IN THE COURT OF APPEALS OF IOWA

No. 1999-366 (9-619) / 98-1928
Filed May 10, 2000

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CLERK SUPREME COURT

FLETCHER LEASING CO.,
Plaintiff-Appellant/Cross-Appellee,

vs.

DENNIS CHARIPAR,
Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Linn County, William L. Thomas, Judge.

Fletcher Leasing Co. appeals, and Dennis Charipar cross-appeals from a district court judgment entered in Fletcher's action for breach of a real estate contract, and Charipar's counterclaim for return of earnest money. The parties dispute whether Charipar received proper permits in fulfillment of a condition within their real estate contract. They further dispute whether Charipar should be awarded damages for attorney fees. Fletcher argues the contractual conditions were performed through the county's issuance of proper permits to Charipar, and alternatively, that Charipar failed to make a good faith effort to obtain satisfactory permits. Charipar cross-appeals, seeking attorney fees due to Fletcher's failure to return the earnest money deposit. **AFFIRMED ON APPEAL, AFFIRMED IN PART AND REVERSED IN PART ON CROSS-APPEAL, AND REMANDED.**

Todd P. Forsythe, Cedar Rapids, for appellant.

William S. Vernon and Cynthia A. Scherrman-Sueppel of Moyer & Bergman, P.L.C., Cedar Rapids, for appellee.

Considered by Huitink, P.J., and Streit and Miller, JJ.

MILLER, J.

Fletcher Leasing Co. (hereinafter "Fletcher") appeals a judgment entered after non-jury trial. The district court found in favor of the defendant Dennis Charipar (hereinafter "Charipar") on both Fletcher's breach of contract claim and Charipar's breach of contract counterclaim, both arising out of a "Purchase/Sale Contract" for the sale of land by Fletcher to Charipar. The trial court ruled that a condition precedent to Charipar's performance did not exist. Charipar cross-appeals, claiming he is entitled to attorney fees as a result of Fletcher's breach in not returning Charipar's earnest money. We affirm on Fletcher's appeal, affirm in part and reverse in part on Charipar's cross-appeal, and remand.

Factual and Procedural Background

The facts of this case are relatively undisputed. In March 1997, Charipar presented a purchase/sale contract to Fletcher for the purchase of approximately thirty-five acres in Linn County. Charipar wished to use this property to begin a nursery/orchard business. This land was zoned agricultural. In order to operate such a business, Charipar would need to secure a "Conditional Use Permit" from Linn County. The offered purchase price was $120,000 and was expressly contingent "upon satisfactory confirmation that storage type building is permitted & acquiring proper permitting for a nursery/orchard wholesale & retail business." This offer was rejected by Fletcher. A second offer to purchase was made by Charipar one week later. This offer included a new proposed purchase price of $137,500, and included the following contingency: "Subject to and contingent upon: (1) Seller securing release from tenant by April 2, 1997 (2) Buyer securing

proper permits for a nursery/orchard wholesale & retail business and A storage type bu[illegible] Buyer to apply for these within ten days." This offer was accepted.

Charipar then applied for a conditional use permit for a wholesale and retail nursery and orchard. The application listed 5-8 vehicles per day. At a hearing before the Linn County Zoning Commission, Charipar told the commission his intent was mainly to operate a wholesale business, consisting of about 75-80% of his total business, with the opportunity to add retail sales if needed. Retail sales and the attendant traffic increase in the area became an immediate concern. The proposed site was not adjacent to a major traffic intersection or interchange. The Linn County Planning and Development staff of the Board of Adjustment expressed the opinion that "18th Street S.W. is gravel surfaced and is not generally adequate for the proposed use." The Linn County Zoning Commission approved the Conditional Use Permit, "subject to the staff report and overruled conditions as recommended by staff." At a meeting eight days later the Linn County Board of Adjustment added the following two conditions:

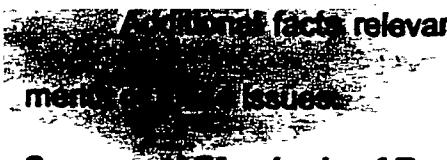
5. Board of Adjustment will review the business plan at the one year review. Specifically, the Petitioner shall document the amount of wholesale and retail activity.
6. The Board of Adjustment may schedule subsequent periodical reviews to insure that the retail sales are subordinate to wholesale sales and that the traffic generated by the Conditional Use is reasonable for this Conditional Use Permit.

At the Board of Adjustment meeting that resulted in the above two restrictions, Charipar was told the Board could add more restrictions at any time in the future for the conditional use to remain in place. Charipar told the Board that he wished to operate his business with 100% wholesale sales, but needed

the financial flexibility to include retail sales. He explained it took a period of one to five years to make certain wholesale parts of the intended business viable and he needed the flexibility to do certain types of retail business in the interim. He noted that there would be a problem with limiting retail sales to a certain percent of sales over the first year or more of the business. The Board made it clear, however, that retail sales were to be subordinate to wholesale sales.

After considering the restrictions placed upon his proposed business and different possibilities of lessening the restrictions, Charipar concluded the Board of Adjustments position was clear, and the restrictions and uncertainties made it unlikely his proposed business could operate a sufficient period of time to become economically viable. He requested the return of $10,000 earnest money. Fletcher did not return the earnest money and sued Charipar for breach of contract. Charipar answered, contending that the contract was not enforceable because contingencies in the Purchase/Sale Contract were not satisfied. Charipar also counter-claimed for a breach of contract, based on Fletcher's failure to return the $10,000 earnest money. Each party also requested attorney fees.

Following trial the court found for Charipar on Fletcher's breach of contract claim, and also found for Charipar on his counterclaim. The trial court denied Charipar's request for attorney fees, "since the contractual provision limits such attorney fees to situations where the seller fails to perform some action. Seller fully performed in this case." Each party appeals that part of the trial court's judgment that is adverse to it.


Additional facts relevant to the issues will be set forth in discussing the merits of the issues.

Scope and Standards of Review

This breach-of-contract case was pled as a law action and tried to the court. We review for correction of errors of law. Iowa R. App. P. 4. The trial court's findings of fact have the effect of a special verdict and are binding upon us if supported by substantial evidence. Iowa Rs. App. P. 4, 14(f)(1). We view the evidence in a light most favorable to the trial court's judgment. *See Van Oort Construction Co., Inc., v. Nuckoll's Concrete Service, Inc.*, 599 N.W.2d 684, 689 (Iowa 1999).

Principles of Contract Law

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 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. *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa 1999). A party breaches a contract when, without legal excuse, it fails to perform any promise which forms a whole or a part of the contract. *Id.*

"Conditions precedent are ... those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available." *Mosebach v. Blythe*, 282 N.W.2d 755, 759 (Iowa App.1979). A determination that a condition precedent

[redacted] however, depend on the particular form of the words used, but rather [redacted] upon the intention of the parties gathered from the language of the entire instrument. *Gildea v. Kapenis*, 402 N.W.2d 457, 459 (Iowa App. 1987).

Principles of Agency Law

An agency relationship exists where there is "(1) a manifestation of consent by one person that another shall act on the former's behalf and subject to the former's control and (2) the consent of the latter to so act." *Benson v. Webster*, 593 N.W.2d 126, 130 (Iowa 1999) (quoting *Mermigis v. Servicemaster Indus., Inc.*, 437 N.W.2d 242, 246 (Iowa 1989)). The knowledge of an agent as to the purpose of the buyer in connection with the use of the item which is the subject matter of the sale is imputed to his principal. *Rasmus v. A. O. Smith Corp.*, 158 F.Supp. 70, 82 (N.D. Iowa 1958) (citing *Hughes v. National Equipment Corp.*, 216 Iowa 1000, 250 N.W. 154, 157 (1933)). In *Hughes*, our supreme court cited 2 C.J.S. 859, for the proposition that "it is a well settled general rule that a principal is affected with constructive knowledge, regardless of his actual knowledge, of all material facts of which his agent receives notice or acquires knowledge while acting in the course of his employment and within the scope of his authority, although the agent does not in fact inform his principal thereof." *Hughes*, 216 Iowa 1000, 250 N.W. 154, 157 (1933).

Merits

The Condition Precedent

The fighting issue is whether a condition precedent to Fletcher's right to Charipar's performance existed or occurred. More specifically, the issue is whether Charipar "secur[ed] proper permits for a nursery/orchard wholesale &

retail business." For the reasons that follow we conclude the trial court did not err in concluding he did not and that the condition precedent thus did not occur.

Fred Gibson served as Charipar's real estate agent in attempting to purchase to real estate from Fletcher. Charipar told Gibson of his need to be able to make both wholesale and retail sales. There is no substantial evidence he told Gibson, or in any manner suggested to him, that a permit would suffice which allowed operation only if wholesale sales exceeded retail sales or if retail sales were in some other manner restricted in relation to wholesale sales. Gibson's knowledge of Charipar's purpose is imputed to Fletcher, because Gibson also acted as agent for Fletcher in Fletcher's attempt to sell the real estate. *Rasmus v. A.O. Smith Corp.*, 158 F. Supp. 70, 82 (N.D. Iowa 1958). Charipar's purpose was then set forth in the Purchase/Sale Contract which Fletcher accepted.

The language in the contract "contingency" includes no limitations on the amount or percent of the intended business which could be wholesale or which could be retail. The "contingency" was clearly for Charipar's benefit, so he would be able to operate the business he contemplated.

If the "contingency" were satisfied, Charipar would be investing $137,500 in land and approximately $60,000 more in a building, equipment and stock. Retail sales would perhaps generate the bulk of the income for at least the first year or two. The requirement that retail sales be subordinate to wholesale sales made it highly unlikely the business would be able to generate sufficient income to support the business until wholesale sales could make it viable. Further, even if the Conditional Use Permit were issued and accepted, it could not be relied on

because new conditions or restrictions could be added and it could be revoked if they were not satisfied.

We conclude, as the trial court did, that Charipar did not obtain a "proper permit [ ] for a ... wholesale and retail business. ..."

Fletcher argues alternatively that Charipar failed to make a good faith effort to obtain a satisfactory conditional use permit, that he should "have gone back to Linn County and, at the very least, discussed the wholesale/retail condition." Charipar had discussed his business plans and needs with Linn County's Planning and Development Department staff, with the Linn County Zoning Commission and with the Linn County Board of Adjustment. The planning staff's concerns that substantial retail business would not be appropriate for the location were clear. Those concerns were discussed at the Zoning Commission meeting. They were discussed and acted on at the Board of Adjustment meeting. The Board of Adjustment rather clearly agreed with and accepted the planning staff's concerns and recommendations. We conclude, as did the trial court, that Charipar was not required to make further efforts to secure a proper conditional use permit.

Attorney Fees

The Purchase/Sale Contract provides in relevant part that the earnest money is

> *to be returned to BUYER in event* this offer is not accepted or *contingencies not met* ...

(emphasis added) and further provides in relevant part

> FAILURE OF SELLER TO PERFORM: In the event that SELLER fails to fulfill this agreement . . . the buyer shall have the

> [redacted] to proceed by any action or actions at law or in equity, and [redacted] agrees to pay costs and attorney fees. . . .

The contingency discussed above was not met. Under the parties' contract the earnest money was therefore to be returned to the buyer, Charipar. Despite Charipar's request, Fletcher did not return the earnest money or have its agent, Gibson, who held the money, do so. Fletcher failed to perform its obligation to return the earnest money and is liable for Charipar's attorney fees. This includes attorney fees on appeal. *See Bankers Trust Co. v. Woltz*, 326 N.W.2d 274, 278 (Iowa 1982). We conclude that part of the trial court's ruling and judgment which denied Charipar's request for attorney fees must be reversed and this case remanded to the trial court to fix and award Charipar trial and appellate attorney fees.

Disposition

We affirm on Fletcher's appeal, affirm in part and reverse in part on Charipar's cross-appeal, and remand to the district court to fix and award trial attorney fees on the existing record and appellate attorney fees following evidentiary hearing.

AFFIRMED ON APPEAL, AFFIRMED IN PART AND REVERSED IN PART ON CROSS-APPEAL, AND REMANDED.