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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Filed April 27, 1982

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RICHARD L. MAYER and PHYLLIS J. MAYER,	)	
Plaintiffs-Appellants,	)	
vs.	)	
RONALD J. KYARSGAARD, d/b/a RON'S HOME IMPROVEMENT and MIDWEST FEDERAL SAVINGS & LOAN ASSOCIATION, An Iowa Corporation,	)	
Defendants-Appellees.	)	

Appeal from Clinton District Court, C. H. Pelton, Judge.

The plaintiffs appeal from the trial court judgment in an action against the contractor and the savings and loan for damages suffered as a result of the contractor's breach of a contract for the construction of a home, and the failure of the savings and loan to obtain lien waivers prior to disbursing loan construction funds to the contractor. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Donald G. Senneff of Shaff, Farwell & Senneff, Clinton, for plaintiffs-appellants.

J. Drew Chambers of Holleran, Shaw, Murphy & Stoutner, Clinton, for defendant-appellee Midwest Federal Savings & Loan Association.

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

PER CURIAM

The plaintiffs appeal from the trial court judgment in an action against the contractor and the savings and loan for damages suffered as a result of the contractor's breach of a contract for the construction of a home, and the failure of the savings and loan to obtain lien waivers prior to disbursing loan construction funds to the contractor. We affirm in part, reverse in part, and remand.

The plaintiffs and the defendant Kyarsgaard entered into an oral contract for the construction of a home to be completed within six months. Kyarsgaard was to act as general contractor to build the home for $46,500. The plaintiffs obtained a construction loan from the defendant Midwest Federal Savings and Loan. The loan money was left with Midwest, to be paid out in four installments to the contractor. As part of the financing agreement, the savings and loan orally agreed not to disburse loan funds until they had received lien waivers from the defendant Kyarsgaard.

Construction of the home began, and Midwest made two payments to Kyarsgaard in the amount of $24,806. Kyarsgaard gave his own lien waiver to Midwest, but no waivers were secured from subcontractors or materialmen. As a result of financial difficulties, Kyarsgaard applied some of the payment funds to debts he had incurred on previous jobs. He told Midwest that all subcontractors and materialmen from the plaintiff's home had been paid. Because of his financial problems, Kyarsgaard's suppliers, subcontractors, and materialmen began to cut off his credit. He therefore made little progress on the construction of the plaintiff's home, which came to a halt when subcontractors refused to work until they were paid. On March 5, 1979, Midwest made two payouts directly to a materialman and a subcontractor in the amount of $5335.40. Several subcontractors and materialmen filed liens totaling $25,925.52 against the plaintiff's home as a result of their nonpayment by the defendant Kyarsgaard. Kyarsgaard also filed a mechanic's lien against the home in the amount of $20,484.

The plaintiffs filed suit August 16, 1979. They alleged that the defendant

Kyarsgaard breached the contract to provide all materials and perform all work necessary for the completion of their home. They also alleged that the defendant Midwest breached its duty by the disbursement of funds without first obtaining lien waivers. The defendant Kyarsgaard filed a counterclaim for breach of contract by the plaintiffs. After hearing, the trial court filed its findings, conclusions, and judgment on June 12, 1980.

The trial court found the defendant Kyarsgaard liable for (1) the cost of completion of the home, which was found to be $10,000; (2) the total amount of mechanic's liens filed against the plaintiff's home, excluding his own, plus interest; (3) $2500 punitive damages; and (4) $762 for utilities and rent paid by the plaintiffs as a result of defendant Kyarsgaard's failure to complete the home. The court found the defendant Midwest had been the agent of the plaintiffs for the purpose of disbursing construction funds once it was satisfied that the plaintiffs were protected, and that it had breached its fiduciary duty by failing to secure lien waivers prior to disbursing funds to the defendant Kyarsgaard. The court ordered Midwest to apply the remainder of the plaintiff's construction loan toward the satisfaction of mechanic's liens, and made it liable with the defendant Kyarsgaard for any additional amount necessary to satisfy all the mechanic's liens. The court found the plaintiffs responsible for $620 worth of extras, and the defendants liable for costs and interest.

The plaintiffs on appeal assert the following arguments: (1) appellate review should be limited to correction of errors at law and findings of fact not supported by substantial evidence; (2) the trial court erred in failing to enter judgment against Midwest Federal for $10,000, the cost of completion of the home; and (3) the trial court erred by applying an equitable remedy when an adequate legal remedy existed, and should have entered judgment against Midwest for the full amount of the mechanic's liens.

We agree with the plaintiffs that the essential character of the action and the remedy sought show that the action was one at law. See Mosebach v. Blythe, 282 N.W.2d 755, 758 (Iowa 1979). Therefore, our review is limited to correction of errors at law.

We will next address plaintiffs' contention that trial court erred in characterizing the action against Midwest as "more in the nature of contracts than in tort." In general a breach of contract is not a tort, but the contract may establish a duty for which a violation may be tortious. M & W Farm Service Co. v. Callison, 285 N.W.2d 271, 276 (Iowa 1979), citing Rice v. Sioux City Memorial Park Cemetery, 245 Iowa 147, 162, 60 N.W.2d 110, 119 (1953). Whether the parties' contract establishes a duty of care under tort law is a question of law for the court to decide. Porter v. Iowa Power & Light Co., 217 N.W.2d 221, 228 (Iowa 1974).

We think the oral escrow agreement established a fiduciary duty between plaintiff and defendant, with the bank as plaintiffs' agent and plaintiff as principal and that defendant-bank breached that duty, as found by trial court. Using tort theory as the measure of damages, plaintiff must be compensated for all damages proximately caused by the tort. Cowan v. Western Union Telegraph Co., 122 Iowa 379, 98 N.W. 281, (1904). The trial court's decision was grounded in contract theory and, therefore, resulted in an inappropriate and inadequate measure of damages.

Further, the plaintiffs argue that the trial court erred by not entering a judgment against Midwest for the full amount of the mechanic's liens, excluding the amount of the lien filed by the defendant Kyarsgaard. The trial court instead applied an equitable remedy, ordering Midwest to apply the $16,676.23 remaining in the construction account to the payment of the liens and entering judgment for any amount of the liens not covered by the account. The trial court stated it used an equitable remedy because the amount of mechanic's liens was uncertain. The court felt that the best way to put the plaintiffs in the position they would have been had it not been for Midwest's breach was by the equitable remedy. In this regard, we agree with the trial court.

The rule is that equity will not provide relief where an adequate remedy at law exists. Mosebach, supra at 761. If the parties had fully performed the contract, the plaintiff would have had a completed home and an approximately $46,000 construction loan to be paid back to Midwest pursuant to the accompanying note and mortgage. If Midwest were ordered to pay damages to the plaintiffs, it would be unclear what is to be done with the remaining money left in the construction account. Therefore, a legal remedy is inadequate, and an equitable one will be used.

Midwest must compensate the plaintiff for all damages proximately caused by its breach. Cowan v. Western Union Telegraph Co., 122 Iowa 379, 98 N.W. 281 (1904). Midwest took $24,806 out of the plaintiffs' construction account and paid defendant Kyarsgaard without obtaining lien waivers. The plaintiffs' home was partially completed. Defendant Kyarsgaard did not pay subcontractors and materialmen, who subsequently filed liens against the plaintiffs' home. (We note that the defendant Kyarsgaard also filed a lien, and agree with the trial court that he has no right to payment.) The plaintiffs are left with an inadequate sum in their construcion account to pay the mechanic's liens, and to pay for the completion of their home. The breach of duty by Midwest is the proximate cause of this situation. Therefore, Midwest must return the $24,806 to the plaintiffs' construction account which now has a balance of $16,676.23. The plaintiffs will then have sufficient funds to pay the liens filed against their home by subcontractors and materialmen, and to complete construction of their home. Midwest is also ordered to disburse funds from said construction account to the plaintiffs as they are needed to pay the liens filed against the home, and to pay for the costs of completion of the home.

Therefore, this case is remanded to the trial court to enter a judgment ordering the defendant Midwest to restore the $24,806 to the plaintiffs' construction account, and to disburse both the $24,806 and $16,676.23 current balance to pay for completion of the plaintiffs' home.

All aspects of the trial court judgment not specifically reversed by this opinion are affirmed.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.