FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

123

CHARLES and LINDA MOORE, d/b/a MOORE-McDOWELL,

Plaintiffs-Appellants,

vs

MAX and KATHRYN O. BAKER,

Defendants-Appellees.

Filed February 25, 1987

6-518
86-909

Appeal from the Iowa District Court for Decatur County (No. CL2037) - M. C Herrick, Senior Judge.

Plaintiffs appeal from the dismissal of an action to recover a real estate commission on theories of breach of contract and quantum meruit. **REVERSED AND REMANDED.**

Susan L. Ekstrom, of Ekstrom & Richardson, Des Moines, for plaintiffs-appellants.

Gary G. Kimes, of Reynoldson, Van Werden, Kimes, Reynoldson, Lloyd & Wieck, Osceola, for defendants-appellees.

Considered by Schlegel, P.J., and Hayden, and Sackett, JJ.

SCHLEGEL, P J. **124**

Plaintiffs appeal the dismissal of an action to recover a real estate commission on theories of breach of contract and quantum meruit. We reverse and remand for a new trial.

Plaintiffs alleged that they had provided certain services to defendants, including procuring a purchaser for certain real property that defendants were selling. Plaintiffs sought a real estate commission based on a written contract. A previous judgment in Decatur County in a related action, Law No. CL-1379, stated

> This action is based on this promissory note, the sum of $6,160.00, which admittedly was signed by the defendants, Max W. Baker and Kathryn O. Baker, and payable to Charles and Linda Moore, doing business as Moore-McDowell, Humeston, Iowa. No interest is provided in the note, but it specifically provides that the loan is for commission payable to be paid from the $40,000 down payment and under the terms of this contract the evidence shows without dispute really that the buyer, Chris Welker, has never paid the $40,000 which was due June 1st, 1982; and has not been able to pay it. There has been no delivery of deed to the Garden Grove property, which was also part of the down payment. It is the opinion and conclusion of the Court that the sale has never been completed actually. Under the terms of the note, itself, the $40,000 is not due and I think the evidence of the parties, especially Mr. Baker, shows that there was never any intention to pay this note until the $40,000 was paid on the principal. While they have received some interest on the balance, the buyer, of course, has had the possession of the farm and the proceeds from the farm so that ordinarily those two matters would balance out. They have also had the risk of improvements they made on this home, which they may be out.
>
> The court is going to find that the plaintiffs have failed to prove that there is anything due on this promissory note and have failed to prove the material allegations of the petition in this case, and the same should be, and it is hereby, dismissed by the Court at Plaintiffs' costs.

Defendants filed a motion to dismiss the second action asserting that it was barred by this previous judgment. The trial court dismissed the petition on the grounds set forth in the motion.

On appeal, plaintiffs assert that the district court erred in dismissing their petition on the grounds of issue preclusion. Our review of the trial court action is limited to errors of law. H & S Ltd. v. Andreola, 363 N.W.2d 592, 595 (Iowa Ct. App. 1984). Even where no findings of fact were made, the trial court decision will be upheld if any proper grounds appear on the record. Hastings v Espinosa, 340 N.W.2d 603, 608 (Iowa Ct. App. 1983).

In order to uphold the sustention of a motion to dismiss we must conclude that no state of facts is conceivable under which a plaintiff might show a right of recovery. Lakota Consolidated Independent School v. Buffalo Center/Rake Community Schools, 334 N.W.2d 704, 708 (Iowa 1983). A motion to dismiss is sustainable only when it appears to a certainty the pleader has failed to state a claim upon which any relief may be granted under any state of facts provable under the allegations. Warford v. Des Moines Metropolitan Transit, 381 N.W.2d 622, 623 (Iowa 1986). The trial court sustained defendants' motion to dismiss based on the defendants' claim that the issues raised by the plaintiffs were the same as those previously litigated.

We do not believe that plaintiffs' petition disclosed to a certainty that they had no claim to a real estate commission from the defendants. The trial court apparently believed that the doctrine of issue preclusion prevented the parties from relitigating issues raised and resolved in the previous action. We do not agree. Issue and claim preclusion are part of the doctrine of res judicata. The doctrine of res judicata is that an existing final judgment rendered on the merits is conclusive of rights, questions, and facts in issue. Jorge Const. Co. v. Weigel Excavating & Grading Co., 343 N.W.2d 439, 443 (Iowa 1984).

In recent years, Iowa courts have used the terms "issue preclusion" and "claim preclusion" in place of the generic term "res judicata." Bryan v. Hall, 367 N W 2d 251, 252 (Iowa Ct. App. 1985). Our courts apply a four-factor standard to be utilized in determining the applicability of issue preclusion:

1. The issue must be identical;
2. The issue must have been raised and litigated in the prior action;
3. The issue must have been material and relevant to the disposition of the prior action; and
4. The determination of the issue in the prior action must have been necessary and essential to the resulting judgment.

Hunter v City of Des Moines, 300 N.W.2d 121, 123 (Iowa 1981).

The earlier decision only referred to the issue of the promissory note. It did not refer to the issue of value of services rendered nor to the claim made for relief based on quantum meruit. These latter two issues are raised in the petition filed in the second action. These issues were neither raised nor litigated in the first action and therefore certainly could not have been necessary and essential to the resulting judgment. The doctrine of issue preclusion, therefore, should not have provided the basis for dismissal of the case at bar

We reverse and remand for a trial on the merits.

REVERSED AND REMANDED.