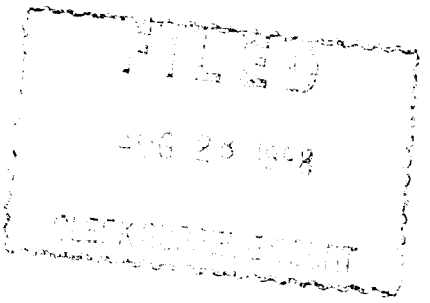
IN THE COURT OF APPEALS OF IOWA



No. 8-233 / 97-1741

SUSAN J. VOGAN and ROLLIN G. VOGAN,

Plaintiffs-Appellees,

vs.

HAYES APPRAISAL ASSOCIATES, INC.,

Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Gregory A. Hulse and Ray A. Fenton, Judges.

Defendant appeals the jury verdict entered in plaintiffs' favor for breach of contract. **REVERSED.**

Robert W. Goodwin of Goodwin Law Office, P.C., Ames, for appellant.

Patrick W. O'Bryan of O'Bryan Law Firm, Des Moines, for appellees.

Heard by Cady, C.J., and Streit and Vogel, JJ.

VOGEL, J.

Defendant Hayes Appraisal Associates, Inc., (Hayes Appraisal), appeals the jury verdict entered in favor of plaintiffs, Susan and Rollin Vogan, (Vogans), for breach of contract. As we find that any damages the Vogans suffered were not the result of any alleged breach by Hayes Appraisal, we reverse.

Background facts. In June 1989, the Vogans hired builder Gary Markley to construct a home for them in West Des Moines, Iowa, for $169,633.59. The Vogans sought a construction loan from MidAmerica Savings Bank, who in turn contacted Hayes Appraisal to do the initial appraisal and make periodic progress reports on the construction.

Based upon the initial appraisal, the Vogans obtained a $170,000 loan from MidAmerica, who was to disburse funds periodically to the builder, withholding 30% until final completion. Construction began on November 22, 1989. On December 28, 1989, Hayes issued its first progress report to MidAmerica, stating that 25% of the work required under the construction plans had been completed.

In February 1990, MidAmerica determined there were insufficient funds to complete the house according to the original plans and appraisal, and contacted the Vogans to address the matter. The builder then informed the Vogans and MidAmerica that it would take an additional $70,000 to complete the home. The Vogans took out a second mortgage of $42,050 and added some of their own funds to pay the overruns

to complete the home. Hayes Appraisal was unaware of the balance of the account and the infusion of the additional monies.

On March 20, 1990, Hayes Appraisal certified that the house was 60% percent complete. On March 28, 1990, Hayes Appraisal issued another progress report indicating that the house was 90% complete. The builder absconded. The Vogans contacted another contractor who estimated it would cost approximately $60,000 to complete the house. On October 16, 1990, Hayes Appraisal issued a final report in which it reported that the home had multiple structural and cosmetic deficiencies. The Vogans stopped making mortgage payments and MidAmerica began foreclosure proceedings. The Vogans counterclaimed, complaining that MidAmerica did not follow its loan procedure for disbursement of construction funds. The Vogans and MidAmerica reached an undisclosed settlement.

On March 24, 1995, the Vogans filed suit against Hayes Appraisal, alleging negligent certification of the percentage of completed construction. They also alleged breach of contract, claiming to be third-party beneficiaries of the Hayes Appraisal-MidAmerica contract. Hayes Appraisal moved for summary judgment, asserting that the undisputed facts showed that the progress reports did not cause the bank to disburse excessive funds. The court denied the motion.

The case proceeded to jury trial on the contract issue only as the negligence claim was dismissed for being time barred. The jury returned a verdict for the Vogans

and awarded them $135,542.19 for breach of contract. Hayes Appraisal moved for a directed verdict and judgment notwithstanding the verdict, asserting the Vogans were not third-party beneficiaries to the Hayes Appraisal-MidAmerica contract and that their damages did not result from any action or inaction of Hayes Appraisal. The court denied the motions and Hayes Appraisal appeals.

Standard of review. Hayes Appraisal preserved error on all issues at the trial court level and by raising them now on appeal, therefore our standard of review in this case is at law and not de novo. Iowa R. App. P. 4.

Damages. Hayes Appraisal asserts the trial court wrongly denied its motions for directed verdict and judgment notwithstanding the verdict because there was insufficient evidence that the Vogans were third-party beneficiaries of the oral contract between itself and MidAmerica. However, we need not reach this issue if we find that the Vogans suffered no damage as a result of any alleged breach by Hayes Appraisal .

In a breach of contract claim, the complaining party must prove 1) the existence of a contract, 2) the terms and conditions of the contract, 3) that it has performed all of the terms and conditions required under the contract, 4) the defendant's breach of the contract in some particular way, and 5) *that plaintiff has suffered damages as a result of the breach. Iowa-Illinois Gas & Elec. Co. v. Black & Veatch*, 497 N.W.2d 821, 825 (Iowa 1993) (emphasis added).

The March 28, 1990, progress report indicated that the house was 90% completed according to the original appraisal amount. However, as early as February 26, 99% of the original $170,000 loan amount had already been disbursed by the bank. The Vogans argue that in spite of the early disbursement of funds, the house clearly was not 90% complete as of March 28, 1990, and assert that this report caused the bank to release an additional $30,000 into the project to their detriment. However, Hayes Appraisal was not obligated to protect the bank (or the Vogans) for any amount in excess of the monies already disbursed. The use of the appraisals was to manage the disbursement of the $170,000 loan — not the disbursement of funds above that amount. Also, Hayes Appraisal points to the expert testimony at trial establishing that the 90% completion figure in the report was to be applied against the original loan of $170,000. The expert testified that rather than induce MidAmerica to release more money, the report should have been a signal that the project was in serious trouble financially as only 90% of the original loan appraisal amount, or $153,000, should have been released to date. Hence, when MidAmerica released added money to the contractor, it was done in spite of the report rather than in reliance on it. The Vogans did not produce testimony that would rebut Hayes Appraisal's expert as to the purpose and use of the percentage of completion report.

Under these circumstances, we find that substantial evidence does not support that the March 28 report resulted in any damage to the Vogans. The damage had already been done by the bank releasing more funds than recommended by the

periodic reports. For this reason, the trial court should have granted Hayes Appraisal's motion for a directed verdict and motion for judgment notwithstanding the verdict.

We reverse the verdict of the trial court and enter judgment in favor of Hayes Appraisal and against the Vogans, with costs assessed to the Vogans.

REVERSED.