

IN THE COURT OF APPEALS OF IOWA

No. 9-072 / 97-2130

Filed June 23, 1999

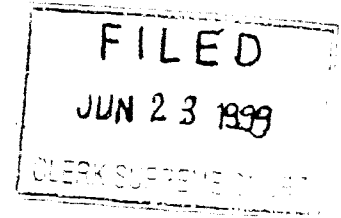
**DONALD L. BAKER and
ANGELINA M. BAKER,**

Appellants,

vs.

**KENNETH EUGENE BENSON and
MILDRED IRENE BENSON,**

Appellees.



Appeal from the Iowa District Court for Monroe County, Daniel P. Wilson,
Judge.

The plaintiffs appeal from the adverse judgment entered against them on their
claim for rescission of a real estate contract. **AFFIRMED.**

John A. Pabst of the Pabst Law Firm, Albia, for appellants.

Marvin V. Colton of the Colton Law Firm, Albia, for appellees.

Considered by Sackett, C.J., Streit, J., and Habhab, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

HABHAB, S.J.

Plaintiffs-appellants Donald and Angelina Baker appeal from an adverse judgment on their claim for rescission of a real estate contract. They contend the district court erred in finding scienter was an element of the claim, applying an erroneous burden of proof, and failing to rescind the contract. We affirm.

Defendants-appellees Kenneth and Mildred Benson listed their home for sale in late May 1995. They had lived in the home since its completion in 1968. Mildred prepared a Seller Disclosure of Property Condition form and did not list any significant structural problems. The Bakers toured the home at least three times with their broker. Once, they brought a local contractor to inspect the home. Neither the Bakers nor the contractor they had inspect the home found any apparent flaws. In obtaining financing, the local bank had the home appraised. The appraiser inspected the home in late June 1995 and opined the property was in very good condition.

The sale closed on July 13, 1995. The Bakers added a breakfast nook, moved a basement wall, and added a bench in the basement prior to moving into the home in August 1995. When they moved in, they noticed several problems, including cracks in some of the bedroom, hallway, and kitchen walls, difficulties in opening doors, a large crack in the garage floor, and a crack in the foundation of the home. They contacted the bank's appraiser who inspected the home again. He acknowledged these problems were not apparent during his inspection in June. The Bakers contacted their insurance carrier, and the home was inspected by engineers in October 1995.

They opined the cracks were minor and did not find major structural defects. The Bakers had the home inspected again in July 1996. The Bensons had engineers inspect the home in April 1997. One engineer opined:

[T]he minor cracks that appear through the home are not the result of movement of the soils supporting the home and certainly do not constitute a major structural defect. In all likelihood, they have existed since the home was built, but because they are so slight, were never thought to be significant by the previous home owners.

The Bakers filed a four-count petition against the Bensons. Prior to the bench trial, the Bakers withdrew three of the four claims. The only claim tried to the court was for misrepresentation. They sought rescission of the contract, the contract price with interest, and costs and damages. The Bakers based their claim, in part, upon the Bensons' alleged failure to disclose the problems in the Seller Disclosure of Property Condition form as required by Iowa Code section 558A.3 (1997).

The district court concluded the Bakers did not prove a material and false representation by the Bensons. It also found any breach was not substantial. In rendering its decision, the district court determined the elements of fraudulent misrepresentation must be established by a preponderance of "clear, satisfactory and convincing evidence."

On appeal, the Bakers claim the district court erred in holding scienter was an element of the claim and in applying an erroneous burden of proof. They argue *Hylar v. Garner*, 548 N.W.2d 864, 871 (Iowa 1996), establishes the elements for misrepresentation do not include scienter. The claim in *Hylar* did not involve

damages; it was an equitable action only for rescission. The Bakers also claim the trial court should have rescinded the contract based upon the Bensons' failure to disclose known defects in the disclosure statement. They argue the court may have relied upon the "as is" language in the listing agreement to preclude recovery.

The Bensons claim the Bakers did not tender the property, a necessary prerequisite to an action for rescission.

We have determined a party must prove the seven elements of fraudulent misrepresentation, including scienter, to prevail on a claim for rescission and damages. *Arthur v. Brick*, 565 N.W.2d 623, 626 (Iowa App., 1997) (involving a claim for damages, not just rescission). The Bakers' claim scienter is not an element fails. Concerning the district court's requirement the Bakers prove their claim by a preponderance of "clear, satisfactory, and convincing evidence," *Robinson v. Perpetual Servs. Corp.*, 412 N.W.2d 562, 565 (Iowa 1987), holds each of seven elements of fraud must be established by a preponderance of clear, satisfactory and convincing evidence. The district court required the correct burden of proof.

The Bakers also claim the Bensons failed to disclose known defects. Mrs. Benson testified she did routine maintenance and painting, including fixing minor cracks in walls when she would paint. The engineer's opinion quoted above accurately describes the Bensons' perception of the "defects" which form the basis of the Bakers' claim. We conclude the Bensons did not fail to disclose known defects on the Seller Disclosure of Property Condition form.

The Bensons' claim concerning tender of the property was not raised in the district court, so is not preserved for review on appeal.¹

Having considered all the claims raised by the parties, whether discussed specifically in this opinion or not, we conclude the district court committed no error in refusing to rescind the real estate contract or to award damages.

AFFIRMED.

¹ The Bensons rely on the general rule set out in *Test v. Heaberlin*, 254 Iowa 521, 524-25, 118 N.W.2d 73, 75 (1962):

Where a party is defrauded, upon acquiring knowledge thereof he must elect whether to rescind the contract because of the fraud or affirm it and claim damages. If a defrauded party elects to disaffirm he must do so promptly and must ordinarily restore or *offer to restore* what he received under the contract.

Id. (emphasis added).

The Restatement of Contracts, section 480(1), states, subject to certain exceptions not applicable here:

The power of any party . . . to avoid a transaction for fraud or misrepresentation is *conditional on an offer* made promptly after acquiring knowledge of the fraud or misrepresentation to return the amount of any money or other performance received as part of the transaction, in substantially as good condition as when received by him, . . .

Restatement of Contracts § 480(1) (citation omitted; emphasis added); *see also Mills Co State Bank v. Fisher*, 282 N.W.2d 712, 714 (Iowa 1979) ("[D]efendant's failure to promptly attempt to return the note proceeds . . . upon discovering the fraud . . . amounted election against rescission.").

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