IN THE COURT OF APPEALS OF IOWA

4-385 / 93-1844

JAMES L. HILER and KATHLEEN M. HILER,

Plaintiffs-Appellees,

vs.

LEGACY MORTGAGE COMPANY, INC.,

Defendant-Appellant.

FILED
JAN 23 1995
CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, K.D. Briner, Judge.

Defendant appeals from a judgment of the district court awarding damages to the plaintiffs for failing to submit their application for a Mortgage Credit Certificate. **AFFIRMED.**

James L. Wagner of Gartelos, Wagner & Ament, Waterloo, for appellant.

Gary F. McClintock of Hoeger & McClintock, Independence, for appellee.

Considered by Donielson, C.J., Cady, J., and Peterson, S.J.*

*Senior judge from the 1st Judicial District serving on this court by order of the Iowa Supreme Court.

PETERSON, S.J.

The plaintiffs, James and Kathleen Hiler (Hilers), bought a home in 1991. This was financed through the Legacy Mortgage Company (Legacy). The Hilers wanted to take advantage of the Mortgage Credit Certificate Program; however, Legacy, after taking the information for the program, failed to make the application for the Hilers with the Iowa Finance Authority, the administrator of the program. Hilers brought an action against Legacy for this failure, and the district court, in a trial to the court without a jury, returned a verdict in favor of the Hilers and against Legacy in the sum of $16,000. Legacy appeals, contending the trial court did not have any evidence to find the defendant negligently caused any loss to the Hilers which would justify the award of damages and costs. It also contends that the trial court erred in its computation of damages. We affirm the trial court.

The standard of review in a law action tried to the court, is not de novo but on assigned errors. Ryan v. Kanne, 170 N.W.2d 395, 399 (Iowa 1969). The trial court's findings of fact thus have the effect of a special verdict and are equivalent to a jury verdict. Id. If supported by substantial evidence and justified as a matter of law, the judgment will not be disturbed on appeal. Id. In determining whether the trial court's findings are supported by substantial evidence, we will not weigh the

evidence or pass on the credibility of witnesses. Id. We must also construe the evidence in the light most favorable to the trial court's judgment. Id.

We find there is substantial evidence in the record to support the findings as made by the trial court. That court found that the Hilers contacted Howard Stiefel (Stiefel), a real estate agent, for the purpose of looking for a house. They advised Stiefel they were interested in a house in the $60,000 price range. After looking at a number of houses, the Hilers made an offer on a house located at 815 6th Street N.W. in Independence, Iowa, in the sum of $53,000. That offer was prepared by Stiefel and was contingent only upon financing approval. That offer was accepted.

During the course of discussion between Hilers and Stiefel, they advised Stiefel that they based their estimate on what they could afford to pay for a home on the belief they would qualify for a Mortgage Credit Certificate (MCC). This program is administered by the Iowa Finance Authority (IFA).

Parties who qualify for MCC participation receive a tax credit in the amount of 25% of the interest that is payable on the mortgage in a given year. This credit is received for the entire life of the mortgage.

In order to participate in the MCC program, the homebuyers have to meet four criteria. First, they must be first homebuyers, which as defined as persons who have not

owned a home during the three years immediately preceding the application. Next, the purchase price must be within certain price limits, and the buyers must fall within certain income limits as set by the Department of Housing and Urban Development. Finally, the application must be made through a participating lender.

The application for participation in this program requires six documents. They are an application on a form provided by the IFA, a copy of the purchase offer, a seller's affidavit on a form also provided by the IFA, income tax returns for the applicants for the previous three years, and an MCC commitment form along with an application fee of $100.

The application for MCC participation to the IFA may be made at any time after the application for the purchase loan is made. The timing of the application to IFA is determined by the practice of the participating lender. The commitment on behalf of IFA for MCC participation is independent of the lender's loan approval.

In February of 1991, the Department of Housing and Urban Development issued revised regulations concerning the purchase price and income limits. These would be effective as of May 21, 1991. If an application was in the IFA office but not acted upon as of that date, then the revised limits would apply to that application. The date that mattered in connection with the applicable limitations

was the date that IFA approved the enrollment of the prospective purchaser in the MCC program.

The buyer's income determination was made on a worksheet provided by IFA. The tax returns for the previous three years were not used to determine the income, but were used to establish whether the purchasers had previously owned a home within the three-year period. The annual income for qualification in the program is determined by projecting for twelve months the most recent monthly income of the parties before the date of the application.

Legacy is a participating lender in the MCC program as administered by IFA. Stiefel referred Hilers to the Legacy Mortgage Company and advised them that Hilers desired to participate in the MCC program. On April 12, 1991, Hilers met with James Burns (Burns), who represented Legacy. At that meeting, they advised Burns they wanted to participate in the MCC program. Burns filled in the numbers on the income reporting form while discussing them with Hilers. When the form was completed, he did not review it with Hilers item-by-item.

Burns began processing Hilers' loan application on April 15, 1991. Ordinarily, processing a loan application requires between two and one-half weeks to four weeks. Based upon the statements of the parties and Burns' calculations, he determined that the combined annual income of the plaintiffs was $40,367. This amount was too high to

qualify the Hilers for participation in the MCC program, even under the older and less-restrictive guidelines which applied before May 21, 1991.

Legacy obtained financing approval for the Hilers; however, they did not submit the plaintiffs' application for participation in the MCC program. Burns said he did not do so for the following reasons: (a) he believed that if the applicants did not qualify for a purchase money loan, the $100 application fee to IFA for participation in the MCC program was not refundable (IFA does not have to refund the application fee for an applicant they find not to be qualified; however, they do so as a courtesy to the applicants); (b) based on the April 12 interview, Burns thought the plaintiffs' income "looked too high" but he could not be certain until he received the income verifications; (c) by the time the Hilers' incomes were verified (both James and Kathleen worked) and assuming a normal processing time of at least ten days for IFA, the purchase price for the home would have exceeded the guidelines which became effective on May 21, 1991.

The participating lender, in reviewing the documents necessary for MCC participation, is required to verify the income amounts as given them by the applicants.

The closing on the home was set for May 31, 1991. At that time Legacy first notified Hilers and Stiefel that the application had not been submitted to IFA for participation in the MCC program and Hilers had not been approved for

participation. They were also advised there had been a change in the guidelines and that the Hilers no longer met the income guidelines.

The offer to purchase the home was contingent only upon financing approval, which had been secured. The Hilers believed the offer to purchase required them to perform, and they did so.

Although eligibility for participation in the MCC program is based entirely upon the information available at the time of purchase, the actual income of the plaintiffs for the qualifying period was within the income guidelines, even though the estimate prepared by Burns based on the plaintiffs' statements to him was not. If Hilers had qualified for MCC participation, the value of that qualification would have been a tax credit of 25% of the interest payable on the mortgage over the entire life of the mortgage. Reduced to the present value by applying a 3% discount, the present value of this tax credit would be slightly in excess of $16,000.

The appellant initially argues that the trial court did not have any evidence to find the defendant negligently caused any loss to the plaintiffs which would justify the award of damages and costs. The thrust of its argument is that there was no evidence about a standard of professional care, diligence, and skill required of Legacy in this situation.

The petition filed in this case by the plaintiffs alleges that Legacy was negligent in not forwarding to the IFA the application for participation in the MCC program. This is a tort action, and the elements of a tort claim generally are (1) the existence of a duty to conform to a standard of conduct for the protection of others; (2) failure to conform of that standard; (3) proximate cause; and (4) damages. Haafke v. Mitchell, 347 N.W.2d 381, 385 (Iowa 1984).

As a general proposition, Burns, on behalf of Legacy, as Hilers' agent, was obligated to exercise reasonable care, diligence, and judgment in the performance of tasks undertaken on behalf of Hilers. See Humiston Grain Co. v. Rowley Interstate Transp. Co., Inc., 512 N.W.2d 573, 575 (Iowa 1994). Persons engaged in the practice of a profession or trade are held to the standard of "the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities." Id. (quoting Restatement (Second) of Torts §283 (1965)). The burden would rest upon Hilers to establish Legacy's breach of this standard of care. Normally this standard is established by expert testimony from a professional in the same field of endeavor; however, this testimony is not necessary if the professional's lack of care is so obvious as to be within the comprehension of a lay person. Id.

Hilers contend that the exception to the requirement for expert testimony applies in this situation. We believe Burns' failure to simply notify the Hilers that he believed they did not qualify for participation in the MCC program and that he did not submit an application to IFA prior to the time of closing is such a lack of care that is obvious to the comprehension of a lay person. He was aware that Hilers believed they needed to participate in the MCC program in order to have sufficient funds to enable them to purchase the home.

The appellant next contends the trial court erred in its computation of damages. It maintains that the damages awarded by the court are speculative because the Hilers may not live in the house for the entire life of the mortgage. It bases this contention on testimony that the average mortgage life in the United States is seven years. The witness who testified about this average life indicated that mortgages in the Independence area last longer, but the witness could not testify to this to a certainty.

Courts have recognized the distinction between proof of the fact that damages have been sustained and proof of the amount of those damages. Orkin Exterminating Co., Inc. v. Burnett, 160 N.W.2d 427, 430 (Iowa 1968). If it is speculative and uncertain whether damages have been sustained, then recovery is denied. Id. However, if the uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from

which the amount can be inferred or approximated. Pringle Tax Serv., Inc. v. Knoblauch, 282 N.W.2d 151, 153 (Iowa 1979).

We believe that damages were sustained by the Hilers and there was a reasonable basis in the record from which the damages as found by the trial court could be determined. There was expert testimony about the amount of the tax credit the Hilers would have received over the life of the mortgage which was reduced to present value. We would also note that there is nothing in the record to support a contention that the Hilers would sell the home in question prior to the time that the mortgage was paid.

In summary, we find that it is not necessary in this situation to have expert testimony with regard to the standard of care required of Legacy in this matter and that there is sufficient evidence in the record to support the judgment as entered by the trial court.

AFFIRMED.