IN THE COURT OF APPEALS OF IOWA

No. 8-089 / 97-567

QC1, INC,

Plaintiff-Appellant,

vs.

IRIA, INC., ROGER LEESE, MEL FOSTER CO., INC. OF IOWA, and STANLEY BENISCHEK,

Defendants-Appellees.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, James R. Havercamp and Charles H. Pelton, Judges.

Plaintiff appeals from two district court orders granting summary judgment in favor of the defendants on plaintiff's claims of negligent misrepresentation.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Martha L. Shaff and Peter J. Thill of Betty, Neuman & McMahon, L.L.P., Davenport, for appellant.

Dennis J. Britt and Amy M. Britt, Davenport, for appellee-Iria, Inc.

Terry M. Giebelstein and Monique C. Gorsline of Lane & Waterman, Davenport, for appellees-Leese, Mel Foster Co., and Benischek.

Heard by Cady, C.J., and Sackett, and Huitink, JJ.

CADY, C. J.

QC1, Inc. appeals from the district court orders granting summary judgment in favor of IRIA, Inc. and Mel Foster Company. QC1 claims genuine issues of material fact exist regarding its claims of negligent misrepresentation, fraudulent misrepresentation, and nondisclosure. We affirm in part and reverse in part.

The facts giving rise to this case developed from the sale of commercial real estate in Scott County. The buyer, QC1, purchased a tract of land adjacent to a right of way owned by the Iowa Department of Transportation (IDOT). IRIA, the seller, advertised the land as frontage property. IRIA retained agents from the real estate company, Mel Foster Company (Mel Foster) to sell the property. Roger Leese was the listing agent and Stanley Benischek was the selling agent.

To market the property, Mel Foster put together a promotional brochure describing the land as containing 3800 feet of frontage property with 98.8 acres of land. Benischek took QC1 president, Dr. Michael Giudici, to view the frontage property. At the time of the inspection, the boundaries of the property had not been staked. Additionally, IRIA leased the land to a farmer who had tilled the land up to a fence line Dr. Giudici assumed to be the boundary of the land. Part of the land tilled by the farmer was in fact IDOT property.

At some point prior to the closing, Esther Christie, an IRIA shareholder, became aware the farmer was farming more land than IRIA actually owned. Christie did not notify Mel Foster Company or Dr. Giudici of this information.

On November 9, 1992, and again on January 9, 1993, Dr. Giudici signed agency disclosure forms stating the agents working for Mel Foster were "representing the seller's interest, their client, and owe duties of loyalty and faithfulness to the seller, but are obligated to treat all parties fairly."

The purchase agreement stated, "it is understood that no representations made by the real estate agent in the negotiation of this sale shall be relied upon unless incorporated herein or endorsed in writing." The agreement further provides:

> [t]he broker, the broker's agents, employees and associates must respond to all questions of the parties accurately and honestly and must disclose MATERIAL DEFECTS about which they have knowledge, but are not required to discover hidden defects in the property or give advice on matters outside the scope of their real estate licenses.

The purchase agreement also contained an addendum providing: "Seller to provide survey prior to closing. Subject to approval of Seller's attorney prior to January 4, 1994."

Christie solicited the survey on behalf of IRIA. Once the surveyor completed the survey, he delivered copies to Christie and to QC1's attorney. The survey copies were delivered approximately six months prior to the closing of the property. Christie did not personally notify Dr. Giudici or Mel Foster agents of the survey results prior to the closing.

The parties closed on the property in February 1994. Approximately one year later, IDOT offered QC1 the opportunity to purchase its right of way adjacent to QC1's land. Dr. Giudici believed QC1 had already purchased this land from IRIA.

QC1 later purchased the right of way land from IDOT, and instituted this action against IRIA and Mel Foster for negligent misrepresentation, fraudulent misrepresentation, and nondisclosure. Following the summary judgment hearing, the trial court dismissed QC1's claims against IRIA and Mel Foster.

On appeal QC1 maintains the district court erred by entering summary judgment in favor of the defendants. QC1 asserts genuine issues of material fact remain concerning negligent misrepresentation, fraudulent misrepresentation, and nondisclosure.

I. Standard of Review

We review a summary judgment ruling for errors at law. *See Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Farmland Mut. Ins. Co.*, 568 N.W.2d 815, 817 (Iowa 1997). Summary judgment may be entered if the record shows "no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." *Id.*; Iowa R. Civ. P. 237(c). Thus, we must determine whether a genuine issue of material fact exists and whether the court correctly applied the law. *See Schuver v. E.I. Du Pont de Nemours & Co. (Inc.),* 546 N.W.2d 610, 612 (Iowa 1996). We view the facts in the light most favorable to the party opposing the motion for summary judgment. *See Shriver v. City of Okoboji*, 567 N.W.2d 397, 400 (Iowa 1997). When the conflict in the record concerns only the legal consequences flowing from undisputed facts, entry of summary judgment is proper. *See Thompson v. City of Des Moines*, 564 N.W.2d 839, 841 (Iowa 1997).

II. Negligent Misrepresentation

It is generally recognized that persons who supply information, in the course of their business or profession, for the guidance of others in their business have a duty to use reasonable care in obtaining or communicating the information. *See Greatbatch v. Metropolitan Federal Bank*, 534 N.W.2d 115, 117 (Iowa App. 1995); Restatement (Second) of Torts § 552 (1977).[1] The cause of action founded on a breach of this duty is negligent misrepresentation. *See Beeck v. Kapalis*, 302 N.W.2d 90, 96-97 (Iowa 1981). We limit the duty in a negligent misrepresentation action to persons engaged in the business or profession of supplying information to others. *See Greatbatch*, 534 N.W.2d at 117. Without facts to show a person is in the business of supplying information to others, no duty arises. *Id.*

QC1 claims IRIA and Mel Foster negligently misrepresented the boundaries of the land it purchased. We consider the duties IRIA and Mel Foster owed to QC1 and the claims against them separately.

A. IRIA

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[1] The Second Restatement of Torts provides negligent misrepresentation occurs when:

> One who, in the course of his business, profession or other employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552.

QC1 must initially establish IRIA owed it a duty of care to support a theory of negligence. *See Greatbatch*, 534 N.W.2d at 116. Thus, in order to successfully establish IRIA negligently misrepresented the boundaries of the land it sold, QC1 must show IRIA is in the business of supplying such information to others. QC1 has failed to establish IRIA is in the business of supplying information concerning commercial real estate to prospective buyers. In fact, IRIA hired Mel Foster to market and sell its property. Therefore, as a matter of law, no duty can be imposed on IRIA because it is not in the business of supplying information in the transaction involved.

B. Mel Foster

Real estate brokers have a fiduciary relationship with their principals which creates a duty of fidelity and good faith. *Garren v. First Realty, Ltd.*, 481 N.W.2d 335, 337 (Iowa 1992); *Menzel v. Morse*, 362 N.W.2d 465, 474 (Iowa 1985). In addition, brokers are agents of the party who first employs them. *Garren*, 481 N.W.2d at 337. Generally, brokers cannot act for the buyer and seller in the transaction without the knowledge of both. *Id.*

In this case, the agents working for Mel Foster represented IRIA, the seller. QC1 acknowledged this by signing an agency disclosure form. Thus, the Mel Foster agents were not in an agency relationship with QC1 and did not owe QC1 fiduciary duties. However, despite the lack of agency relationship between QC1 and Mel Foster, Mel Foster owed QC1 a general duty not to negligently harm them. *See*

Gerard v. Peterson, 448 N.W.2d 699, 702 (Iowa App. 1989). Additionally, the disclosure statement signed by QC1 provided it would treat all parties fairly.

Unlike IRIA, Mel Foster is in the business of supplying information concerning real estate for the guidance of others. Mel Foster therefore has a duty to use reasonable care in obtaining or communicating such information. The questions of whether Mel Foster breached its duty to QC1 and whether QC1 justifiably relied on Mel Foster's representations are genuine issues of material fact. In particular, whether it was reasonable for QC1 to rely on the alleged negligent misrepresentations of Benischek after receipt of the survey and placement of the corner flags is a question for the fact finder. Summary judgment is therefore inappropriate with regard to this claim.

III. Fraudulent Misrepresentation

QC1 must prove seven elements to recover under fraudulent misrepresentation: (1) representation; (2) falsity; (3) materiality; (4) scienter; (5) intent to deceive; (6) reliance; and (7) resulting injury and damage. *See Arthur v. Brick*, 565 N.W.2d 623, 625 (Iowa App. 1997). The first three elements are usually treated as one element and are referred to as fraudulent misrepresentation. *Id.; Clark v. McDaniel*, 546 N.W.2d 590, 592 (Iowa 1996).

The failure to disclose a material fact *known* to the person who has a legal duty to inform the other contracting person of the matter can constitute fraud. *Clark*, 546 N.W.2d at 592 (for concealment to be actionable, the representation must "relate to

a material matter known to the party...which it is his legal duty to communicate to the other contracting party whether the duty arises from a relation of trust, from confidence, from inequality of condition and knowledge, or other attendant circumstances"). While no specific test in our case law exists for determining when a duty to reveal arises in fraud cases, "[a] misrepresentation may occur when one with superior knowledge, dealing with inexperienced persons who rely on him or her, purposely suppresses the truth respecting a material fact involved in the transaction." *Id.*(quoting *Kunkle Water & Elec., Inc. v. City of Prescott*, 347 N.W.2d 648, 653 (Iowa 1984)).

Although caveat emptor once precluded buyers of real estate from recovering damages in many cases, the more recent trend has been to enlarge the responsibility of the seller and restrict the application of caveat emptor. *See Arthur*, 565 N.W.2d at 625. Additionally, we have now dislodged the antiquated concept of caveat emptor in most business transactions, and, instead, require the "obligations of agents and fiduciaries, functioning in positions of trust and confidence, to perform their duties in complete candor, honesty, loyalty and good faith." *Id.* (quoting *Miller v. Berkoski*, 297 N.W.2d 334, 340 (Iowa 1980))[2].

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[2] Iowa Code section 558A requires a seller of real estate to complete a disclosure form which informs the purchaser of "the condition and important characteristics of the property and structures located on the property . . . ." Iowa Code § 558A.4(1). There is also liability on a transferor, broker, or salesperson if "that person has actual knowledge of the inaccuracy, or fails to exercise ordinary care in obtaining the information." Iowa Code § 558A.6(1). This section was not enacted at the time of the events giving rise to this cause of

QC1 asserts IRIA and Mel Foster fraudulently misrepresented the boundaries of the land it purchased and genuine issues of material fact exist concerning its fraud claim. Mel Foster had a contractual duty to respond to all questions of the parties accurately and honestly. IRIA similarly had a duty to truthfully represent the boundaries of the land it was selling. We believe questions of material fact remain on the fraudulent misrepresentation elements of the representations made, the scienter, intent to deceive, and reliance. There was evidence Christie was specifically told prospective buyers should be informed that the tenant farmer was tilling IDOT land. This was important information because it made it appear to observers that IRIA owned the IDOT land. Consequently, summary judgment is inappropriate with regard to QC1's fraudulent misrepresentation claim against IRIA and Mel Foster.

IV. Nondisclosure

As with fraudulent misrepresentation, genuine issues of material fact exist concerning nondisclosure. Mel Foster had a contractual duty to treat all parties fairly and to answer all questions honestly, and IRIA was contractually bound to deliver the property as described in the contract. We believe the question whether IRIA or Mel Foster breached duties to disclose the boundaries of the property remain genuine issues of material fact. Viewing the facts in a light most favorable to QC1, we therefore find summary judgment inappropriate.

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action.

V. Conclusion

In conclusion, we affirm the district court's grant of summary judgment regarding the negligent misrepresentation claim against IRIA. We reverse all other summary judgment findings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.