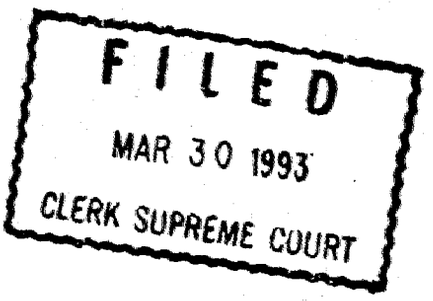
IN THE COURT OF APPEALS OF IOWA

No. 2-497 / 91-1830



NATIONAL PROPERTIES CORPORATION,

Appellee,

vs.

VISTA DEVELOPMENT CORPORATION,

Appellant,

and

KENNETH SMITH,

Defendant.

Appeal from the Iowa District Court for Polk County, Rodney J. Ryan, Judge.

Vista appeals trial court's ruling in this declaratory judgment action. **AFFIRMED AS MODIFIED.**

Douglas F. Staskal of Brick, Gentry, Bowers, Swartz, Stoltze, Schuling & Levis, P.C., Des Moines, for appellant.

John R. Mackaman of Dickinson, Throckmorton, Parker, Mannheimer & Raife, P.C., for appellee.

Considered by Oxberger, C.J., and Sackett and Habhab, JJ.

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HABHAB, J.

On April 28, 1989, Vista Development Corporation and National Properties Corporation (hereinafter "NPC") entered into an agreement for the purchase by NPC of a truck retread facility owned by Vista in a suburb of Wichita. The building was constructed by Pace Construction, an entity affiliated with Vista, for use by Goodyear. Vista leased the building to Goodyear and, as part of the sale, assigned the Goodyear lease to NPC. Pursuant to the agreement, Vista was to be responsible for repairs of all defects of the building for two years after NPC obtained possession.

On February 26, 1990, Goodyear reported to NPC after a property inspection that there was a general problem of foundation settlement. The report stated that the situation should be monitored periodically and that interim repairs should be made. Upon receipt of the report, NPC contacted Kenneth Smith, president of Vista. NPC subsequently reported to Goodyear that it had retained an engineering firm to assess and monitor the problem. Vista also retained an engineering firm, which prepared a report on the building problems in March 1990. The firm hired by NPC, Booker-Freund, also made an inspection of the building. NPC also retained Terracon, a soil testing firm. NPC incurred expenses of $10,976.16 in investigating the building problems. Vista incurred expenses of

approximately $400. Vista attempted to correct the problem.

NPC ultimately filed the present action against Vista, claiming that: (1) under the purchase agreement, Vista was responsible for all future defects caused by the movement of the foundation or floor because the defect manifested itself during the two-year guarantee period; and (2) Vista owed monetary damages to NPC for sums expended to inspect the building. At trial, Vista maintained that it had corrected the problem with the concrete slabs and that NPC had not complained of any problems since. Vista also argued that movement in the building was natural because of the poor soil conditions. The district court ruled that Vista was liable to NPC for future unspecified repairs pursuant to the purchase agreement. The district court also awarded NPC $5,483.46 in damages. Vista has appealed.

Although this is a declaratory judgment action, under Iowa Rule of Civil Procedure 267 we review it as any other judgment. Our scope of review is governed by how the case was tried in district court. Grinnell Mut. Reins. Co. v. Voeltz, 431 N.W.2d 783, 785 (Iowa 1988). This case was tried in equity, so our review is de novo. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when

considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. Justiciable Controversy

Vista's first contention is that there is not a justiciable controversy and therefore the trial court should not have granted a declaratory judgment. Vista argues that it repaired the defects and that any future problems are purely conjectural.

A justiciable controversy must exist to warrant an issuance of declaratory judgment. Betchel v. City of Des Moines, 225 N.W.2d 326, 330 (1975). The facts alleged must show there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant a declaratory judgment. Id. Further, Iowa Rule of Civil Procedure 262 provides "[a]ny person interested in a contract, oral or written, . . . may have determined any question of the construction or validity thereof or arising thereunder, and obtain a declaration of rights, status or legal relations thereunder." A contract may be construed either before or after there has been a breach thereof. Iowa R. Civ. P. 263.

NPC sought a declaratory judgment that Vista is liable for future repairs necessary because of floor and/or foundation movement. Vista claimed it was not liable for the movement of the building because it is a normal consequence of the condition of the soils on which the

building was constructed. We find there is a substantial controversy between the parties about how the contract should be construed. We therefore affirm the trial court's determination that a declaratory judgment was appropriate.

II. Vista's Liability for Building Shifts

When construing a written contract, the cardinal principle is that the intent of the parties must control, and except in cases of ambiguity, intent is determined by what the contract itself says. Iowa R. App. P. 14(f)(14). We may ascertain the meaning and legal effect of a contract by giving the language its common and ordinary meaning. Pappas v. Bever, 219 N.W.2d 720, 721 (Iowa 1974).

Paragraph 10 of the agreement between NPC and Vista is as follows:

> 10. REPAIRS AND MAINTENANCE. Seller agrees with Buyer that Seller shall remain solely responsible to Tenant for the completion or repair of all defects raised by the Tenant prior to, or for two years following Tenant's possession of the Land and Improvements, and Seller agrees to reimburse the Buyer for any loss of rent as provided by Paragraphs 1(f) and 10 of the lease.

It appears to be undisputed that some movement is occurring in the building. All three of the expert reports verified Goodyear's complaints and explained in explicit detail the cracks and differential movement between the building foundation and interior floor slab. The reports determined that the shifting will require continuing repair throughout the life of the building.

Vista contends paragraph 10 does not apply because there was no evidence that the building itself was improperly designed or that the problem was related to anything other than poor soil. Vista further argues that the soil condition of the Wichita area causes natural movements of the soil and that it should not be held accountable for such natural conditions.

We determine that movement in the floor and/or foundation is a defect under paragraph 10 of the contract. The movement requires the building to be continually monitored and is expected to cause future damage to the building. The movement manifested itself during the two-year period and Goodyear complained about the defect. We agree with the trial court that Paragraph 10 of the purchase agreement places upon Vista the sole responsibility for all repairs that are necessarily performed in the future that can be shown to be the natural consequences of the foundation wall settlement and floor movement, defects presently complained about by Goodyear. We therefore affirm on this issue.

III. Money Damages for NPC's Expenses in Investigating

Vista also contends that it should not have to pay half ($5,483.58) of the expenses NPC incurred in investigating Goodyear's complaint. In a letter dated February 26, 1990, Goodyear notified NPC that Goodyear's February 14, 1990, inspection revealed a general problem of foundation

settlement. Raymond DiPaglia, president of NPC testified that upon the receipt of the letter he called Vista's president, Ken Smith, and informed him of the problem. In a letter dated March 5, 1990, DiPaglia informed Goodyear of the following:

> I contacted Mr. Smith by phone and told him of your letter. He stated that he would send a representative to the job site to assess the problems as soon as possible. Additionally, National Properties Corporation will hire a Wichita area engineer to assess and monitor the problems outlined in your letter. (Emphasis added.)

So at least as early as March 5th NPC intended to hire its own experts. ETC, the expert hired by Vista, inspected the building and wrote his report on March 19, 1990. The two experts hired by NPC, Terracon and Booker/Freund, did not submit their reports on the building until April 18th and May 9th respectively. The Booker/Freund report relied on the ETC and Terracon reports.

After reviewing all the evidence, we determine that Vista investigated Goodyear's complaints within a reasonable amount of time and took steps to cure the damage which had occurred. The small delay did not give NPC the right to charge Vista for the costs NPC incurred in hiring its own experts. In addition, it appears from the responsive letter of March 5, 1990, by DiPaglia to Goodyear that NPC determined on its own to retain an expert. The record does not support a finding that NPC incurred this expense because Vista was slow in responding to Goodyear's

complaint. We modify the trial court on this issue by deleting the requirement that Vista pay one-half of the expense NPC incurred in investigating Goodyear's complaint.

IV. Hearsay Objection to the Testimony of Raymond DiPaglia

Vista's final contention of error is that the trial court erred in admitting testimony of Raymond DiPaglia over Vista's hearsay objection. Although we have some doubt as to whether the complained-of testimony was subject to a hearsay objection, we need not address the issue for there is no credible suggestion the trial court's findings were influenced by that testimony. In addition, in reaching our decision, we have given no consideration to the objected-to statement.

Costs of this appeal are assessed one-half to Vista and one-half to NPC.

AFFIRMED AS MODIFIED.