IN THE COURT OF APPEALS OF IOWA

FILED
MAY 3 1 1988
CLERK SUPREME COURT

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| **STEVEN B. KROTZ,** | ) |
| Plaintiff-Appellant, | ) |
| vs. | ) |
| **HILDA FREDERICK, a/k/a HILDA H. BJORNSEN, STANBROUGH REALTORS, BETTER HOMES & GARDENS OF FORT DODGE, IOWA, INC., ORKIN EXTERMINATING COMPANY, INC., and FIRST REALTY, LTD., d/b/a FIRST REALTY/ BETTER HOMES AND GARDENS** | ) |
| Defendants-Appellees. | ) |

Filed May 31, 1988

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Appeal from the Iowa District Court for Linn County (No. LA 13357) - Lynne E. Brady, Judge.

Plaintiff appeals from the district court's granting of the defendants' motions for summary judgment. **AFFIRMED.**

Mitchell E. Turner, Des Moines, for defendant-appellee Hilda Frederick, a/k/a Hilda H. Bjornsen.

Eric F. Schwarz, of Snyder & Schwarz, P.C., Rock Island, Illinois, for defendant-appellee Orkin Exterminating Company, Inc.

Peter C. Riley, of Tom Riley Law Firm, P.C., Cedar Rapids, for plaintiff-appellant.

Richard C. Garberson and Constance M. Alt, of Shuttleworth & Ingersoll, P.C., Cedar Rapids, for defendant-appellee First Realty.

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

**SACKETT, J.** 139

This is an appeal from the trial court's order granting summary judgment for all defendants in a termite damage case. We affirm.

Plaintiff-Appellant Steven Krotz bought Defendant-Appellee Hilda Frederick's house on November 1, 1982. Orkin Exterminating Company inspected the house on September 27, 1982 and found no active termites. In April or May 1983, Krotz first observed active termites in his home. He called an expert to examine the property. Krotz's expert discovered there was structural damage to the house caused by prior termite infestations.

Krotz sued Hilda Frederick and First Realty (formerly called Stanbrough Realtors) under theories of breach of contract, negligent misrepresentation, and fraudulent misrepresentation. He also sued First Realty for negligence. Krotz did not appeal that part of the trial court's order granting summary judgment to Orkin Exterminating Company and we do not address that issue on appeal.

In reviewing the grant of summary judgment, the question is whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. Kapadia v. Preferred Risk Mut. Ins. Co., 418 N.W.2d 848, 849 (Iowa 1988). We examine the record in a light most favorable to the party opposing the motion for summary judgment to determine if movant met his or her burden. Id. at 850.

1. **Breach Of Contract.** The uniform purchase agreement signed by Krotz and Frederick and dated November 1, 1982, contained the following provisions:

> STRUCTURAL PEST CONTROL REPORT: SELLER will furnish a structural pest control report by a Professional Exterminator and agrees to pay for any treatment necessary to free the premises of active structural pests.

At an open house on October 3, 1982, Krotz was shown an Orkin certificate entitled "Pest Control Reinspection Service," which evidenced the termite control service agreement between Frederick and Orkin. At the November 1 closing, Krotz was given the Orkin reinspection certificate, dated September 27, 1982. The certificate states:

> 1. Frederick had made no modifications to her house, which would invalidate her coverage, since the original treatment by Orkin.
>
> 2. The service rendered was an annual reinspection and the house was not retreated.
>
> 3. No evidence of swarms or tunnels was found.

Krotz argues the Orkin certificate does not comply with the contract provision requiring Frederick to furnish a structural pest control report. He claims the purchase agreement required Frederick to show there was no structural damage to the house caused by pests. We agree with the trial court that the only obligation under the contract is for Frederick to prove the house is free of active structural pests at the time of sale.

We hold that the Orkin certificate is a structural pest control report within the meaning of the purchase agreement. Krotz failed to show defendants breached the sales contract.

The trial court did not err in granting defendants' motions for summary judgment with regard to the contract claim.

**2. Fraudulent Misrepresentation.** The elements of fraud must be established by clear and convincing evidence. See Cornell v. Wunschel, 408 N.W.2d 369, 374 (Iowa 1987). Courts take that standard of proof into account in ruling on summary judgment motions. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202, 216 (1986). An essential element of an action in fraud is scienter (knowledge) of the false representation. See Robinson v. Perpetual Servs. Corp., 412 N.W.2d 562, 565 (Iowa 1987).

The fraudulent misrepresentation complained of was defendants' failure to disclose the existence of termite damage to the dwelling. See generally Annotation, Duty of Vendor of Real Estate to Give Purchaser Information as to Termite Infestation, 22 A.L.R.3d 972 (1968). We agree with the trial court the evidence fails to show knowledge of defendants of termite damage at the time of sale. See, e.g., Phoenix v. Stevens, 127 N.W.2d 640, 643 (Iowa 1964) (defendants knew no more about termites and damage caused by them than did plaintiffs); Berman v. Regna, 728 S.W.2d 285, 288 (Mo. Ct. App. 1987) (defendant realtor had no information structural damage from termites had occurred); Weaver v. Travers, 631 S.W.2d 81, 83 (Mo. Ct. App. 1982) (no evidence to establish defendants' knowledge of termite damage). Krotz fails to prove an essential element of fraudulent misrepresentation.

The trial court did not err in granting defendants' motions for summary judgment on the fraudulent misrepresentation claim.

**3. Negligent Misrepresentation.** Negligent misrepresentation merely requires that defendants failed to exercise reasonable care to obtain the truth of a communicated statement, but that they need not be aware the statement is false. Restatement (Second) of Torts § 552 (1977). See Beeck v. Kapalis, 302 N.W.2d 90, 97 (Iowa 1981).

An element of negligent misrepresentation is that defendants supply false information. See id. Krotz alleges the Orkin certificate indicates there were no past termite infestations, and that by providing the reinspection certificate, defendants represented the residence was not subject to prior termite damage.

We find Krotz's interpretation of the Orkin certificate to be contrary to its plain language. The certificate shows the house had been previously treated for termites; it does not make any representations regarding existing structural damage.

We find defendants did not make any representations on the subject of structural damage. Defendants did not supply false information to Krotz. Accordingly, an action for negligent misrepresentation does not lie. See Fraizer v. Southwest Savs. & Loan Ass'n, 653 P.2d 362, 367 (Ariz. Ct. App. 1982).

The trial court did not err in granting defendants' motions for summary judgment on the issue of negligent misrepresentation.

**4. Negligence.** Krotz claims Defendant First Realty breached its duty to inform him of prior termite infestations. We believe the Orkin reinspection certificate did in fact alert Krotz to the fact the house had had termites. We find no breach of duty by First Realty.

Krotz also argues First Realty negligently failed to discover the existence of structural damage caused by past termite infestations. The existence of a duty to conform to the legal standard of reasonable conduct is a prerequisite to establishing a claim of negligence. Larson v. United Fed. Savs. & Loan Ass'n, 300 N.W.2d 281, 285 (Iowa 1981).

The purchase agreement provides:

> INSPECTION. This offer is based upon my personal inspection or investigation of the premises and not upon any representation or warranties of condition by the SELLER or his agent. BUYER or his representative has the right to enter and inspect premises, prior to closing, and acknowledges, by deposit of final funds, that the property is acceptable and all equipment is in working order. . . .

In light of this provision, we hold First Realty had no duty, acting as a reasonable broker, to obtain an expert structural damage assessment.

The trial court did not err in granting First Realty's motion for summary judgment as to the negligence claim.

Krotz has failed under all of his theories to raise genuine issues of material fact and defendants are entitled to judgment as a matter of law.

**AFFIRMED.**