IN THE COURT OF APPEALS OF IOWA

No. 1-120 / 90-1048

FILED
SEP 24 1991
CLERK SUPREME COURT

LAURANCE D. GOODWIN and **ELLINOR GOODWIN GREEN,**

Plaintiffs-Appellants,

vs.

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WARDWAY PLAZA PARTNERS, MERIDITH IC, MERIDITH IAC COMPANY, LAWRENCE E. FEIDLER, NATIONWIDE REDEVELOPERS II, BARRY M. KLEIN and **LOUIS STRAUS, JR.,**

Defendants-Appellees.

and

BALCOR REAL ESTATE FINANCE, INC.,

Intervenor.

Appeal from the Iowa District Court for Johnson County, Kristin L. Hibbs, Judge.

Plaintiffs appeal the district court's dismissal of their action for recovery of rent and termination of a long-term ground lease for Iowa City real estate known as the Wardway Plaza Shopping Center. **AFFIRMED.**

William L. Meardon and Timothy J. Krumm of Meardon, Sueppel, Downer & Hayes, Iowa City, for appellants.

Terry L. Monson and Michael J. Eason of Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, Des Moines, for appellees.

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

DONIELSON, J.

Plaintiffs Laurence D. Goodwin and Ellinor Goodwin Green are brother and sister. We will refer to them as the Goodwins. The Goodwins own a parcel of real estate in Iowa City, Iowa. They inherited this land from their father. In 1964 the father leased the land for sixty years to Hermel, Inc. Eventually defendant Wardway Plaza Partners acquired the leasehold interest. The other defendants in this case are partners in Wardway.

The Goodwins brought this suit against defendants claiming Wardway had breached the lease agreement by consistently paying the rent late. The lease provides the rent is payable on the first of each month in the amount of $1,333.33. Each of the Goodwins should receive a check for $666.67 each month. Most of the payments by Wardway were a few days late; however, some were months late. At the time of trial, all payments were current.

The Goodwins began holding on to their checks instead of depositing them. They also kept records of the late payments for purposes of bringing the present action. Mrs. Green wrote a letter to Wardway in November 1984 about the late payments. The Goodwins' counsel, William Meardon, wrote to Wardway in July and August 1986. This action was filed on October 26, 1987.

Balcor Real Estate Finance, Inc. intervened due to the Goodwins' allegation that the lease should be terminated because mortgages were placed upon the property in

violation of the terms of the lease. The district court found the Goodwins failed to meet their burden of proof on this issue. None of the mortgages encumbered the Goodwins' fee simple interest in the property.

The district court rejected the Goodwins' claim the lease should be terminated because Wardway was insolvent. No evidence was presented to show Wardway was insolvent except for the evidence that it tended to pay its rent late.

The district court found Wardway paid all unpaid rent within the cure period after receiving a written sixty-day notice of default. The court also refused to award punitive damages.

Wardway was ordered to pay the amount of the Goodwins' uncashed checks, plus some agreed amount of interest. The Goodwins filed a rule 179(b) motion because there was no actual agreement as to the amount of interest. However, before the court could rule on this motion, the Goodwins filed their notice of appeal.

I. This case was tried at law. Our scope of review is on assigned error only. Iowa R. App. P. 4.

II. The Goodwins contend they should have been awarded interest on the delinquent rent payments. They seek interest of 5% per year on all late payments, from the due date until the date received. They also seek interest on the unpaid rent from the date of the filing of the petition

until the date on which the payments were actually tendered.

The district court stated that the parties had agreed to some amount of interest. However, the parties had no such agreement. The Goodwins raised this issue in their rule 179(b) motion. Before the district court could rule on the motion, the Goodwins filed their notice of appeal.

A rule 179(b) motion is essential to preservation of error when a trial court fails to resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication. Farmers State Bank v. United Central Bank, 463 N.W.2d 69, 72-73 (Iowa 1990). Issues must be presented to and passed on by the district court before they may be raised and decided on appeal. Id. at 73. A trial court may not be put in error unless the issue was presented for ruling, and the failure to obtain a ruling is inexcusable unless the court refuses or fails to rule after a ruling is requested. Linge v. Ralston Purina Co., 293 N.W.2d 191, 195 (Iowa 1980).

We find the Goodwins failed to preserve error on this issue. While the Goodwins raised in their rule 179(b) motion the district court's failure to resolve the issue of interest, they failed to obtain a ruling on their motion. There is no claim the district court refused or failed to rule on the motion after it was submitted.

III. The Goodwins contend the district court should have awarded them attorney fees. The terms of the lease

provided for attorney fees to a prevailing party in a suit for default under the lease. The Goodwins assert they were forced to bring this suit by Wardway's default. They also feel they are the prevailing party in the suit.

Generally, the award of attorney fees is discretionary, not mandatory, and is reviewed only for abuse of discretion. See Sheer Construction, Inc. v. W. Hodgman & Sons, Inc., 326 N.W.2d 328, 334 (Iowa 1982). In this case both the Goodwins and Wardway prevailed on some issues. Neither party was clearly the prevailing party in the suit. We find the district court acted within its discretion in ordering each party to pay its own attorney fees.

IV. Finally, the Goodwins contend they should have been awarded punitive damages. They base their claim for punitive damages on three theories: (1) infliction of severe emotional distress; (2) conversion; and (3) wrongful acts, committed maliciously.

Punitive damages are always discretionary, and are not a matter of right. Berryhill v. Hatt, 428 N.W.2d 647, 656 (Iowa 1988). A breach of contract alone, even if intentional, will not form the basis of punitive damages. Id. Rather, the breach must also constitute an intentional tort, or other wrongful act committed with legal malice. Id. Legal malice may be established by showing wrongful or illegal conduct committed or continued with a willful or

reckless disregard of another's rights. Pogge v. Fullerton Lumber Co., 277 N.W.2d 916, 920 (Iowa 1979).

We hold the district court did not err in refusing to award punitive damages in this case. We do not find any evidence Wardway committed an intentional tort or any other wrongful act. There is no evidence Wardway's late payment of the rent was done with legal malice.

We affirm the district court on all issues.

AFFIRMED.