

IN THE COURT OF APPEALS OF IOWA

No. 0-051 / 99-844

Filed February 23, 2000

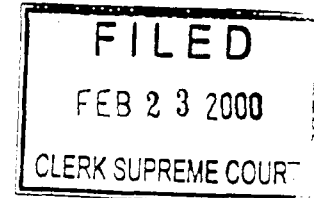
PEGGI S. CUTRIGHT,

Plaintiff-Appellee,

vs.

ADEBAYO KAMSON,

Defendant-Appellant.



Appeal from the Iowa District Court for Scott County, Patrick J. Madden,
Judge.

Defendant appeals from the judgment entered upon the district court's finding
for the plaintiff in her action for damages arising from the parties' failed real estate
transaction. **AFFIRMED AND REMANDED WITH DIRECTIONS.**

Kyle D. Williamson of Engelmann, Carroll & Williamson, Davenport, for
appellant.

Michael J. Motto of Carlin, Hellstrom & Bittner, Davenport, for appellee.

Heard by Mahan, P.J., and Zimmer, and Vaitheswaran, JJ.

VAITHESWARAN, J.

Adebayo Kamson made an offer to buy a home from **Peggi S. Cutright**, but ultimately **did not** purchase the home. The district court concluded he breached the real estate agreement. We affirm.

I. Background Facts and Proceedings

Cutright owned a home in Bettendorf. Kamson offered to purchase the home and Cutright accepted. The parties memorialized the offer and acceptance in a real estate purchase agreement dated March 10, 1998. The agreement included a rider that called for a whole house inspection on or before March 20, 1998. A company chosen by Kamson inspected the home on March 14, 1998, in the presence of Kamson's realtor. Kamson arrived as the inspection was being completed. The inspector reviewed the results with Kamson at that time. The report revealed no major problems with the home but noted certain minor problems such as the need to caulk around the bathtub, paint certain window sills, tighten bolts around the toilet, and add soil around portions of the foundation.

On March 16, 1998, Kamson advised his realtor he wished to have Cutright repair the deficiencies noted in the report, and alter the deck to comply with safety recommendations, as suggested in the report. Cutright agreed to make repairs, although Kamson disputes he received notice of this agreement. Neither Kamson nor his **realtor** appeared at the closing.

Cutright sued Kamson for specific performance and damages. By the time of trial, the house had been sold to a third party, leaving only the damage claim. The district court concluded Kamson breached the real estate purchase agreement. The court entered judgment against him for \$6254.69 plus interest, and ordered

Kamson to pay Cutright's attorney fees in the amount of \$3585. This appeal followed.

II. Standard of Review

Although Cutright initially sought the equitable remedy of specific performance, the parties agree the case was tried as a law action for damages. Therefore, our review is for errors at law. See *Risse v. Thompson*, 471 N.W.2d 853, 857 (Iowa 1991). "If an action at law is justified as a matter of law and is supported by substantial evidence, then the trial court's judgment will not be disturbed on appeal." *Mosebach v. Blythe*, 282 N.W.2d 755, 758 (Iowa 1979). We review the district court's damage award ruling for an abuse of discretion. *Kerndt v. Rolling Hills Nat'l Bank*, 588 N.W.2d 410, 414 (Iowa 1997).

III. Breach of Contract Claim

Cutright contends Kamson breached the real estate contract. She must prove: (1) the existence of a contract; (2) the terms and conditions of a contract; (3) she has performed all the terms and conditions required under the contract; (4) Kamson breached the contract; and (5) she suffered damages as a result of the breach. *Molo Oil Co. v. River City Ford Truck Sales, Inc.* 578 N.W.2d 222, 224 (Iowa 1998).

A. Existence of Contract

Kamson maintains a contract did not exist because Cutright was unaware Kamson was insisting she repair all defective items noted in the inspection report and he was unaware she had taken steps to do so. We disagree. The issues Kamson raises go to the elements of performance and breach, rather than the existence of a contract. The parties signed a real estate purchase agreement with

an addendum governing the legal effect of a home inspection. This was a contract.

See *Berryhill v. Hatt*, 428 N.W.2d 647, 652-53 (Iowa 1988).

B. Terms and Conditions

The parties agree the case turns on the following contract terms and conditions pertaining to whole house inspections:

If such inspections indicate approval of the condition of the item or items to be inspected, this agreement shall remain in full force and effect.

If such inspection states disapproval of any item or items to be inspected and notice of such disapproval is served on the Seller within 24 hours after completed inspections, then this agreement shall be terminated and the down payment shall be returned to the Purchaser.

Notwithstanding the above, the parties may agree, by amendment and modification to this agreement, or terms necessary to remedy any problem related by an inspection, and being the cause of disapproval, and to proceed thereunder with performance of this agreement.

C. Performance

We must first determine what terms and conditions Cutright was required to perform under the contract and whether she performed those terms and conditions. Neither party disputes the meaning of the contract terms.¹ Instead, the parties disagree about the legal effect of the language. Kamson contends the second unnumbered paragraph entitled him to have Cutright cure every defect noted in the inspection report as a condition precedent to closing on the home. Cutright counters the second paragraph cited above authorized Kamson to terminate the agreement only if: (1) the whole house inspection noted disapproval of the items inspected and (2) Kamson notified Cutright of the disapproval within 24 hours of the

¹ The record suggests the parties did not have a meeting of the minds as to the meaning of the term "disapproval" in the second unnumbered paragraph. Kamson's actions suggest he believed any expression of dissatisfaction in the inspection report and by him would amount to "disapproval." Cutright, on the other hand, appears to equate "disapproval" with rejection of an item. We need not determine the meaning of the term, as neither party has raised the issue.

inspection. She asserts Kamson did not satisfy either of these prerequisites for termination.

Interpretation of a contract involves ascertaining the meaning of words. See *Ridinger v. State*, 341 N.W.2d 734, 736-37 (Iowa 1983). Construction involves determining its legal effect. See *Amerus Property Brokers v. Hicklin*, 585 N.W.2d 245, 247 (Iowa 1998). The legal effect of a contract is a question of law to be determined by the court. *Magina v. Bartlett*, 582 N.W.2d 159, 163 (Iowa 1998).

We conclude the second paragraph pertaining to disapproval of items and termination of the agreement is inapplicable. As the district court correctly pointed out, Kamson did not express a wish to terminate the contract under that section. To the contrary, he affirmed his desire to proceed with the purchase, if the defects noted in the report were corrected. Therefore, we need not determine the legal effect of the termination paragraph.

Instead, we focus on the third unnumbered paragraph cited above, which permits the parties to agree "to remedy any problem related by an inspection." After Kamson advised his realtor he wished to have repairs made, Cutright voluntarily undertook to remedy all the defects itemized in the home inspection report. On April 22, 1998, Cutright's attorney wrote to Kamson's presumed attorney, stating, "it is my understanding that all of the requested repairs (many of them quite minor) will be completed by closing." Cutright's attorney included an itemized list of needed repairs and stated, "[I]n the meantime I am assuming that the attached list may help resolve any remaining concerns regarding the requested repairs and will allow us to proceed". Therefore, as contemplated in the third unnumbered paragraph of the addendum, Cutright assumed a performance obligation of correcting the problems

enumerated in the inspection report.

The remaining question is whether Cutright fully performed this undertaking. Kamson maintains he was unaware Cutright made all the needed repairs. He states he drove by the house approximately two weeks before the closing, noticed the deck had not been fixed, and notified Cutright's realtor. The April 22 letter did not list the deck as an item Cutright was willing to repair. However, we agree with the district court's finding that Cutright may have overlooked this problem because the inspection report listed the deck condition as satisfactory. In any event, Cutright testified she would have cured the problem if she had known about it. Accordingly, we conclude Cutright intended to fully perform repair obligations she voluntarily assumed and she substantially performed these obligations by the time of closing.

D. Breach

Kamson contends Cutright failed to notify him she had performed all the needed repairs, which, he maintains was a condition precedent to his performance on the contract. See *Gerard v. Peterson*, 448 N.W.2d 699, 701 (Iowa App. 1989) (defining conditions precedent). We conclude Kamson had constructive knowledge the repairs had been completed. Two days before the scheduled closing, Cutright's attorney wrote to the person she believed to be Kamson's attorney, informing him the necessary repairs would be made by closing. Kamson concedes his putative attorney advised him a letter was waiting for him but he did not retrieve the letter. Kamson also advised his realtor he did not intend to attend the closing and he ultimately did not do so. We conclude Kamson breached the real estate purchase agreement by failing to close on the house, after he received constructive notice that all requested repairs would be completed.

7

E. Damages

Cutright testified that, as a result of Kamson's breach, she was unable to purchase a condominium, which was contingent on the sale of her home. Additionally, she testified she was forced to move into an apartment after she ultimately sold her home but before she was able to find another condominium.

The district court awarded the following damages: (1) costs of an air conditioner Cutright installed after Kamson breached the contract (\$978.75); (2) costs of a garage door Cutright installed after Kamson breached the contract (\$650.75); (3) the difference between the price Kamson agreed to pay and the price Cutright ultimately obtained (\$1500); (4) costs of an apartment Cutright rented for two months (\$1440); (5) costs of storing extra items after she moved from her home (\$1060.19); (6) costs of a loan application, appraisal and credit report on the condominium (\$300); (7) the abstracting fee on the condominium she intended to purchase (\$75); and (8) a payment she made to her attorney for representing her in connection with the failed real estate transaction (\$250).

Kamson contends all damages not based on the value of the property are improper. We disagree. Traditional contract damages are designed "to place the injured party in the position [the] party would have occupied had there been performance." *Berryhill*, 428 N.W.2d at 656. We agree with the district court that the listed items "are consequential damages incurred because of the defendant's breach of the parties' agreement."

IV. Appellate Attorney Fees

Cutright seeks appellate attorney fees in the amount of \$6150, pursuant to a provision in the real estate contract authorizing payment of attorney fees. It is

established that a contract clause authorizing payment of attorney fees permits an award of appellate fees. Iowa Code § 625.22 (1997); *Bankers Trust Co. v. Woltz*, 326 N.W.2d 274, 278 (Iowa 1982). We prefer that the district court make the determination of an appropriate award, following an evidentiary hearing. *Id.*; *Folkers v. Southwest Leasing*, 431 N.W.2d 177, 184-85 (Iowa App. 1988). Accordingly, we remand for the limited purpose of holding an evidentiary hearing on the appropriate amount of appellate attorney fees.

AFFIRMED AND REMANDED WITH DIRECTIONS.