IN THE COURT OF APPEALS OF IOWA

No. 1-457 / 91-275

FILED
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CLERK SUPREME COURT

MIDWEST APPRAISERS AND LIQUIDATORS, LTD.,

Appellee,

vs.

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MICHAEL NICHOLLS and **LIBBIE BARNES,**

Appellants.

Appeal from the Iowa District Court for Linn County, L. Vern Robinson, Judge.

Defendants appeal the district court's judgment for plaintiff on its claim of breach of a contract for real estate commissions. **AFFIRMED.**

Richard D. Raymon, Cedar Rapids, for appellants.

Adrian T. Knuth, Anamosa, for appellee.

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

HABHAB, J.

Michael and Vicky Nicholls were the owners of an 80-acre tract of land in Linn County, Iowa. They had purchased the land on contract in 1979. A balloon payment was due in 1989, and they needed to sell a portion of the land in order to make the payment.

The Nicholls contacted Midwest Appraisers and Liquidators, Ltd. about selling approximately 65 acres of the land at an auction. The Nicholls sought to keep about 13 acres as a homestead and to operate a hog confinement business.

Paul Glenn is the sole officer and stockholder of Midwest. He advised the Nicholls there may be problems in obtaining approval for their plan from the Linn County Platting and Zoning Commission. The Nicholls decided to go ahead with their plan.

The Nicholls received a short-term loan to cover the balloon payment. They received the deed to the land on July 6, 1989. They executed a warranty deed to Libbie Barnes, Vicky's mother. This deed was filed on July 14, 1989. On that day Libbie executed a warranty deed to Michael and Vicky. This deed was not filed until December 8, 1989.

Michael Nicholls and Libbie Barnes entered into a written contract with Glenn which provided he would sell the land at an auction and receive a 3-1/2% commission plus all sale and advertising expenses, whether the sale was

completed or not. The contract was signed on August 21, 1989.

The auction was held on September 22, 1989. Two buyers, Joseph Moore and Jerome Seifried, offered $92,836.55 for the property. Nicholls signed the offer and acceptance of this bid, but Barnes did not. Nicholls claims he was acting as an agent for Barnes throughout the transaction. The Nicholls then attempted to gain approval from the zoning commission for their use of the 13-acre tract. The commission did not approve the plan. The Nicholls then decided to call off the sale. The purchasers agreed. Thereupon Glenn submitted a bill for his commission but the Nicholls refused to pay.

Glenn instituted this suit against Michael Nicholls and Libbie Barnes. Defendants claimed there had been an oral modification of the written contract in which Glenn had agreed to forego his commission. The district court found this argument was not supported by the evidence. The court concluded defendants had breached the written contract. The court entered judgment against defendants for $5,082.69, which represented $3,249.28 for commission and $1,833.41 for expenses. Defendants now appeal.

I.

In an action at law, review in this court is only on errors assigned and the matter is not triable de novo. Carson v. Mulnix, 263 N.W.2d 701, 705 (Iowa 1978). If the

district court's findings are supported by substantial evidence and justified as a matter of law, they are binding on us and the judgment will not be disturbed on appeal. Id.

II.

Defendants contend on appeal the written contract with Glenn was modified by a later oral modification. They claim all parties were concerned about the zoning problem and that finally Glenn agreed not to take a commission if the zoning commission did not agree to the Nicholls' plan.

A written contract may be modified by a subsequent oral one. Mosebach v. Blythe, 282 N.W.2d 755, 760 (Iowa App. 1979). Consent to the modification may be either express or implied from acts and conduct. Id. New consideration is necessary to support a contract modification. Recker v. Gustafson, 279 N.W.2d 744, 759 (Iowa 1979). Whether a contract has been modified by the parties is a question of fact. Mosebach, 282 N.W.2d at 760.

The district court here found there was not sufficient evidence of an oral modification. We hold the district court's decision is supported by substantial evidence. The only evidence to support the defendants' argument is Mike Nicholls statement that Glenn told him over the telephone his commission would be "no problem." We affirm the district court.

III.

Defendants contend the judgment should not have been entered against both Michael Nicholls and Libbie Barnes arguing that only Nicholls signed the agreement resulting from the offer and acceptance at the auction sale. They claim Barnes should not be considered responsible for the debt to Glenn because she did not sign that agreement.

Defendants admit Barnes did sign the commission agreement with Glenn. This is the agreement she is being held to and is the agreement whereby she agreed to pay a 3-1/2% commission plus expenses whether the sale was completed or not.

We affirm the district court's action of entering judgment against both Michael Nicholls and Libbie Barnes.

The district court is affirmed on all issues.

AFFIRMED.