IN THE COURT OF APPEALS OF IOWA

No. 6-605 / 95-1705

BRENDA PIXLER,

Plaintiff-Appellee/Cross-Appellant,

vs.

JANI GOULETTE and SANG NGU a/k/a JOHN NGU, f/k/a SANG,

Defendants-Appellants/Cross-Appellees.

FILED
DEC 20 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Woodbury County, Gary E. Wenell, Judge.

The defendants appeal a district court ruling finding in favor of the plaintiff on her fraud claim against the defendants and against them on their counterclaim for assault and battery. **AFFIRMED IN PART AND REVERSED IN PART.**

Robert B. Deck, Sioux City, for appellants.

Martha M. McMinn, Sioux City, for appellees.

Heard by Huitink, P.J., and Streit and Vogel, JJ.

STREIT, J.

The defendants appeal a district court ruling in favor of the plaintiff for fraud.

On June 16, 1987, Wilbert Nelson sold to Douglas and Brenda Pixler a home located at 1117 Floyd Boulevard in Sioux City for $18,000 with monthly payments of $235. For a period of time in 1993, the Pixlers moved to an acreage in the country. Jani Goulette, Brenda's sister, and her husband, John Ngu, moved into the house and made the payments thereon as rent. The Pixlers decided to return to the home and took over possession. Goulette and Ngu were acrimonious about having to move from the home.

The Pixlers separated in February 1994 and Brenda assumed the contract indebtedness. Brenda fell behind in her payments on the house, owing approximately $1500. Nelson served Brenda with a notice of forfeiture, dated May 16, 1994.

Brenda went to Goulette to borrow money to cure the default. Goulette agreed to pay Nelson the amount due on the house for Brenda. As a result of these conversations, Brenda did not make any further attempts to cure the default.

Goulette and Ngu contacted Nelson. Instead of paying the amount past due on the house for Brenda, they agreed to pay off the entire real estate contract after forfeiture of the Pixler's interest. After the forfeiture Goulette and Ngu paid Nelson $7700, the remaining amount on the forfeited real estate contract.

After acquiring the property, Goulette charged Brenda Pixler rent of $235 per month and served notice upon her for past due rent for July 1994. Goulette and Ngu

subsequently filed an action for forcible entry and detainer. Following a hearing, the district court entered an order on October 6, 1994, holding Goulette and Ngu were the owners of the property and entitled to possession.

On October 17, 1995, Pixler filed a petition claiming fraud. Goulette and Ngu filed their answer and counterclaims alleging Brenda Pixler had assaulted Ngu by kicking him. The district court concluded that Goulette and Ngu knowingly gave false assurances to Brenda Pixler that they would cure the default. The court found that by doing so, they obtained the house for $7700 which was worth significantly more. The court awarded Brenda Pixler $6300 plus interest, representing the court's valuation of the home at $14,000 minus the $7700 already paid by Goulette and Ngu. The court additionally awarded Brenda Pixler punitive damages in the amount of $1000. The court dismissed Ngu's claim of assault and battery, holding there was no evidence he had suffered any damages.

The defendants claim the district court erred in concluding the plaintiff had proved by clear and convincing evidence that defendants had made fraudulent misrepresentations to plaintiff about curing plaintiff's default on a real estate contract. The plaintiff has filed a cross-appeal, claiming (1) the district court erred in awarding her monetary damages instead of the equity in her home, and (2) she should have been awarded attorney fees.

This case was tried to the court at law, thus our review is limited to correction of legal error. Iowa R. App. P. 4. The evidence is to be viewed in the light most

favorable to sustaining the court's judgment. *City of McGregor v. Janett*, 546 N.W.2d 616, 617 (Iowa 1996). The appellate court is not, however, bound by the trial court's conclusions of law. *Barske v. Rockwell Int'l Corp.*, 514 N.W.2d 917, 920 (Iowa 1994).

Defendants maintain there is no clear and convincing evidence in the record they willfully misrepresented to Brenda Pixler they would provide her with the funds necessary to cure the default. To prove fraudulent misrepresentation, a plaintiff must establish the following elements by a preponderance of clear, satisfactory and convincing proof: (1) representation, (2) falsity, (3) materiality, (4) scienter, (5) intent to deceive, (6) reliance, (7) resulting injury and damage. *McGregor*, 546 N.W.2d at 691 (citing *Cornell v. Wunschel*, 408 N.W.2d 369, 374 (Iowa 1987)). A statement of intent to perform a future act is actionable only when spoken with the existing intention not to perform. *Id.* (citing *Robinson v. Perpetual Servs. Corp.*, 412 N.W.2d 562, 565 (Iowa 1987)).

The district court found that the defendants told Brenda Pixler that they would cure her default knowing that they had no intention of curing the default. Instead, the defendants purchased the property for the contract balance. The defendants deliberately misled Brenda so that she would not cure her default. The defendants purchased the home for substantially less than it was worth under the guise to the seller that they were purchasing it so Brenda could live in the house. The court

concluded there was a resulting injury and damage, ie., Brenda Pixler's eventual loss of the property.

We conclude, based on the record, the district court did not err in finding fraudulent misrepresentation by defendants. A showing of resulting injury or damages, however, is an element in a fraudulent misrepresentation case. *Sanford v. Meadow Gold Dairies, Inc.*, 534 N.W.2d 410, 413 (Iowa 1995) (citing *Robinson*, 412 N.W.2d at 565)). We find Brenda Pixler has proven her cause of action and some damages. We reverse and order a new trial, however, to the district court for determination of the extent of her interest in the property and her damages. The record shows Brenda Pixler had a one-half undivided interest in the property with Doug Pixler. Brenda Pixler did not inform the trial court by any evidence what her interest in the home was following her divorce from Doug Pixler. We find it impossible for the trial court to have calculated her damages without this information when the damages are based on the value of the object which the plaintiff has an interest.

John Ngu brought an action for assault and battery against Brenda Pixler. The standard of review is for correction of errors. The district court found there was no evidence of any damages and denied any award to Ngu. We find no error by the district court.

We have considered defendant's other contentions on appeal to be without merit. We order a new trial as to the issue of the extent of Brenda Pixler's interest in the property and damages only. We affirm on all other matters.

AFFIRMED IN PART AND REVERSED IN PART.