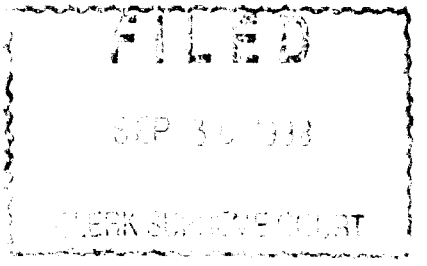
IN THE COURT OF APPEALS OF IOWA

No. 8-331 / 97-1019
Filed September 30, 1998



LARRY J. DEPPE and
DEBORA L. DEPPE,
Appellants,

vs.

JAMES MAYBERRY and
SUE MAYBERRY,
Appellees.

Appeal from the Iowa District Court for Johnson County, J. Hobart Darbyshire, Judge.

The plaintiffs appeal from the district court's ruling dismissing their action seeking rescission of a contract to purchase real estate from the defendants. **AFFIRMED.**

Michael J. McCarthy of McCarthy, Lammers & Hines, Davenport, for appellants.

Nancy S. Tabor and Mark Lawson of Baty and Tabor, Maquoketa, for appellees.

Considered by Cady, C.J., and Streit and Mahan, JJ.

STREIT, J.

The Deppes appeal from the trial court's dismissal, after trial, of their petition to rescind a contract with the Mayberrys based on alleged fraudulent misrepresentations. Because the Deppes have not proven representations made by the Mayberrys were false, their claim fails. The trial court is affirmed.

I. Background Facts & Proceedings.

On July 25, 1995, Larry and Debora Deppe entered into a written agreement to purchase an earth home from James and Sue Mayberry for $126,000.

Before closing, the Mayberrys delivered the Residential Property Seller Disclosure Statement required by Iowa Code section 558A to the Deppes. The disclosure form asked the following questions:

1. Basement/Foundation: Any known water or other problems? ...
2. Roof: Any known problems?, Any known repairs? ...
17. Physical problems: Any known settling, flooding, drainage or grading problems? ...
18. Structural damage: Any known structural damage?

The Mayberrys checked "no" in response to each of these questions. The Deppes moved into the home prior to closing. The Deppes did not notice any problems with water seepage before closing. On November 1, 1995, after the closing, the Deppes noticed water on the floor of the atrium and in the laundry storage area. The Deppes sought to rescind the contract claiming they would not have bought the home if they had known of the water problems. The Mayberrys refused to rescind.

In February 1996, the Deppes brought an action for rescission. The evidence at trial included a history of water seepage into the home. The original owner said during his possession he noticed water seepage in what became the laundry storage area and in the atrium area several times. He testified he told the Mayberrys of the seepage. The Mayberrys noticed water in the laundry area and the atrium only when they were remodeling the house. At that time, they took steps to remedy the seepage and did not notice any water after that. The Mayberrys' expert testified the seepage problem could be repaired for $3275. The Deppes' witness, a contractor, testified the cost of the repairs would be over $17,000. The Deppes continued to experience water leakage as of the time of trial.

At the close of the defendants' case, plaintiffs brought a motion to amend their petition to conform to the evidence, seeking damages based on the tort of fraudulent misrepresentation. The district court denied the plaintiffs' motion to amend their petition and dismissed the plaintiffs' petition for rescission. The Deppes appeal the court's dismissal of their petition to rescind.

II. Standard of Review.

A plaintiff's request for rescission of a contract is an equitable proceeding which is reviewed de novo. Iowa R. App. P. 4; *Breitbach v. Christenson*, 541 N.W.2d 840, 843 (Iowa 1995). We give weight to the fact findings of trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

III. Rescission Based Upon the Mayberrys' Responses on Disclosure Form.

The plaintiffs claim that the Mayberrys' responses on the disclosure form required by Iowa Code section 558A were fraudulent misrepresentations which justify rescission of the real estate contract.

The plaintiffs have not sought damages in tort, but only equitable rescission of the contract. Although they sought to amend their petition after trial to plead the tort of fraudulent misrepresentation, they have not appealed the trial court's denial of that motion.

Five elements are required to prove a party is entitled to equitable rescission. Those elements are: (1) representation; (2) falsity; (3) materiality; (4) intent to deceive; and (5) reliance. *Arthur v. Brick*, 565 N.W.2d 623, 625 (Iowa App. 1997). The element of scienter is not required in an action for equitable rescission. *Hyler v. Garner*, 548 N.W.2d 864, 872 (Iowa 1996).

The Mayberrys' responses on the disclosure form were representations.

The crux of this case is whether the representations were false. To satisfy the falsity element "it is necessary to establish that the representation was false at the time it was relied upon." *Magnusson Agency v. Public Entity Nat. Company-Midwest*, 560 N.W.2d 20, 28 (Iowa 1997)(citation omitted). The plaintiffs interpretation of the question "Any known water or other problems?" on the disclosure form required the Mayberrys to disclose not only problems existing at the time the form was prepared,

but any water problems in the history of the property. The Mayberrys' interpretation of the question "Any known water or other problems?" on the disclosure form required them to disclose only current water problems. The Mayberrys' interpretation of what the question on the disclosure required them to disclose was reasonable. Their answer to that question was truthful. At the time the residential disclosure form was prepared, to their knowledge, there were no water problems on their property. Because the Deppes have not offered sufficient evidence to prove the representations were false at the time they were made, they cannot establish their claim of misrepresentation. For this reason, there is substantial evidence supporting the trial court's dismissal of the petition for rescission.

AFFIRMED.