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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JOHN N. McROBERTS,

Plaintiff-Appellant,

vs.

FIRST FEDERATED CHURCH OF DES MOINES, IOWA,

Defendant-Appellee.

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8-514
88-336

Appeal from the Iowa District Court for Polk County (No. CL 66-38861), Ray A. Fenton, Judge.

The plaintiff purchased real estate from the defendant and later sought reimbursement from the defendant for the costs of removing buried rubble. **AFFIRMED.**

William B. Serangeli, of Smith, Schneider, Stiles, Mumford, Schrage & Zurek, P.C., Des Moines, for the plaintiff-appellant.

Daivd H. Luginbill and Ronald L. Peeler, of Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, Des Moines, for the defendant-appellee.

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

OXBERGER, C.J.

Plaintiff, John N. McRoberts (McRoberts), appeals from an action tried to the court which held plaintiff failed to meet his burden to establish a modification in the purchase agreement between the parties. Plaintiff raises two issues on appeal: first, that the evidence adduced at trial established that a modification to the parties' purchase agreement had occurred, and second, that the defendant, First Federated Church (First Federated), should be bound by their realtor's alleged failure to communicate to McRoberts First Federated's rejection of his letter. We affirm.

First Federated owned a piece of real estate which was the cite of a former church building destroyed by fire. Real estate developer John McRoberts made an offer to purchase the property; this offer was accepted by First Federated. However, between the date the offer was accepted and the date scheduled for closing, McRoberts became concerned about the possibility that excessive rubble from the destroyed building might be buried on the site. McRoberts communicated his concern to First Federated's business manager and to the real estate agent representing First Federated, Michael Swaim. McRoberts contends he told these people he would not close the transaction unless First Federated agreed to take care of the rubble problem. First Federated denies that McRoberts' communication rose to this level.

On the date scheduled for closing the transaction, which was done without a face-to-face meeting, McRoberts tendered to realtor Swaim his check for the purchase price. He also submitted to Swaim a letter addressed to First Federated stating that McRoberts would seek subrogation for any expenses he incurred to remove rubble. Realtor Swaim took the checks and letter to two First Federated officers, who accepted the checks and tendered a deed in return but rejected McRoberts' letter concerning rubble as unacceptable. There was conflicting evidence regarding whether Swaim told McRoberts that the First Federated officers had rejected his letter concerning rubble.

When McRoberts began his project to develop the real estate, he found there was in fact excessive rubble under the surface. He thereupon filed the present suit against First Federated, seeking reimbursement for the costs of removing the rubble. McRoberts alleged his letter submitted on the date of closing amounted to a modification of the purchase agreement. He further alleged this modification imposed upon First Federated a duty to reimburse him for rubble removal.

I. Standard of Review

Our review in law actions ordinarily is whether the trial court's findings are supported by substantial evidence. Iowa R. App. P. 14(f)(1). However, when we

review an action where a party has failed to meet its burden our review is not for substantial evidence. See Pohlman v. Ertl Co., 374 N.W.2d 253, 255-56 (Iowa 1985); Anthony v. State, 374 N.W.2d 662, 664-65 (Iowa 1985). Our supreme court said in Anthony:

> When the trial court in a law action tried to the court denies recovery because of a party's failure to carry his burden on an issue, we will not interfere on appeal unless we find the party carried his burden as a matter of law. The evidence in the party's favor must be so overwhelming that only one reasonable inference could be drawn. On review we examine the evidence in the light most favorable to the judgment.

Anthony v. State, 374 N.W.2d 662, 664-65 (Iowa 1985) (citing Roland A. Wilson v. Forty-O-Four Grand Corp., 246 N.W.2d 922, 925 (Iowa 1976)). There was conflicting testimony at trial. We do not pass on the credibility of the witnesses. Carson v. Mulnix, 263 N.W.2d 701, 705 (Iowa 1978).

II. Modification

McRoberts contends his evidence established acceptance by First Federated of his proposal to modify the purchase contract by adding a requirement that First Federated reimburse him for rubble removal. The trial court concluded McRoberts' letter represented a unilateral attempt to modify the purchase agreement. The trial court further concluded First Federated's nonresponse to this letter did not constitute acceptance.

In order to modify a contract, the new agreement must have all the requisites of a valid and enforceable agreement, or it will not be binding. Caffrey Farms, Inc., v. Williams Pipe Line Co., 739 F.2d 1366, 1368 (8th Cir. 1984) (applying Iowa law). In order to create a binding contract there must be an offer and acceptance; in other words, a meeting of the minds of the contracting parties. Bankers Trust Co. v. Economy Coal Co., 224 Iowa 36, 40, 276 N.W. 16, 19 (1937).

The letter which McRoberts contends modifies the purchase agreement between the parties stated McRoberts had discovered footings and foundation walls below the surface. The letter also stated McRoberts reserved the right of subrogation against First Federated for the rubble removal costs.

We do not find the letter clearly makes an offer to modify or that it makes modification a condition of closing. We find the letter to state an intention to sue First Federated for the costs. Even if the letter could be construed to be an offer, we agree with the trial court that it is a unilateral offer. First Federated's silence in response to the letter cannot be construed to be an acceptance. See Ducommen v. Johnson, 252 Iowa 1192, 1197, 110 N.W.2d 271, 274 (1961). Therefore, we fail to find the purchase agreement in this case was modified as plaintiff contends.

III. Agency

McRoberts also contends the defendant, First Federated, should be bound by their realtor's alleged failure to communicate to McRoberts First Federated's rejection of his letter. Swaim, the realtor, was aware that First Federated rejected McRoberts' contentions when he presented the letter to First Federated at the closing. McRoberts asserts Swaim knew he intended to make this alleged modification a condition of closing. McRoberts, therefore, concludes First Federated should be bound by the knowledge which its agent Swaim had. The district court rejected this contention.

The dispositive issue is whether Swaim, the realtor, had apparent authority to act on behalf of First Federated. Apparent authority is that which though not actually granted, the principal knowingly permits the agent to exercise, or which the principal hold the agent out as possessing. Hull v. Crow, 240 Iowa 81, 90, 34 N.W.2d 195, 200 (1948). The guiding principle in an analysis of apparent authority as between the principal and the third party must be determined by the actions and statements of the principal not the agent. Spencer Concrete Products Co. v. City of Spencer, 254 Iowa 87, 95-96, 116 N.W.2d 455, 459 (1962).

There is some support for the fact that Swaim may have given McRoberts the indication that he had authority to act

on behalf of First Federated. However, we do not find any evidence First Federated gave McRoberts any indication Swaim was authorized to enter an agreement on their behalf. To the contrary, McRoberts testified he was aware, from prior dealings with churches, approval of a governing body was required. We find substantial evidence to support the trial court's finding Swaim did not have the authority to act on behalf of First Federated.

AFFIRMED.

Donielson, J. concurs; Sackett, J. specially concurs.

SACKETT, J. (specially concurring)

I reluctantly concur with the majority's opinion because I find we are bound by the trial court's finding of facts.

The disturbing aspect of this transaction is that First Federated's realtor was given the letter with the check in final payment and took them to First Federated together and First Federated rejected the letter without telling anyone it was doing so and accepted the check. I have difficulty condoning such practices. Additionally, I find the realtor was agent for First Federated at all times material.