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IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

WILLARD SPAULDING and
RUTH SPAULDING,

Plaintiffs-Appellees,

vs.

WAYNE E. AKKERMAN, d/b/a AKKERMAN
ALL AREAS REAL ESTATE CO., and
LOIS AVANTS,

Defendants-Appellants.

Filed November 26, 1980

0-289
2-64026

Appeal from Polk District Court - Gibson C. Holliday, Judge.

Defendant realtors appeal from judgment for plaintiffs in an action brought by them to recover for defendants' breach of fiduciary duty in connection with the sale of plaintiffs' home. **AFFIRMED.**

Jeffrey G. Flagg, Des Moines, Iowa, for defendants-appellants.

Richard B. Margulies of Rosenberg & Margulies, Des Moines, Iowa, for plaintiffs-appellees.

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

PER CURIAM

Defendants, realtors, appeal from judgment awarding damages to plaintiffs as a result of defendants' conduct in the sale of plaintiffs' home. We affirm the trial court.

Plaintiffs' petition alleges that they listed their home for sale with defendant Avants, an employee of defendant Akkerman, that defendants used "fraud, deceit, coercion, duress and undue influence" to induce plaintiffs to sell their home to Akkerman's daughter and son-in-law. It is alleged that this action on defendants' part constituted a breach of fiduciary duty, a breach of contract, and negligence. It is further alleged that in addition to other damages sustained from such conduct plaintiffs are entitled to damages for intentional infliction of emotional distress and punitive damages.

The case was tried to the court. Subsequently, the court entered its findings of fact, conclusions of law and judgment finding that defendants had breached a fiduciary duty to the plaintiffs by revealing to defendant Akkerman's daughter and son-in-law information which gave them an advantage in the purchase of plaintiffs' home. Trial court further found that defendants used coercive sales tactics and misrepresentation to induce plaintiffs to sell their home and that plaintiffs had suffered \$3,000 in actual damages as a result. In addition, the court awarded \$1,000 for damages for intentional infliction of emotional distress, \$2,000 in punitive damages, and ordered that defendants return the real estate commission of \$1,820. This appeal is taken from that judgment.

I. We first consider defendants' contentions that the record does not establish their liability under the pleaded theories of breach of fiduciary duty, breach of contract, or negligence. In this regard we consider the issue of liability for \$3,000 actual damages found by the trial court and the order for restitution of the realtor's commission in the amount of \$1,820.

With respect to the \$3,000 awarded for actual damages the trial court found such award was proper under all three of plaintiffs' pleaded theories. In this law-tried action, the trial court's findings of fact have the effect of a special verdict. Iowa R. App. P. 4. Our review is only for correction of errors of law. *Id.*

In reviewing the record under this standard we conclude that there is substantial evidence to support the \$3,000 actual damage award under a theory of breach of fiduciary duty, breach of contract or both. Because the award is sustainable on these theories we need not consider whether this recovery may also be sustained on a negligence theory.

The relationship between real estate agents and brokers and their clients is a fiduciary one. Miller v. Berkoski, No. 64128, slip op. at 7-8 (Iowa Sup. Ct., Oct. 15, 1980); Miller v. Iowa Real Estate Commission, 274 N.W.2d 288, 292 (Iowa 1979). The nature of that relationship is spelled out in Githens v. Johnson, 195 Iowa 646, 649, 192 N.W. 270, 272 (1923):

It is elementary that an agent must be loyal in transacting the business of his principal. An agent is under the legal duty to fairly and fully disclose all facts within his knowledge germane to the subject-matter of the agency, and in the strictest good faith impart to his principal all information that would control, or have a tendency to influence the conduct of the principal. It is his duty to secure the highest price possible. It is his duty to inform his principal as to the true value of the land and to communicate any offers made therefor. He occupies a position of confidence, and must bear true allegiance to his principal. The principal has a right to rely on the statements of the agent in relation to the subject-matter of the agency. The agent must make a full, fair and prompt disclosure of all the circumstances affecting the principal's rights or interests.

The record contains substantial evidence to support the trial court's conclusion that defendants breached their fiduciary duties toward plaintiffs. The record reveals that defendant Akkerman advised his daughter, Mrs. Snogren, prior to the time she and her husband made an offer on plaintiffs' home that plaintiffs had to sell for health reasons and would accept less than the asking price. The record further indicates that when plaintiffs were reluctant to accept the Snogrens' offer, Akkerman, in the presence of defendant Avants pressured them into doing so. When they later balked at going through with the offer, Akkerman threatened them with a specific performance action. This evidence clearly indicates that defendants were not giving their undivided loyalty to the plaintiffs. Instead, they appeared to be more concerned with finding a low-priced home for the Snogrens at plaintiffs' expense, if necessary. Such conduct is a breach of defendants' fiduciary duty. Because the duties which defendants owed plaintiffs were contractual in nature, their conduct also amounts to a breach of the covenants in the listing agreement between the parties.

As to the amount of actual damages awarded (\$3,000 plus return of the commission), we believe the evidence supports such recovery. Although plaintiffs had previously agreed to accept a \$26,000 offer on their home with FHA terms (an offer similar to the Snogrens' \$26,000 offer), the record indicates plaintiffs were happy that the prior transaction was not finalized. At the time of the Snogren offer they no longer wished to accept FHA terms because the cost of required repairs would diminish their

net proceeds below an amount which they were willing to accept. As previously indicated, the record indicates defendants pressured plaintiffs into accepting the Snogrens' FHA offer. From the testimony it appears the result was that plaintiffs received about \$4,400 less in net proceeds than they had been willing to take. While there is no absolute assurance that plaintiffs would have received \$3,000 more in net proceeds had the defendants attempted to secure a conventional sale transaction, we believe the deprivation of plaintiffs' opportunity to attempt such a sale supports, on the present record, the \$3,000 award. Under the applicable law return of the broker's commission was also warranted. See e.g., Jones v. Sears, 258 Iowa 906, 140 N.W.2d 854 (1966).

II. The trial court also awarded plaintiffs \$1,000 in damages resulting from defendants' actions causing plaintiffs to suffer severe emotional distress. We find substantial evidence to support this award and affirm.

The elements of the tort of intentional infliction of emotional distress are found in Wambsgans v. Price, 274 N.W.2d 362, 365-66 (Iowa 1979): (1) outrageous conduct by the defendant; (2) defendant's intention of causing, or reckless disregard of the probability of causing, emotional distress; (3) plaintiff suffers severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. "Outrageous conduct" has been defined as "conduct exceeding all bounds usually tolerated by decent society." Meyer v. Nottger, 241 N.W.2d 911, 918 (Iowa 1976).

These elements are satisfied in the present case. Much of the evidence in this regard concerns the incident when defendants brought the Snogrens' offer to buy to plaintiffs' home. Avants had called Mrs. Spaulding earlier that day and asked if she and Akkerman could come over that evening with the offer. Mrs. Spaulding said yes, but pointed out that she had taken her husband to the hospital that day for an appointment and that they were both tired and did not want to have to sign anything. When defendants arrived, Mr. Spaulding was seated in his recliner. He was having difficulty breathing. Akkerman, however, told him in a very loud manner to get up to the table where he had the offer to buy. Mrs. Spaulding tried to follow Akkerman's presentation of dollar amounts with a calculator, but could not do so; her hand began to shake visibly. She further testified that she and her husband felt terrible about signing the offer, but felt they had no choice because of Akkerman's demanding and persistent manner.

After this incident, Avants became very persistent regarding the Spauldings' signing of the deed transferring the house to the Snogrens. This went on despite Mrs. Spaulding's frequent protests that she and her husband did not want to sign anything without having consulted with their lawyer. Avants said a lawyer was not necessary and that it would only cost them money. She also criticized their lawyer. At one point, she presented Mrs. Spaulding with a letter from the Snogrens threatening a suit for specific performance if the deed was not signed. In addition to the method in which the Snogren transaction was handled by defendants, there is also evidence of deliberate actions by defendant Akkerman seeking to force plaintiffs to buy another home unsuitable for their needs.

These circumstances were not without physical repercussions. Mrs. Spaulding testified that after the offer was signed with reluctance, she broke down and was unable to sleep that night. Dr. Walter Eidbo, plaintiffs' physician, testified that Mrs. Spaulding came to see him on April 15, 1977, complaining of dizziness brought on by the pressures of moving into a new home. She was "nervous and shook up"; her symptoms got progressively worse. He concluded that she had an anxiety reaction relating to the pressure to sell applied by defendants and that her pre-existing conditions were aggravated by the moving from their house.

We conclude, as did the trial court, that defendants' conduct in the sale of plaintiffs' house was outrageous and was done in reckless disregard of the probability of causing emotional distress. Plaintiffs suffered such distress which was caused by defendants' outrageous conduct. We affirm the \$1,000 award for plaintiffs in this regard.

III. Finally, defendants claim there is insufficient evidence to support the punitive damages award of \$2,000. "[P]unitive damages are not recoverable as a matter of right. In the same vein, it is understood the allowance of smart money rests with the fact-finder ... (citations) More to the point, this court has repeatedly sanctioned allowance of exemplary damages, where appropriate, by way of punishment to the actor and as a deterrent to others." Young v. City of Des Moines, 262 N.W.2d 612, 620 (Iowa 1978). See also Pogge v. Fullerton Lumber Co., 277 N.W.2d 916, 920 (Iowa 1979). We see no reason to disturb the award of punitive damages. Defendants' conduct warranted such an award. Particularly in view of the relatively small amount awarded, we cannot say the trial court abused its discretion in making its decision.

We have examined all of defendants' arguments on appeal and find no reason to disturb the judgment of the trial court. We therefore affirm.

AFFIRMED.