upon those statements, she moved into a second floor unit. In fact, a serial rapist had recently broken into the apartment next to the one the landlord rented her, which shared her balcony. The perpetrator returned, used the same balcony to break into her apartment, and sexually assaulted her.<sup>v</sup>

### *Alarm Systems*

Victims of crimes in which panic alarm components of alarm systems fail to work as represented may also invoke fraud or misrepresentation as a basis for recovery.<sup>vi</sup>

In *Elizabeth E. v. ADT Security Systems West*, the plaintiff alleged that an alarm company had misrepresented that a security system had a “panic alarm” enabling store employees to summon help immediately in the event of a crime. Confronted by an assailant, the plaintiff attempted to use the panic alarm, but the system had no such feature. Reversing summary judgment, the Nevada Supreme Court ruled that “if a

representative of ADT negligently misrepresented the existence of a panic feature . . . a basis for liability in tort has been asserted.”<sup>vii</sup> However, the court seemed to premise its ruling that ADT owed a duty to the plaintiff on the basis of negligent misrepresentation or breach of contract between ADT and the plaintiff employer, and specifically rejected a “fraud” claim.<sup>viii</sup>

In *Ostalkiewicz v. Guardian Alarm*, the owner of a jewelry store sought recovery from an alarm company whose services included a “hold-up” alarm that would summon the police if triggered. Robbers entered the warehouse, the owner signaled the panic alarm, but the security service had not programmed its computer correctly and the alarm went unheeded.

The owner testified that an alarm company representative had repeatedly assured him that the hold-up alarm worked, when in fact it did not. The trial court allowed a fraud count to go to the jury, and declined to direct a verdict for the defendant. On appeal, the Rhode Island Supreme Court affirmed the trial court’s refusal to direct a verdict on that fraud claim, but also affirmed the grant of a new trial where the trial judge had concluded that the owner’s testimony had serious credibility problems.<sup>ix</sup>

### *Employer-Employee*

Employers intent upon inducing employees or independent contractors to perform certain services at night, with no security, in a dangerous area or in other situations in which they would be at risk, may shade the truth.<sup>x</sup>

In *Howarth v. Rockingham Publishing Co.*, the court denied summary judgment on a fraud count in an action by a young newspaper carrier against a newspaper for

failing to disclose a history of pedophile attacks. The court ruled that the “plaintiff presents claims of actual or constructive fraud against Rockingham sufficient to survive the instant motion for summary judgment.”

## **Conclusion**

In cases in which defendants have misrepresented the existence, nature, amount, or effectiveness of security measures, fraud can prove an effective theory beyond negligence-based inadequate security counts. In the right case, it can be a valuable weapon, elegant in its simplicity and its ability to motivate jurors.

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- i. *Miller v. Charles E. Smith*, 1999 U.S. App. LEXIS 1013 (4th Cir. 1999) (unpublished opinion).
- ii. *Id.* at 7-8 (oddly, the court further held that the statement that the complex had “no history of significant crime or violence on or near the premises” was an opinion and not actionable).
- iii. *Id.* at 9.
- iv. *Id.* at 8-9.
- v. *Doe v. Maclin Realty*, 43 ATLA L. REP. 186 (June 2000). *See Washington v. United States*, 953 F. Supp. 762, 770 (N.D. Tex. 1996) (denying motion to dismiss fraud claim where plaintiff claimed apartment management made misrepresentations regarding safety of apartment complex, but where no brief filed in support of motion; trial court did require plaintiff to amend complaint to include more specific allegations as to fraudulent statements). *But see Doe v. Flair Corp.*, 719 N.E.2d 34, 39, 129 Ohio App. 3d 739 (1998) (requiring that plaintiff prove intent to mislead on the part of leasing agent). *See Cooke v. Allstate Mgmt. Corp.*, 741 F. Supp. 1205, 1215-16 (D.S.C. 1990) (rejecting fraud claim based on statement by leasing agent that complex was “safe,” ruling that statement involved only opinion, but not ruling on whether representations regarding criminal history would have been actionable).
- vi. *Elizabeth E. v. ADT Sec. Sys. W.*, 108 Nev. 889, 839 P.2d 1308 (1992); *Ostalkiewicz v. Guardian Alarm*, 520 A.2d 563 (R.I. 1988).
- vii. *ADT*, 839 P.2d at 1311.
- viii. *Id.* at 1311-1312.
- ix. 520 A.2d at 567-68.
- x. *See, e.g., Howarth v. Rockingham Publishing Co.*, 20 F. Supp. 2d 959 (W.D.Va. 1998).