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IN THE COURT OF APPEALS OF IOWA

GERALD A. PALMER and NANCY D. PALMER,

Plaintiffs-Appellants,

vs.

MARK J. ANDREWS, BRADFORD D. POTTS, RONALD D. JOHNSON, INMAN REALTY COMPANY and the INMAN CORPORATION, d/b/a INMAN REALTY COMPANY,

Defendants-Appellees.

Filed March 26, 1985

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Appeal from the Iowa District Court for Pottawattamie County - Glenn M. McGee, Judge.

Plaintiff buyers appeal from the order directing a verdict for defendants in an action for fraudulent inducement in the procurement of a real estate contract and business. REVERSED AND REMANDED.

F. J. Kraschel of Kraschel & Comes, Council Bluffs, for plaintiff-appellants.

James A. Pratt of Heithoff, Pratt & Heithoff, Council Bluffs, for defendant-appellee Andrews.

John W. Wilke of Sodoro, Daly & Sodoro, Omaha, Nebraska, for other defendants-appellees.

Considered by Oxberger, C.J., and Hayden and Sackett, JJ.

Plaintiffs Gerald and Nancy Palmer purchased a business property from defendant Mark Andrews. The sale was arranged by realtor defendants Potts and Johnson, employees of Inman Realty Company and Inman Corporation.

The Palmers originally approached Potts in the summer of 1981, expressing their desire to purchase a business. They eventually became interested in buying The Gold Mine, a tavern-restaurant in Council Bluffs. Andrews, who owned the business and was a friend of Johnson, had listed the business with Inman Realty. In the process of negotiations, Andrews told the Palmers he was getting out of the tavern-restaurant business and moving to Kansas City. He also stated he had no intention of competing with the Palmers and would help them get started with the business.

The Gold Mine was represented as grossing over $300,000. Although the Palmers were not able to examine the books, they were given a list of beer distributors to verify the amount of purchases made by the business.

When a friend of the Palmers who was going to make the purchase with them decided to back out, so did the Palmers. Johnson then urged the plaintiffs to make the purchase on their own and explained how they could finance the transaction.

Plaintiffs then signed a Uniform Purchase Agreement to buy the property at the asking price of $135,000. No mention of the business was made on the Agreement. Prior to closing, Johnson advised the Palmers to have an attorney examine the abstract. The attorney consulted to examine the abstract informed the plaintiffs that he heard Andrews was opening another bar in Council Bluffs. He suggested plaintiffs get a covenant not to compete. When Nancy Palmer requested the covenant, Johnson told her it was too late. Potts told plaintiffs that if they backed out, they would be sued for the full purchase price. Once again, the Palmers were assured of no competition.

Nancy Palmer quit her teaching job to work in the business. They opened for business and were forced to spend substantial sums to replace the depleted inventory. The business declined and finally closed in December of 1981. Within one month of the purchase, Andrews opened another bar in Council Bluffs and employed some of his former help from The Gold Mine.

Plaintiffs filed suit in December of 1981 against Andrews for fraud, misrepresentation and breach of contract and against Potts, Johnson and Inman for misrepresentation and negligence. They also sought an injunction to prevent forfeiture of the real estate contract. At trial the court directed a verdict for all defendants holding:

> [T]he Court is most concerned about the matter of the plaintiffs showing any damages as required by the measure of damages [benefit of the bargain] as I set out earlier in some conference with counsel, and I think there has been no competent evidence shown under the measure of damages as I set it out to all of you earlier. There is nothing in the record that could give the jury the fair market value of the property on the date of its purchase, and there is nothing in the record to show the value of the property if it had been as represented by the plaintiff. And for that reason, even though there might be enough to submit to the jury the question on fraudulent inducement to the contract, there is nothing in the record to support any damages for them to award. I would not submit the question of exemplary damage, in any event, because there is simply no evidence in the record to support a submission of that.
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> I also find that there is insufficient evidence to submit, in any event, any count except the one on fraudulent inducement of the contract. There is not enough evidence to support any of the other divisions or counts; and I, therefore, am going to direct a verdict for the defendants for the reasons that I have just set out.

I.

Appellants contend that the trial court erred in determining that the exclusive measure of damages is the benefit of the bargain rule. We agree.

Iowa has followed the benefit of the bargain rule where the defrauded purchaser is entitled to the difference between the property as represented and the value of the property received. Holcomb v. Hoffschneider, 297 N.W.2d 210, 213 (Iowa 1980). However, where strict adherence to the rule would work hardship

on a party, then a plaintiff may recover his actual pecuniary loss. See B & B Asphalt v. T. S. McShane Co., 242 N.W.2d 279, 285 (Iowa 1976):

> A successful plaintiff in a fraud case is entitled to recover for his actual pecuniary loss sustained as a direct result of the wrong. When the fraud occurs in the sale of personal property, the usual measure of that loss is the difference between the actual value of the property at the time of the transaction and the value it would have had if the representations had been true, the loss of benefit of the bargain. However, when recovery of the benefit of the bargain will not make the buyer whole, additional damages will be allowed. The measure of damages in an action for fraud in the sale of personal property is the same as an action for breach of warranty. (emphasis added)(citations omitted).

It is clear from the facts of the case that something in addition to real estate was being conveyed. The proper measure of damages here is plaintiffs' pecuniary loss sustained as a direct result of the fraudulent and negligent misrepresentations by the defendants.

Iowa has recognized the difference between proof that damages have been sustained and proof of the amount of damages.

> If it is speculative and uncertain whether damages have been sustained, recovery is denied. If uncertainty lies only in the amount of damages, recovery may be had if there is a reasonable basis in the evidence from which the amount can be inferred or approximated. (citations omitted.)

Larsen v. United Fed. Sav. & Loan Ass'n. of Des Moines, 300 N.W.2d 281, 288 (Iowa 1981).

The Palmers presented evidence of loans they obtained and expenses they incurred. They also mortgaged their home and Nancy quit her job. Sufficient evidence of damages sustained appears in the record to submit the question of amount to a jury.

II.

It is unclear to us from the trial court's ruling whether or not all counts against the realtors and realty company were dismissed. We can only infer that if the trial court dismissed the negligence claims, it was based on the premise that defendants owed no duty to plaintiffs, or evidence of that duty was not presented.

We have already determined that evidence of misrepresentation and damages was produced.

> [I]t is well established that intent to deceive and the closely related element of scienter are shown not only when the speaker has actual knowledge of the falsity of his representations but also when he speaks in reckless disregard of whether his representations are true or false. A false statement innocently but mistakenly made will not establish intent to defraud, but, when recklessly asserted, it will imply an intent to defraud.

Grefe v. Ross, 231 N.W.2d 863, 867 (Iowa 1975).

There is evidence of actionable representations in Johnson's assuring Plaintiffs that Andrews was moving to Kansas City and would not be competing with them, and that Andrews grossed $300,000 a year and netted $100,000, but they would have to pay to see the books.

In connection with the realtor's duty, the trial court erred in not admitting the National Association of Realtors Code of Ethics. The Iowa Real Estate Commission conducts itself as a professional body guided by specific ethical standards. Menzel v. Morse, No. 83-869, slip op. at 20 (Iowa Feb. 13, 1985), held it was reversible error for the trial court to reject standards of conduct for realtors elicited in the Code of Ethics. While violation of the standards is only evidence of negligence and not negligence per se, Id. at 17, the court or jury should examine the acts and conduct of the parties in light of these standards. Id. at 20.

It is difficult to determine in this situation whether Johnson and Potts were agents of Andrews, the Palmers, or both.[1] However, in light of Menzel, Id. at 21-22 ("the agency issue may not be controlling given plaintiff's evidence that certain standards of skill, knowledge and conduct are designed to benefit both parties to a real estate transaction") and the duty of realtors to all parties and the public in general, we find it unnecessary for the jury to determine the agency question before making a decision on simple negligence.

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[1] Johnson had agreed to sell the property for Andrews, but he also took realtor Potts' place at a meeting when Potts was out of town. Following that meeting, the record seems to indicate that both Potts and Johnson were advising the Palmers.

It was error for the trial court to dismiss the claims against the realtors. The acts and conduct of Potts and Johnson should be considered in light of duties imposed by the Code of Ethics and accepted standards of conduct for realtors.

III.

Exemplary damages may be awarded in cases of fraud. Holcomb, 297 N.W.2d at 213. Descriptions of conduct which warrant punitive damages range from malicious and willful with a deliberate intent to injure, to reckless indifference. Id. at 214-15. These damages may also be appropriate where the person committing the fraud was in a special position of trust and confidence. Id. at 214. It is in this context that the jury must consider the agency question to determine if that special trust and confidence was present.

We do not determine whether defendants' conduct rose to the level of outrageous conduct to warrant exemplary damages. We do hold that the jury, after hearing and observing the witnesses, could award punitive damages; and the issue of punitive damages should be submitted to the jury.

IV.

The promissory note, teaching contract, and evidence of foreclosure on the Palmers' home are all relevant to the question of damages and should have been admitted. We presume the trial judge's refusal to admit this evidence is due to his erroneous determination of the measure of damages.

The National Association of Realtors Code of Ethics is relevant to the realtors' duty and should have been admitted. See Menzel v. Morse, No. 83-869 (Iowa Feb. 13, 1985).

Because plaintiffs have not alleged that the real estate value is less than represented and the level of damages is plaintiffs' pecuniary loss, assessed value of the real estate is irrelevant. To fail to admit it was not error.

V.

The breach of contract issue should have been submitted to the jury.

Parol evidence is admissible to prove not only that fraud induced a writing, Lamasters v. Springer, 99 N.W.2d 300, 302 (Iowa 1959), but also that a collateral agreement constituted part of the consideration or inducement for entering the contract. Blunk v. Kuyper, 44 N.W.2d 651, 655 (Iowa 1950)(cases and authorities cited therein). The Palmers introduced evidence they were sold a going business complete with inventory. The amount of inventory conveyed is ambiguous. Testimony also indicated the Palmers and Andrews may have had an oral covenant not to compete.

Breach of contract could be determined from the evidence. The breach of contract claims should not have been dismissed.

REVERSED AND REMANDED.