IN THE COURT OF APPEALS OF IOWA

No. 3-260 / 92-1307

FILED
JAN 25 1994
CLERK SUPREME COURT

RANDY L. FEAKER and **DENISE R. FEAKER,**

Appellees,

vs.

GREGORY C. BULICEK,

Appellant,

AL CAPONE, INC., An Iowa Corporation, and **JOHN T. SAATHOOF,** Custodian for Charles Joseph Bulicek, A Minor,

Defendants.

Appeal from the Iowa District Court for Linn County, Lynne E. Brady, Judge.

Appellant appeals the district court's ruling rescinding a contract and setting aside an award of punitive damages. **AFFIRMED.**

Richard D. Raymon, Cedar Rapids, for appellant.

Gregory J. Epping of Terpstra, Terpstra & Epping, Cedar Rapids, for appellees.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ.

DONIELSON, P.J.

In August 1990, Randy and Denise Feaker entered into a contract with Greg Bulicek. The Feakers agreed to purchase an ongoing business known as Riverside Steak and Ale, with an option to purchase the real estate. The Feakers were to tender $20,000 in cash and turn over the deed to real estate located on Ellis Boulevard, allegedly worth $70,000.

During the negotiations, Bulicek asked the Feakers to deed the Ellis Boulevard property to Al Capone, Inc., of which he was president. The Feakers refused and executed a deed to Greg Bulicek and Al Capone, Inc. When Bulicek recorded the deed, it had been changed to deed the property to Gregory Bulicek for Al Capone, Inc. The secretary of state subsequently dissolved the corporation for failure to file an annual report. The corporation then quitclaimed the deed to John Saathoff as custodian of Bulicek's minor son and then to Jeff Bulicek as custodian of Bulicek's son.

After learning there were liens on Bulicek's property and Bulicek was in default on the mortgage, contrary to the contract, the Feakers filed this claim seeking a rescission of the agreement. The Feakers subsequently purchased the mortgage from the bank.

Bulicek counterclaimed, alleging the Feakers had negligently and fraudulently misrepresented the value of the Ellis Boulevard property. He also resisted the rescission on the ground it would be impossible to return to the status quo after he had made substantial

improvements to the Ellis Boulevard property. Bulicek's claims proceeded to a trial at law by jury and, at the same time, the Feakers tried their claim in equity to the court.

The jury returned a verdict of $51,200 in actual damages and $30,000 in punitive damages against the Feakers. The court ruled in favor of rescission and awarded the Feakers $24,063.20 in damages against Bulicek.

The Feakers filed a motion for new trial, a motion for judgment notwithstanding the verdict, and a motion to quash the execution. Bulicek filed a motion for new trial and a 179(b) motion. Ruling there was insufficient evidence of aggravating circumstances to warrant submission of the issue of punitive damages to the jury, the court set aside the punitive damage award. The Feakers' motions were overruled in all other respects. The court overruled Bulicek's motion for new trial and 179(b) motion. The court overruled the 179(b) motion on the ground it was untimely filed. Additionally, by agreement between the parties, the court set off the judgments against each other. Bulicek appeals and the Feakers cross-appeal.

I. Scope of Review.

Initially, we consider the proper scope of review. The essential character of a cause of action and the relief it seeks, as shown by the complaint, determine whether an action is at law or equity. Nichols v. Schweitzer, 472 N.W.2d 266, 269 (Iowa 1991); Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents, 471 N.W.2d 859, 862 (Iowa

1991). The rescission portion of this action was pled and tried in equity. Therefore, we review de novo. Iowa R. App. P. 4; Risse v. Thompson, 471 N.W.2d 853, 856 (Iowa 1991). We give weight to the 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). The counterclaim for damages was tried at law. Therefore our review is for errors at law. Iowa R. App. P. 4. The trial court's findings of fact are binding on appeal if supported by substantial evidence. Iowa R. App. P. 14(f)(1); Risse, 471 N.W.2d at 857.

We note initially, after our review of the record on appeal, we are left with an impression similar to Judge Brady's as expressed in the findings of fact on July 2, 1992:

> This is a somewhat unusual story where two persons, namely: Mr. Feaker and Mr. Bulicek, who on one hand claim to be astute, successful businessmen, on the other hand claim that they were duped in a business deal by the other person. The testimony at trial left the undersigned with the feeling that there was more to the story than was heard from the witness chair.

The record suggests both parties were aware of the potential problems in this transaction. It appears they both made some attempt to resolve the difficulties when they arose. At some point the deal broke down, resulting in the claims and counterclaims with which we are faced.

II. Rescission of the Contract.

Appellant first argues rescission of the agreement was improper. The supreme court discussed the basic policy behind rescission in Maytag Co. v. Alward:

> There is no hard and fast rule on the subject of rescission, for the right usually depends on the circumstances of the particular case. It is permitted for failure of consideration, fraud in making the contract, for inability to perform it after it is made, for repudiation of the contract or an essential part thereof and for such a breach as substantially defeats its purpose. It is not permitted for a slight, casual or technical breach, but, as a general rule, only for such as are material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract. Failure to perform in every respect is not essential, but a failure which leaves the subject of the contract substantially different from what was contracted for is sufficient. If the party who seeks rescission has an adequate remedy at law, ordinarily he is not entitled to rescind, but in case of repudiation, or of a breach going to the root of the contract, unless the damages can be ascertained with reasonable certainty, rescission is a matter of right, with restitution instead of compensation.

Maytag, 253 Iowa 455, 465-66, 112 N.W.2d 654, 660 (1962) (quoting approvingly Callanan v. Keeseville Ausable Chasm & L.C.R. Co. (Powers), 119 N.Y. 268, 281, 92 N.E. 747, 752 (1910)).

Before rescission may be granted, three requirements must be met: (1) the party seeking rescission must not be in substantial default, (2) the breach must be substantial and go to the heart of the contract, and (3) the remedies at law must be inadequate. Potter v. Oster, 426 N.W.2d 148, 151 (Iowa 1988); Folkers v. Southwest Leasing, 431

N.W.2d 177, 182 (Iowa App. 1988); Maytag, 253 Iowa at 466, 112 N.W.2d at 660. "Rescission is a restitutionary remedy which attempts to restore the parties to their positions at the time the contract was executed. Potter, 426 N.W.2d at 151; see Restatement (Second) of Contracts § 344 (1979). We recognize, however, restoration of the parties to their position at the time the contract was made is not always possible. Sjulin v. Clifton Furniture, 241 Iowa 761, 769, 41 N.W.2d 721, 727 (1950).

After a careful examination of the record before us on appeal, we conclude the three requirements for rescission have been met. Appellee was not in substantial default of his obligations when he filed for rescission. He had conveyed the Ellis Boulevard property and paid to appellant, applied to repairs on the property, or escrowed the funds required by the contract. Appellant's breach concerning the liens went to the heart of the contract and was clearly prohibited. Because of appellant's financial position, especially concerning obligations to his former wives and children, a damage award would be inadequate. We recognize both properties were improved during the period of the contract, but determine returning the properties to their original owners in their improved state is equitable under the circumstances of this case. We therefore affirm the decision of the district court granting rescission of the contract.

III. Setting aside punitive damages.

Appellant next asserts the district court erred in setting aside the jury's award of punitive damages and finding insufficient evidence of aggravating circumstances to warrant submitting the issue to the jury. We disagree.

It is appropriate to award punitive damages only when the party acts with actual or legal malice. See Barnhouse v. Hawkeye State Bank, 406 N.W.2d 181, 184 (Iowa 1987). Such things as hatred, personal spite, or ill will demonstrate actual malice. Parks v. City of Marshalltown, 440 N.W.2d 377, 379 (Iowa 1989). Legal malice is demonstrated by wrongful conduct committed with a willful or reckless disregard for the rights of another. Id.; see Iowa Code § 668A.1(1)(a) (1991) (requiring "willful and wanton" disregard for the rights or safety of another). In order for conduct to be willful and wanton, the party must do an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow. See Fell v. Kewanee Farm Equip. Co., 457 N.W.2d 922, 919 (Iowa 1990) (quoting Prosser & Keeton on Torts, § 34, at 213 (5th ed. 1984)). If room exists for reasonable minds to disagree over the relative risks and benefits of the conduct at issue, punitive damages are not appropriate. Larson v. Great West Cas. Co., 482 N.W.2d 170, 174 (Iowa App. 1992) (citing Kehm v. Procter & Gamble Mfg. Co., 724 F.2d 613, 623 (8th Cir. 1983)). Iowa Code section 668A.1(1)(a)

requires proof established by clear, convincing, and satisfactory evidence, a higher standard than a mere preponderance of evidence. Id. Conduct which is objectionable is not enough to support a claim for punitive damages. See Coster v. Crookham, 468 N.W.2d 802, 811 (Iowa 1991).

There is no direct evidence of malice in the record. Appellee's actions show he acted to protect himself and his interests when disputes arose. Although the effect of his actions was to cause injury to appellant, we conclude appellee's conduct was not so improper as to raise any inference of legal or actual malice. Therefore we determine the trial court did not err in setting aside the award of punitive damages for insufficient evidence.

IV. Directed verdict on punitive damages.

Appellant finally asserts the court erred in directing a verdict in favor of appellee on the issue of punitive damages. We disagree. A directed verdict is appropriate in cases where each element of the claim is not supported by substantial evidence. Oberreuter v. Orion Indus., Inc., 398 N.W.2d 206, 209 (Iowa App. 1986). A court ruling on a motion for directed verdict must view the evidence in the light most favorable to the nonmoving party. Beitz v. Horak, 271 N.W.2d 755, 757 (Iowa 1978); Iowa R. App. P. 14(f)(2). Movant is considered to have admitted the truth of all evidence offered by nonmovant and every favorable inference that may be deduced from it. B & B

Asphalt Co. v. T. S. McShane Co., 242 N.W.2d 279, 284 (Iowa 1976). To overrule the motion, the court must find substantial evidence in support of each element of nonmovant's claim. Beitz, 271 N.W.2d at 757. If reasonable minds could differ, an issue is for the jury. Harvey v. Palmer College of Chiropractic, 363 N.W.2d 443, 444 (Iowa App. 1984). The trial court is vested with considerable discretion in determining whether evidence is sufficient. Hoover's Hatchery, Inc. v. Utgaard, 447 N.W.2d 684, 687 (Iowa App. 1989). Since the district court had already determined the evidence was not sufficient to support an award of punitive damages, then there was not substantial evidence to support every element of the claim. Therefore, a directed verdict was appropriate.

V. Sufficiency of the evidence of misrepresentation.

Appellees assert in their cross-appeal the trial court erred in denying their motion for a directed verdict on appellant's claim for damages, arguing the evidence was insufficient to send the issue to the jury. We disagree. The evidence in the record concerning the valuation placed on the Ellis Boulevard property and the representation of the rental income of the property is sufficient to withstand a motion for a directed verdict. Based on the principles discussed in the previous section, we conclude the issue was properly submitted to the jury. The district

court did not err in refusing to direct a verdict for appellees.

AFFIRMED.

Schlegel, J., concurs; Sackett, J., specially concurs without opinion.