IN THE COURT OF APPEALS OF IOWA

RAILWAY INN, INC., an Iowa Corporation,

Plaintiff-Appellant,

vs.

JAROLD A. BROWN and **MARILYN E. BROWN**,

Defendants-Appellees.

Filed August 30, 1983

3-202
2-69484

Appeal from Pottawattamie District Court - Glenn M. McGee, Judge.

Plaintiff corporation, seller of a bar, appeals from judgment for defendant buyers on their counterclaim for equipment defects and debts in plaintiff's action to recover on a promissory note. AFFIRMED.

Peter C. Bataillon of Sodoro, Daly & Sodoro, Omaha, Nebraska, and Richard D. Crotty, Council Bluffs, for plaintiff-appellant.

Michael A. Sciortino of Walter, Sciortino & Vannier, Council Bluffs, for defendants-appellees.

Considered by Oxberger, C,J., and Donielson, Snell, Schlegel and Hayden, JJ.

DONIELSON, J.

Plaintiff corporation, seller of a bar, appeals from judgment for defendant buyer on their counterclaim for equipment defects and debts in plaintiff's action to recover on a promissory note. Plaintiff claims that: (1) the provision in the sales agreement that the buyers had inspected the property and were familiar with its condition means that the sale was "as is," and prevents buyers from recovering for defects in the property; and (2) the final purchase contract signed by the parties on December 11, 1979, which did not contain an explicit warranty against defects in the property, superseded and extinguished the earlier uniform purchase agreement dated August 15, which did contain such a warranty. We affirm.

On August 15, 1979, plaintiff buyer and defendant sellers entered into a contract for the sale of a bar in Council Bluffs known as "Bob's Alibi." The sale price was to be $60,000. The printed uniform purchase agreement had an additional handwritten condition: "all fixtures, equipment, etc. to remain and be in good running order." The agreement also contained a provision stating: "Purchaser has examined said property, and accepts the same in its present condition."

The parties closed with a more extensive and apparently specifically drafted purchase agreement made on December 11, 1979. This agreement does not have the provision that the equipment was to be in "good running order," but did contain a representation by the seller that it had "good and marketable title to all the assets . . . free from all encumbrances." The agreement also promised that the business complied with "all laws, rules, and regulations . . . ." The defendant buyers paid $56,000 at the time of sale and provided a promissory note for $3,000 for the balance. The note carried no interest and was to be due eighteen months after closing. At the time of closing the plaintiff also provided a "bulk sales affidavit" in which the corporation asserted that there were no outstanding debts of the bar.

After the defendants took over operation of the bar they discovered a number of relatively minor defects in the condition of the building and its accessories; for example, a defective exhaust fan motor, repairs needed in the bathroom, and failure of the big screen television to operate. The total cost of the necessary repairs was found to be $1,966. The defendants also found themselves involved with certain of plaintiff's creditors to whom plaintiff owed money for an emergency fire escape system and a portable television set.

When the promissory note came due, defendants refused to pay it on the grounds the assets were defective to the extent of the repairs they had to make and that some assets were not transferred with good title.

The plaintiff then sued on the promissory note. The court found that defendants owed plaintiff the $3,000, but that the value of the repairs and the assets upon which plaintiff did not have good title amounted to $3,030. The court found that plaintiff breached the December 11 agreement by failing to have "good and marketable title to all the assets", and the court also found "a violation in his [plaintiff's] representation to the purchasers that all fixtures, equipment would be in good running order." The court gave defendants an offset for the amount of their counterclaim, i.e., $3,030. The court stated that "considering the interest due" the counterclaim was a "total setoff." Judgment was entered against plaintiff for court costs only. Plaintiff brought this appeal.

I.

Plaintiff first claims that defendants are precluded on their counterclaim from recovering the $1,966 to repair defects in the equipment by paragraph 6(e) of the December 11 agreement: "Purchaser [defendants] has inspected and is familiar with the premises, and with the physical condition of all furniture, fixtures and equipment therein." Plaintiff contends this language means that defendants were required to accept the equipment and fixtures "as is." We disagree. First, we no longer adhere to a rigid application of the ancient principle of caveat emptor. See Farmers State Bank v. Cook, 251 Iowa 942, 947, 103 N.W.2d 704, 707 (1960). In addition, paragraph 6(e) did not remove from plaintiff, as the party with the superior knowledge of the working condition of the bar equipment and fixtures, the duty to fully disclose those facts to defendants. Smith v. Peterson, 282 N.W.2d 761, 767 (Iowa Ct. App. 1979). There is little dispute that the defects repaired by defendants existed before the sale took place. Plaintiff's failure to inform defendants of those defects was in derogation of its duty.

II.

The trial court also found in defendants' favor on their counterclaim because of plaintiff's representation to them that all fixtures and equipment would be in "good running order." This was apparently in reference to that clause in the August 15 agreement which stated: "[a]ll fixtures, equiptment [sic] etc. to remain and be in good running order." Plaintiff alleges that the August 15 agreement along with the above clause was superseded and extinguished by the December 11 contract which contained no such explicit language. Assuming without deciding that plaintiff is correct on this point, the record shows that plaintiff made oral representations to defendants that the equipment and fixtures were functional and working properly. At trial, defendant Jarold Brown testified that Bob Sweet, president of plaintiff corporation, assured him that "[e]verything was in working order" and that "when he [Sweet] said it was all right, then I assumed that it was." As we have already noted, plaintiff had an obligation to inform defendants about the condition of the equipment and fixtures. Defendants justifiably relied on plaintiff's oral representations. The trial court correctly awarded defendants an offset against plaintiff's claim on the note because of the latter's breach of those representations.

The judgment of the trial court is affirmed in its entirety.

AFFIRMED.