FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

34

ELMO I. CLEAVELAND and VIRGINIA CLEAVELAND,

Plaintiffs-Appellees,

vs.

GARY LALOR and BELLCO MIDWEST CORP.,

Defendants-Appellants.

8-445
88-332

Appeal from the Iowa District Court for Pottawattamie County (57586), Leo F. Connolly, Judge.

Defendants appeal the district court order overruling their motion for judgment notwithstanding the verdict or motion for new trial. **AFFIRMED.**

Michael G. Reilly of Perkins, Sacks, Hannan, Reilly & Petersen, Council Bluffs, for defendants-appellants.

Lyle A. Rodenberg, Council Bluffs, for plaintiffs-appellees.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

Defendants, Gary Lalor and Bellco Midwest Corporation, appeal the district court's order overruling their motion for judgment notwithstanding the verdict or, in the alternative, a motion for new trial, following a jury verdict awarding plaintiffs $10,000 each from Lalor and Bellco. Defendants contend that: (1) plaintiffs failed to prove their claim for fraud since neither defendant made false representations to the plaintiffs concerning repairs of the building plaintiff sold to Lalor; and (2) plaintiffs' decision to forfeit the real estate contract was an election of remedies preventing plaintiffs' fraud action.

In March 1985, the Cleavelands accepted Lalor's purchase offer to buy a commercial building for the purpose of turning it into a restaurant. Remodeling of the building was necessary in order to get the necessary permits to open the restaurant. Lalor hired Bellco Midwest to do some of the remodeling. During the remodeling, it was learned that there were structural defects with the kitchen floor. Lalor notified the Cleavelands and relayed to them Bellco's bid to repair the floor. The Cleavelands agreed and paid the bill of $1,428 following completion of the repairs.

Lalor's restaurant was unsuccessful and he forfeited his rights under the contract in 1986. Later, the

Cleavelands examined the repair of the floor and concluded it was unsatisfactory and that the bill was excessive for the work done. The Cleavelands filed this lawsuit claiming that Lalor and Bellco had defrauded them in the repair of the floor. After trial, the jury returned a verdict awarding the Cleavelands $10,000 against each defendant. The district court overruled the defendants' motions seeking to set aside this award. Both Lalor and Bellco appealed.

In considering defendants' motion for judgment notwithstanding verdict, our function is to review the evidence to determine whether it is sufficient so that the trial court was justified in submitting the question to the jury as trier of facts. Meeker v. City of Clinton, 259 N.W.2d 822, 828 (Iowa 1977). The court is required to view the evidence in the light most favorable to the party against whom the motions were made. Winter v. Honeggers' & Co., Inc., 215 N.W.2d 316, 321 (Iowa 1974). If there is substantial evidence in support of each element of plaintiff's claim, the motion should be denied. Valadez v. City of Des Moines, 324 N.W.2d 475, 477-78 (Iowa 1982).

I. Recovery in a fraud action is premised on plaintiff's ability to show by a preponderance of clear, satisfactory and convincing evidence each of the following elements: (1) representation; (2) falsity; (3) materiality; (4) scienter; (5) intent to deceive;

(6) reliance; and (7) resulting injury and damage. B & B Asphalt Co., Inc. v. T.S. McShane Co., Inc., 242 N.W.2d 279, 284 (Iowa 1976). Here, defendants apparently dispute the sufficiency of the evidence to submit the theory of fraudulent representation to the jury because they claim that neither defendant made false representations to the Cleavelands concerning the repairs of the building. We cannot agree. We conclude there was sufficient and competent evidence to raise a jury question on the issue of whether defendants fraudulently misrepresented facts upon which plaintiffs relied to their detriment and damage.

Testimony by both plaintiffs' expert, Robert A. Pingle, as well as defendant, Burton Bell, vice-president of Bellco Midwest Corporation, indicated that the total value of the work actually done, based upon exhibit photos #1-#6, was somewhere between $100-$150 (Pingle) and $155 (Bell), yet Lalor presented a bill to Cleaveland from Bellco for the amount of $1,428. In support of their bill, defendants claim that they encountered additional repair work once they started the job that was not represented in any of the photos or the evidence. The evidence also indicates that the Cleavelands relied upon both Lalor and Bellco's representations that the work had been completed in a workmanlike manner in accepting the bill and paying it and it was not until Cleaveland regained possession of the building that he discovered the slipshod nature of the work. Defendant Bellco further claims that, through its representative Burton Bell, it never made any representations to the Cleavelands because "Mr. Bell never spoke with or dealt with the Cleavelands at any time during the project, despite testimony from Lalor that he represented that the work had been done on behalf of Bell. Lalor similarly denies participation in the fraud despite his testimony.

We hold that the jury could have concluded from this evidence that defendants Lalor and Bellco intentionally misrepresented the value of their work, and that plaintiff Cleaveland detrimentally relied on this representation in paying the claimed expenses. We find no error in the submission to the jury of this issue.

II. Defendants further urge that the Cleavelands had no right to institute this action in the first place, and that, apparently, the district court lacked subject matter jurisdiction to entertain this suit because defendants' decision to forfeit the contract was an election of remedies barring plaintiffs' fraud action. Defendants cite Abodeely v. Carras, 221 N.W.2d 494, 498 (Iowa 1974), in support of their claim.

We find defendants' claim to be without merit. Abodeely stands for the proposition that when a vendee defaults in the performance of a real estate contract, the vendor may elect one of four remedies on the contract. The court stated that "[t]he remedy of the vendor by way of forfeiture of the contract and the continued liability of the purchaser for the purchase money are totally inconsistent and may not both be pursued." 221 N.W.2d at 498. This is a different case. Plaintiffs' fraud has nothing to do with the purchase installment contract and is an entirely independent action.

We affirm the trial court's order overruling defendants' judgment notwithstanding the verdict motion or motion for new trial.

AFFIRMED.