IN THE COURT OF APPEALS OF IOWA

FILED
DEC 22 1988
CLERK SUPREME COURT

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DALE C. GRIFFITH and MAISEL E. GRIFFITH,	)	
Plaintiffs-Appellants,	)	
vs.	)	
CONTRACT EXCHANGE CORPORATION, DWAYNE KELLEY, BANC IOWA, ANTHONY SCHUBERT, MARK J. HERZBERGER and DEANNA S. HERZGERGER,	)	8-125 87-517
Defendants-Appellees.	)	

Appeal from the Iowa District Court for Linn County (12697), William R. Eads, Judge.

The purchasers of a vendor's interest in a real estate contract appeal the district court's ruling in their favor on the issue of damages. **AFFIRMED.**

John H. Ehrhart and Jon M. McCright of Fisher, Ehrhart & McCright, Cedar Rapids, for plaintiffs-appellants.

Stephen A. Swift, Cedar Rapids, for defendants-appellees Herzberger.

Gregory D. Kingery of Ackley, Kopecky & Kingery, Cedar Rapids, for defendants-appellees Kelley and Banc Iowa.

Edward M. Blando of Elderkin, Pirnie, Von Lackum & Elderkin, Cedar Rapids, for defendants-appellees Schubert and Contract Exchange Corp.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

SCHLEGEL, J. 96

This case involves a claim for damages arising from the sale of a vendor's interest in a real estate contract. Appellants Dale and Maisel Griffith, purchasers of the vendor's interest, claim that: 1) the trial court erred in ruling that the actions of the Herzbergers, the sellers of the property and the interest, and Tony Schubert and Contract Exchange Corporation (CEC), the broker of the vendor interest and his closely held corporation, were not fraudulent; 2) the trial court erred in ruling that the actions of Dwayne Kelley and Banc Iowa, the appraiser and his employer, were not constructively fraudulent; 3) the trial court erred in ruling that the negligence of the Herzbergers was not the proximate cause of the Griffiths' damages; 4) the trial court erred in ruling that the actions of Dwayne Kelley and Banc Iowa did not constitute negligent representation; and 5) the trial court erred in its determination of damages.

Our review is for the correction of errors at law. Iowa R. App. P. 4. The trial court's findings are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). In evaluating the sufficiency of the evidence, we view it in its light most favorable to sustaining the court's judgment. Hall v. Wright, 261 Iowa 758, 156 N.W.2d 661 (1968).

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In June 1979, defendant Mark Herzberger purchased a home in Cedar Rapids, Iowa. He obtained a mortgage loan in order to make the purchase. In 1981 he and his wife decided to move from their home and listed it for sale with Hoeger and Associates at a listing price of $51,950. The balance that remained due on the loan was approximately $39,500.

On April 3, 1981, the Herzbergers received an offer to purchase the home for $56,000 from Patrick K. O'Neal. The Herzbergers accepted the offer, which provided for a purchase price of $56,000 on contract with a down payment of $5,000, the balance of $51,000 to be carried on a Uniform Sales Contract. The offer was subject to the approval of Contract Exchange, a corporation in the business of buying and selling vendor interests in real estate contracts.

Anthony Schubert, sole shareholder and operator of Contract Exchange, was contacted on April 6, 1981, by the Herzbergers' realtor, who was attempting to arrange the marketing of the vendor interest. Schubert quoted a purchase price of $8,900; Schubert was to pay $8,900 to the Herzbergers in exchange for the right to receive $51,000 from O'Neal, less the amount remaining on the underlying mortgage loan which would be assumed. The effect of this type of arrangement was to make the transaction a cash sale for the Herzbergers.

On April 6, 1981, Banc Iowa was asked to conduct an appraisal of the residence. Dwayne Kelley, an employee of Banc Iowa, took the appraisal order over the phone and did the appraisal, which estimated the market value, as of April 6, 1981, to be $56,000. This appraised value equaled the actual sales price.

On or about April 11, 1981, Schubert met with plaintiffs Dale and Maisel Griffith to discuss possible investment in the residence. At this meeting, the plaintiffs agreed to purchase the contract vendor interest for $10,000. Griffith was to receive monthly payments from O'Neal which was to yield Griffith a return on his investment. On April 22, 1981, Schubert agreed to purchase the contract from the Herzbergers. On April 28, 1981, Schubert and the Griffiths met to close their end of the deal. The Griffiths paid what remained due on their purchase of the contract vendor interest. That same day, a final closing was held. At this closing, the Uniform Sales Contract was executed by the Herzbergers and O'Neal. This contract stated that the sale price was $56,000,and that this sum was payable as follows: "[$5,000] on the execution of the agreement, and the balance . . . in payments . . . ." This document states that $5,000 was paid and received as a down payment, however, it was the Herzbergers who paid the $5,000 on that date.

O'Neal later defaulted on his obligations. Through a forfeiture proceeding, the Griffiths obtained possession of the house and continued to make payments on the underlying mortgage. They attempted to sell the property up to the time of trial.

The district court awarded the Griffiths actual but not punitive damages against Schubert and his corporation, finding negligence but not fraud against these two defendants. The court also held that the other defendants were not liable.

I.

The Griffiths first claim that the trial court erred in ruling that the actions of the Herzbergers and Contract Exchange (Tony Schubert) were not fraudulent. In order to prove fraud, it was necessary for the Griffiths to establish each of the following elements by a preponderance of clear, satisfactory, and convincing evidence: 1) representation, 2) falsity, 3) materiality, 4) scienter, 5) intent to deceive, 6) reliance, and 7) resulting injury and damage. Grefe v. Ross, 231 N.W.2d 863, 864 (Iowa 1975) (citing Hall v. Wright, 261 Iowa 758, 766, 156 N.W.2d 661, 666 (1968)).

A. The Herzbergers. The Griffiths allege that the signing of the Uniform Sales Contract on April 28, 1981, was conduct by the Herzbergers which asserted the existence of a fact, that fact being that the sales price on the home

was $56,000, and that a down payment had been made to them in the amount of $5,000. The Griffiths further allege that this representation was false because the Herzbergers made the $5,000 payment upon closing, thus reducing the actual sale price to $46,000, and was material, because the price at which a property is sold would be a factor that a reasonable person would consider in deciding whether to purchase the contract vendor's interest in the property. They further allege that the Herzbergers' material misrepresentation of the sale price was made with scienter and intent to deceive, and that their reasonable reliance on the material misrepresentations resulted in their injuries.

Upon our review of the record, we believe there is substantial evidence to support the trial court's findings that the Herzbergers' actions failed to constitute fraud. We are particularly concerned here with the allegation that the Herzbergers had actual knowledge of the falsity of the representation made, see Grefe, 231 N.W.2d at 867, or were reckless in their representations. Id. Examined in the light most favorable to the findings of the trial court, we do not believe that the Herzbergers intentionally set out to deceive or mislead the Griffiths into their investment, or behaved in a level of reckless conduct similar to that found in Grefe. In Grefe, the evidence clearly demonstrated a reckless pattern of false and "grandiose"

representations and promises, by which the defendant induced the plaintiff to purchase an interest in the property in question. Such is not the case here, and we fail to find that the Herzbergers' actions constituted fraud.

B. Contract Exchange (Tony Schubert). The Griffiths claim that by representing O'Neal as a buyer capable of making the payments on the contract in question, Schubert and Contract Exchange defrauded the Griffiths. In our review of the facts and the applicable elements of law, we fail to reach this same conclusion. The trial court found that there was no deliberate intent on the part of Schubert to deprive the Griffiths of their money. In support of this finding, the court cited the fact that had McNeal made all of the payments, there would have been no need to even consider the value of the property. The court also relied upon the fact that Schubert made it clear to investors such as the Griffiths that he was not a guarantor of the safety of the contract investments, as evidenced by the high interest rates.

The evidence fails to establish, by clear and convincing evidence, that Schubert's conduct constituted fraud.

II.

The Griffiths next claim that the actions of Banc Iowa through Dwayne Kelley, their representative, were

constructively fraudulent as a result of its fiduciary and/or confidential relationship with the Griffiths. As a preliminary matter, we note that this issue is properly before this court. Contrary to the assertions of Dwayne Kelley and Banc Iowa, Plaintiff's Motion to Amend Count I of the Petition to include claims of both actual and constructive fraud was consistent with the final judgment of the court. The court ruled on both the actual and constructive fraud theories. Accordingly, Plaintiff's Motion to Amend was de facto sustained.

A theory of recovery based on constructive fraud arises from a breach in a confidential or fiduciary relationship. Stout v. Vesely, 228 Iowa 155, 157, 290 N.W. 116, (1940). A confidential relationship arises when one person has gained the confidence of another and purports to act or advise with the other's interest in mind. Punelli v. Punelli, 364 N.W.2d 259, 261 (Iowa App. 1984). The gist of the doctrine is the presence of a dominant influence by one person over another, and the plaintiff must show this relationship by clear and convincing proof. Id.

The trial court failed to find the existence of any facts which indicated that Banc Iowa and/or Dwayne Kelley were in a confidential relationship with the Griffiths. The only findings of fact applicable to Banc Iowa and/or Dwayne Kelley with respect to this issue were as follows:

> 1. On April 6, 1981, Doug McVay, the listing agent, telephoned Banc Iowa and ordered an appraisal for the B Avenue property. McVay spoke

with Defendant Dwayne Kelley, who was an employee of Banc Iowa, which was then known as Bohemian Savings and Loan Association. McVay related that the sales price of the property was $56,000.00 on a private party contract.

2. On April 6, 1981, Dwayne Kelley, in his capacity as an employee of Banc Iowa, proceeded to appraise the property. He estimated the market value as $56,000.00.

3. He knew or should have known that the appraisal was for Schubert and knew the nature of Schubert's business. He also knew that potential investors would rely on his appraisal in making investment decisions.

4. Bank Iowa received a fee of $120.00 for its appraisal.

The trial court subsequently overruled plaintiffs' request in their 179(b) motion to specifically find the existence of a confidential and fiduciary relationship between plaintiffs and Banc Iowa and/or Dwayne Kelley. We find the facts to be supported by substantial evidence and affirm the trial court on this issue.

III.

Griffiths' next claim that the Herzbergers' negligence was the proximate cause of the Griffiths' damages. The trial court found that the Herzbergers were negligent in their handling of the transaction, but failed to find that this negligence was the proximate cause of the Griffiths' damages. An act is a proximate cause when the actor's conduct is a substantial factor in bringing about the injury. The plaintiff bears the risk of nonpersuasion in establishing the defendant's negligence as a proximate

cause in his injuries. See Adam v. T.L.P. Rural Elec. Co-Op, 271 N.W.2d 896, 902 (Iowa 1978).

We similarly agree that the Herzbergers' actions failed to constitute the "but-for" cause of plaintiffs' injuries.

IV.

The Griffiths next claim that the actions of Banc Iowa, through their employee Dwayne Kelley, constituted negligent misrepresentation. The tort of negligent misrepresentation occurs when:

> [O]ne who in the course of business, profession or 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 Section 552(1), Beeck v. Kapàlis, 302 N.W.2d 90, 97 (1981).

The Griffiths claim that Kelley failed to exercise due care in making the appraisal. They claim that he made a "rush" inspection of the property and estimated the value to be exactly equal to the sale price. They further claim that he had a pecuniary interest in supplying the information, knew that Schubert intended to supply the information to them, and that they justifiably relied on the appraisal in making their decision to purchase the contract interest.

We once again agree with the trial court's finding that plaintiffs have not established the elements necessary for

the tort of negligent misrepresentation. Wayne Larson, plaintiffs' expert valuation witness, testified at trial that he could not say that his valuation was any better than Kelley's valuation procedure or that Kelley's procedure was wrong, and that such valuations are a matter of opinion, within limits. Kelley's valuation of $56,000 was found to have been a reasonable figure and we agree. We find no merit in plaintiff's claim.

V.

The Griffiths finally claim that the trial court erred in its determination of damages. The trial court awarded the Griffiths their initial investment of $10,000 and their out-of-pocket expenses, which consisted largely of mortgage payments and property maintenance. The court deducted $1,300 in capital improvements, expenditures that the court felt were permanent improvements to the property; $14,400 the Griffiths received either from O'Neal or lessees of the property; $1,200 which equaled the amount the court felt the value of the house exceeded the mortgage balance; and about $3,800 which the court found to equal the amount that the Griffiths saved in taxes due to their losses.

Upon our review of the record, we find that the court's damage determinations are supported by substantial evidence and affirm the ruling.

The trial court's decision is affirmed in toto.

AFFIRMED.