IN THE COURT OF APPEALS OF IOWA

EDWARD A. KIRWAN,

Plaintiff-Appellant,

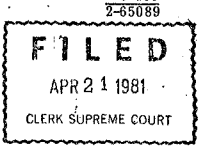
vs.

BJARNE A. PEDERSON and FIRST NATIONAL BANK IN SIOUX CITY, IOWA, Executor of the Hugh Allan McCoy Estate,

Defendants-Appellees.

Filed April 21, 1981

0-459
2-65089



Appeal from Woodbury District Court. David J. Blair, Judge.

Plaintiff appeals from judgment of the district court which held that he failed to prove damages in his action for breach of contract to develop certain farm land. AFFIRMED.

Craig Raby, of Crary, Huff, Yates & Clem, Sioux City, Ia., for plaintiff-appellant.

Dewie J. Gaul, of Jacobs, Gaul, Nymann & Green, Sioux City, Ia., for defendant-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

PER CURIAM

Plaintiff, Kirwan, appeals from a judgment of the district court which held that he failed to prove damages in his action for breach of contract to develop certain farm land. He claims that the evidence is sufficient to prove that he could have sold the land so that his share of the profit would have been at least $37,500. Plaintiff's petition also requested equitable relief and the case was tried in equity. Consequently, our review is de novo. Iowa R. App. P. 4. We affirm.

This is the second time that this case has come before us. In our first opinion, Kirwan v. Pederson, No. 2-62957 (Iowa Ct. App. filed December 27, 1979), we described the factual background as follows:

> Kirwan and Pederson had made arrangements for development of real estate in Sioux City. Those arrangements called for Pederson, a Nevada resident, to finance the purchase of real estate and for Kirwan to carry out the "leg work" in Iowa for the purchase and development of the land. For his efforts, Kirwan was to receive twenty-five percent of the profit on the resale of the land. When his efforts to sell the land were rebuffed by Pederson, Kirwan brought this suit to enforce terms of an alleged oral contract, supposedly later memorialized in a writing introduced at trial as plaintiff's exhibit 1. Additionally, Kirwan sought to establish the parties had a joint venture and he asked for dissolution of the joint venture and appointment of a receiver authorized to sell the real estate and distribute the profit under the terms of the parties' contract. The trial court found the oral agreement unenforceable as a matter of law because Pederson's promise to pay "was contingent upon the fulfillment of a condition within the discretionary control of the defendant - a circumstance which makes defendant's obligation illusory and not actual."

Slip op. at 1. The trial court also found that Pederson intended to develop the land, a 160-acre farm, as a residential subdivision.

We reversed the court's conclusion that the oral agreement was unenforceable "since the terms of the agreement were sufficiently specific and the parties intended to be bound by it even though it was not in writing," slip op. at 3, and remanded for a determination of damages due Kirwan, if any, based on the trial record. On remand, the district court ruled on April 21, 1980, that Kirwan presented no competent evidence on the issue of damages and therefore denied him any recovery. This appeal followed.

Kirwan testified that he received various offers to buy the undeveloped land at prices ranging from $750 to $1,500 per acre, whereas Pederson purchased the farm for

$58,000, or $362.50 per acre. Kirwan claims on appeal that these figures provide an adequate basis from which to calculate damages. "The plaintiff who seeks damages for profits prevented is required to introduce evidence that will enable those profits to be evaluated with reasonable certainty." King Features Syndicate v. Courrier, 241 Iowa 870, 882, 43 N.W.2d 718, 726 (1950).

We agree with the trial court that Kirwan did not provide the necessary evidence of damages. The evidence he presented concerned offers to buy the undeveloped farm. Under the oral agreement, however, the parties intended to develop the land first and then sell it at a profit for subdivision purposes. This is evident from Pederson's testimony that he told Kirwan that he wanted to subdivide the farm since there was "no way" he wanted to farm. Kirwan clearly presented no evidence that he incurred any costs; he admitted that Pederson was the only one who put any money into the deal. More importantly, Kirwan presented no evidence of what the land would be worth after development and how much profit would result upon resale. Given the fact that the parties agreed to sell the farm after development, this lack of proof of damages is fatal to Kirwan's argument.

We agree with the trial court that the record in this case does not permit a finding of damages for breach of contract. We therefore affirm its order denying recovery for Kirwan.

AFFIRMED.

Donielson, J. dissents, joined by Oxberger, C.J.

DONIELSON, J. (dissenting)

In my view, there is sufficient evidence to establish that the plaintiff could have sold this land at a profit to himself of at least $37,500. The fact that this evidence concerns offers to buy the land in its undeveloped state, rather than in its developed state as anticipated by the agreement, should not be controlling on the question of damages. The land is presumably worth less in its undeveloped than in its developed state. I would not preclude plaintiff's recovery of any damages merely because he is unable to present evidence establishing the greatest amount of damages to which he would be entitled under the agreement. In other words, merely because plaintiff cannot prove X amount of damages does not mean that he should be denied recovery of that portion of X that he can prove he is entitled to recover. I therefore would reverse the trial court's order and remand for determination of damages.

Oxberger, C.J., joins in this dissent.