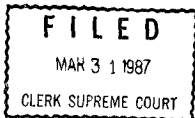


IN THE COURT OF APPEALS OF IOWA



ECONOMY ADVERTISING COMPANY,)

85

Plaintiff-Appellee,)

Filed March 31, 1987

vs)

McNO, INC., RICHARD L. McGOWAN,)
and PAUL NOVAK,)

6-528
86-126

Defendants-Appellants.

Appeal from the Iowa District Court for Johnson County (48706) - August
F Honsell, Jr., Judge.

Defendants appeal a judgment for plaintiff in an action seeking damages
for breach of a contract for the sale of real estate. **AFFIRMED.**

Walter J. Steggal, Jr., of Holden, Steggal & Heckel, Cedar Rapids, Iowa,
for defendants-appellants.

Thomas D. Hobart and Robert N. Downer of Meardon, Sueppel, Downer
& Hayes, Iowa City, Iowa, for plaintiff-appellee.

Considered by Donielson, P.J., Snell, and Schlegel, JJ.

SCHLEGEL, J.

Defendants appeal a judgment for plaintiff in an action seeking damages for breach of a contract for the sale of real estate. We affirm.

In 1979 defendants McGowan and Novak, who are Cedar Rapids businessmen, formed a corporation with themselves as sole shareholders. The only capital contributed to the corporation was used for the purchase of a duplex in 1980. In 1983 Novak asked an employee of his with a real estate background to keep an eye out for Iowa City real estate that could be purchased and used as a site for apartments. The employee was referred to E.H. Borchardt, who was stated to often know of such properties. Borchardt showed the employee two parcels which were, however, sold to others before submission of an offer by defendants.

In October 1984, Borchardt initiated a contact with plaintiff in which he inquired concerning the availability of a particular parcel. Borchardt was told that plaintiff wanted to sell the parcel for a \$140,000 cash offer without financing contingencies. Borchardt said that he had persons interested in buying and would try to obtain a \$150,000 offer with the understanding that he would receive as a finder's fee any amount in excess of \$140,000. Plaintiff expressed a willingness to consider an offer along those lines. No listing agreement or formal arrangement was made.

An offer to buy for \$145,000 was made and accepted but defendants ultimately refused to perform when they were unable to arrange financing that was satisfactory to them. At trial in a breach of contract action in which plaintiff sought money damages defendants presented evidence that the offer was made following a representation by Borchardt that another buyer could readily be found if they decided not to go through with the deal.

Plaintiff did not actively seek to find another buyer but defendants also made attempts to obtain more satisfactory financing after the scheduled date

of closing. Conflicting estimates of the value of the property were presented at trial.

The trial court found that Borchardt was not an agent of plaintiff and awarded damages of \$56,134.50. Plaintiff was found to be entitled to pierce the corporate veil and judgment was accordingly entered against defendants jointly and severally.

Our review of the trial court is limited to errors of law. Iowa R. App. P. 4. Findings of fact in a law action are binding upon an appellate court if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

I.

The defendants first contend that the evidence was sufficient to prove that Borchardt acted as an agent for plaintiff seller and that Borchardt made material misrepresentations that require voiding the contract. Defendants have the burden of showing Borchardt acted as an agent for plaintiff. See Chariton Feed and Grain v. Harder, 369 N.W.2d 777, 789 (Iowa 1985). Our courts have followed the rule that an agency results from the manifestation of consent by the principal that another shall act on the principal's behalf and subject to his control, and consent by the other so to act. Id. at 789-904. The determination of whether agency exists is a fact question. Id. at 789.

The facts presented at trial provided substantial evidence that no agency relationship existed between Borchardt and the plaintiff. Borchardt was not in the employ of plaintiff; he apparently acted as a go-between between different buyers and sellers; he did nothing more than bring an offer to plaintiff for its consideration. Therefore, the evidence does not support a finding that Borchardt was acting on the principal's behalf and subject to its control. Substantial evidence supports the trial court's finding that Borchardt was not an agent for plaintiff.

Even had the court found agency, substantial evidence exists to support the court's finding that defendants were not fraudulently induced by Borchardt. In order for misrepresentation to allow a party to escape performance, that misrepresentation must amount to fraud in the inducement. See Sedco International, S.A. v. Corg, 522 F. Supp. 254 (S.D. Iowa 1981), *aff'd*, 683 F.2d 1201 (8th Cir. 1982), *cert. denied* 459 U.S. 1017, 103 S. Ct. 370, 74 L. Ed. 2d 512. The trial court did not find that Borchardt fraudulently induced the defendants to enter into the contract. After an examination of the record we can find no evidence which could adequately support this assertion by the defendants. Borchardt may or may not have told the defendant's representative that the land could be easily resold. There is no indication, even assuming Borchardt made the claim, that any statement made by Borchardt was material to defendants' failure to put a financing contingency into the contract. There certainly was no evidence as to intent to deceive or reliance on Borchardt's statement by the defendants. The district court committed no error in its refusal to find fraudulent inducement in this case.

II.

Defendants also maintain that the evidence was sufficient to establish plaintiff's failure to mitigate damages. The court did not find that plaintiff had failed to adequately mitigate its damages, given the evidence presented. It is the plaintiff's duty to mitigate his damages but defendant has the duty to prove the damages could be mitigated. F.S. Credit Corporation v. Shear Elevator Inc., 377 N.W.2d 227, 233 (Iowa 1985); DeWaay v. Muhr, 160 N.W.2d 454, 457 (Iowa 1968). The evidence shows that the plaintiff offered to mitigate, in a letter of May 29, 1984, but defendants never responded to the plaintiff's proposals. Furthermore, the evidence does not support a conclusion that the defendants sought any mitigation of damages, even when they could not close

by the agreed upon date. Defendants continued to seek financing and sought only a complete release from the transaction, as evidenced in the letter of defendant's attorney's letter to plaintiff's attorney of April 26, 1984. Furthermore, testimony was offered that there was a lack of buyers to whom the plaintiff could have sold the real estate, in the time period after the defendants failed to close the transaction. In light of the foregoing, we cannot say that the trial court erred in failing to find that no damages should have been awarded because of plaintiff's failure to mitigate damages.

The defendants also argue that the evidence was insufficient to support the trial court's award of damages. The measure of damages for breach of a land purchase contract is the difference between the fair market value of the property at the time of breach and the contract price. Gordon v. Pfab, 246 N.W.2d 283, 288 (Iowa 1976). The trial court was presented with different estimates of the fair market value of the land at the time the contract was breached. Defendant's own witness estimated the property to be worth \$90,000. The contract price was for \$145,000. Therefore, \$55,000 is a damage award well within the evidence presented. The court did not err in using this figure as its basis for an award of damages.

III.

Defendants also contend that the corporate veil should not have been pierced and that its shareholders should not have been held personally liable. Our courts look to a number of tests to determine if a corporate veil should be pierced. As the supreme court said in Adam v. Mt. Pleasant Bank and Trust Co., 355 N.W.2d 868, 872 (Iowa 1984):

The corporate veil may be pierced where the corporation is a mere shell, an alter ego of its controlling owner which served no legitimate business purpose. See generally Northwestern Nat. Bank of Sioux City v. Metro Center, Inc., 303 N.W.2d 395 (Iowa 1981). Fraud is not a prerequisite

site for piercing the corporate veil. Team Central, Inc. v Teamco, Inc., 271 N.W.2d 914, 923 (Iowa 1978). The factors which may be considered in determining whether a corporation is merely the alter ego of its controlling owner were set out in Lakota Girl Scout Council, Inc. v Havey Fund-Raising Management, Inc., 519 F.2d 634 (8th Cir. 1975). A corporation's existence may be disregarded if: "(1) the corporation is undercapitalized, (2) without separate books, (3) its finances are not kept separate from individual finances, individual obligations are paid by the corporation, (4) the corporation is used to promote fraud or illegality, (5) corporate formalities are not followed or (6) the corporation is merely a sham."

In the present case, the trial court said:

It is apparent from the evidence produced at time of trial that McNo, Inc. had no assets available to meet its debts at the time that its owners sought to conduct business under its corporate veil. It is inequitable that they should be permitted to avoid personal liability when attempting to conduct corporate business without providing any sufficient basis of financial responsibility to the creditors so affected.

The supreme court has found that undercapitalization is an adequate grounds for denying the separate entity privilege. Briggs Transportation Company v. Starr Sales Company, 262 N.W.2d 805, 810 (Iowa 1978). The trial court's factual findings relating to the undercapitalization of the corporate entity and its conclusion that the veil should be pierced are supported by substantial evidence and will not be disturbed on appeal.

AFFIRMED.