FILED
APR 29 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

LARRY FALLER,	)	
Plaintiff-Appellee,	)	Filed April 29, 1980
vs.	)	
CITY OF SIOUX CITY, IOWA,	)	0-48 2-63227
Defendant-Appellant.	)	

Appeal from Woodbury District Court - David J. Blair, Judge.

Defendant appeals judgment for plaintiff in negligence action arising from defendant's demolition of plaintiff's building. Affirmed.

James L. Abshier, City Attorney, and Michael S. Walsh, Assistant City Attorney, Sioux City, for defendant-appellant.

Timothy W. Shuminsky of Shuminsky & Shuminsky, Sioux City, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Defendant appeals judgment for plaintiff in negligence action arising from defendant's demolition of plaintiff's building. For reversal, defendant asserts its employees exercised due care in recommending and commencing demolition of plaintiff's building, which allegedly was an imminently dangerous structure. Defendant further asserts plaintiff as contract-seller of this property lacks standing to maintain this action and is bound by judgment for defendant in a related action brought by the contract-buyer. We affirm the trial court decision.

Our review is limited to correction of errors at law. Iowa R. App. P. 4.

I.

Plaintiff was the contract-seller and legal titleholder to a building demolished by defendant under a municipal ordinance authorizing emergency demolition of imminently dangerous structures. On July 10, 1975, plaintiff filed a petition alleging defendant was negligent in its razing of his building. Following trial to the court, judgment for plaintiff was entered, awarding him $4,379.50 plus interest and discharging a lien on his property for demolition costs of $1057. Trial court concluded defendant failed to prove building was imminently dangerous within the meaning of the statute since the predicted collapse might occur in thirty days or more, rather than immediately. A related action brought by the contract-buyer of the property resulted in summary judgment for defendant. A similar motion in this action by defendant was overruled on the distinction that here, unlike the contract-buyer, plaintiff did not admit the building's state of disrepair.

Pursuant to complaints from neighbors of plaintiff's property, a city building inspector viewed the property at 1501 Main Street in Sioux City on April 9, 1975. During his inspection, he found the house foundation was buckling and bulging, front porch supports were pulled loose, and the driveway had a large hole in it. The building inspector reported his findings to his supervisor, the Director of the Health Department, and returned to the house later that day to place a placard on the house that stated the house was unfit for human occupancy. Returning to his office, he telephoned plaintiff and advised him the city was considering emergency action against the house. Later

that day, the inspector, the city engineer, the Public Service Director, the Director of the Building Inspection Division, further examined the property. An independent consulting engineer, employed to investigate the house's structural integrity, viewed the property on April 10, 1975. The Public Service Director, the Director of Building Inspection, and the independent architectural engineer all recommended immediate demolition of the structure, which in their opinion could collapse at any time. Based on these recommendations, defendant proceeded to demolish the house under the authority of Chapter 20.06, Municipal Code of Sioux City, Iowa (1975). Defendant's contractor began demolition on April 11, 1975.

II.

Defendant's first contention is trial court erred in not finding defendant's employees exercised due care in executing sections 20.06.020(3)(b) and 20.06.060, Municipal Code of Sioux City, Iowa (1975). Defendant correctly states the law that a municipality is immune from liability for a claim based on an act or omission of an employee exercising due care in the execution of an ordinance. Wilson v. Nepstad, 282 N.W.2d 664, 669 (Iowa 1979); § 613A.4, The Code 1975; see Harryman v. Hayles, 257 N.W.2d 631, 638 (Iowa 1977). In this case, establishing due care required proving the building was an imminently dangerous structure within the meaning of Chapter 20.06, Municipal Code of Sioux City, Iowa (1975), and immediate demolition was thus necessary and authorized by law.

The trial court found defendant failed to prove plaintiff's building was an imminently dangerous structure since defendant's evidence indicated the building was no more likely to collapse within one day than thirty or more days. This uncertainty, according to the trial court, did not create an imminent danger characterized by an immediate risk of harm. This fact finding must be affirmed if there is substantial evidence supporting it. Iowa R. App. P. 14(f)(1). See generally Leppo v. City of Petaluma, 20 Cal. App. 3d 711, 719, 97 Cal. Rptr. 840, 844 (1971); Jackson v. City of Columbus, 41 Ohio App. 2d 90, 96-97 322 N.E.2d 283, 288 (1974). Defendant had the burden of proof on this issue. Iowa R. App. P. 14(f)(5).

An imminently dangerous structure is defined in the city ordinances as a building in danger of immediate collapse of all or any part of its structure and thereby poses an

imminent, immediate danger to the health and safety of the general public or adjacent property. § 20.06.020(b), Municipal Code of Sioux City, Iowa (1975). Defendant was thus required to prove not only the building was in danger of immediate collapse, but also such a collapse posed an immediate danger to the health and safety of the general public or adjacent property. The trial court's adverse findings to defendant on both points are supported by substantial evidence in the record.

While defendant's employees testified to the dilapidated nature of the building and their opinion of an impending collapse, they did not predict a specific time for collapse or produce definite, articulable reasons why they considered collapse to be imminent. Even though defendant's evidence stands uncontradicted, a factual question was engendered as to reasonable inferences to be drawn from it. Iowa R. App. P. 14(f)(17).

Further, the location of the house presented no immediate health or safety problem to the general public or adjoining property. The building was bordered on the south by a vacated portion of 15th Street, on the east by Main Street, on the north by a vacant lot, and on the west by Perry Creek. The building was leaning to the west, so if it had collapsed it probably would have collapsed into the creek. The building was in a low-traffic, residential area, with no schools or playgrounds nearby. There was no showing of any threat to the health or safety of the general public or adjoining property. Trial court's fact-finding was supported by substantial evidence in the record.

III.

Defendant also contends plaintiff as a contract-seller lacked standing to sue for damages since the contract buyer brought a similar suit. Defendant argues that prior to mortgage foreclosure the mortgagor as legal title holder is the only proper party to bring suit for alleged damage to the contract security. See Mathews v. Silsby Brothers, 198 Iowa 1392, 1395-97, 201 N.W. 94, 95-96 (1924). Defendant then equates the contract-buyer here to the position of mortgagor. At this step, defendant's syllogism goes asunder since the contract-buyer holds not legal title, but equitable title. Junkin v. McClain, 221 Iowa 1084, 1089-90, 265 N.W. 362, 365 (1936); Wood v. Schwartz, 212 Iowa 462, 470, 236 N.W. 491, 494-95 (1931); Comment, Remedying the Inequities of Forfeiture in Land Installment Contracts, 64 Iowa L. Rev. 158, 161 n.29 (1978). Here, plaintiff as

contract-seller is the legal titleholder. Junkin, 221 Iowa at 1089-90, 265 N.W. at 365. The dicta in Mathews relied upon by defendant in fact supports plaintiff's position he possesses standing to bring this suit. Mathews, 198 Iowa at 1395-97, 201 N.W. at 95-96.

Defendant also seeks to use the concept of issue preclusion defensively. It argues the summary judgment granted it in the action brought by the contract-buyer precludes plaintiff from bringing this suit. Defendant's argument is without merit. The fatal flaw in defendant's argument is the lack of identity of the parties, namely the contract-buyer and plaintiff. See Mauer v. Rohde, 257 N.W.2d 489, 497 (Iowa 1977). In the first action, the contract-buyer admitted the building's state of disrepair, but plaintiff makes no such admission. Defendant failed to show plaintiff authorized the contract-buyer to make such an admission on his behalf. Since this issue was not litigated in the prior action, that action has no preclusive effect here. See Mauer, 257 N.W.2d at 497.

We affirm the trial court decision.

AFFIRMED.

All judges concur except Carter, J., who specially concurs.

CARTER, J. (specially concurring)

I concur in divisions I, II and the result. With respect to the issues considered in division III, I believe that ordinarily a contract purchaser's interests would be sufficiently similar to those of the contract seller with respect to involuntary demolition of the real estate that a judgment against the buyer should preclude a contrary result in an action by or against the seller. See Restatement, Judgments, section 85 (1942). This is not true in the present case, however. Here, the interest of the buyer was forfeited after commencement of her action but before the proceedings on the city's motion for summary judgment. This fact would have removed her incentive to defend against the motion to such extent that her defense was not likely to be representative of the seller's interests for purposes of applying issue preclusion. Under such circumstances the trial court correctly refused to apply issue preclusion to bar the seller's claim for damages.