

IN THE COURT OF APPEALS OF IOWA

FILED

MAR 23 1982

CLERK SUPREME COURT

JILL BROUWER, d/b/a BROUWER REALTY,)

Plaintiff-Appellant,)

Filed March 23, 1982

vs.)

399

NORTHWESTERN BELL TELEPHONE COMPANY,)

Defendant-Appellee.)

2-49
2-66126

Appeal from Woodbury District Court - David J. Blair, Judge.

Plaintiff-realtor appeals from summary judgment entered for defendant-telephone company in a suit arising out of defendant's failure to publish plaintiff's business listing in its telephone directory. **AFFIRMED.**

Timothy W. Shuminsky of Shuminsky, Shuminsky & Molstad, Sioux City, Iowa, for plaintiff-appellant.

Michael R. Hellige of Shull, Marshall & Marks, Sioux City, Iowa, for defendant-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Plaintiff-realtor appeals from summary judgment entered for defendant-telephone company in a suit arising out of defendant's failure to publish plaintiff's business listing in its telephone directory. Plaintiff argues that the trial court erred in granting defendant's motion for summary judgment and that the terms of the contract which served as the basis for the trial court's judgment were unconscionable and should not be enforced.

The facts before the court by way of pleadings, exhibits, affidavits, and requests for admissions, are not in dispute. On June 2, 1978, plaintiff Jill Brouwer entered into a written contract with defendant Northwestern Bell Telephone Company for placement of advertising of plaintiff's real estate business in defendant's yellow pages. When the new telephone book was published, plaintiff's listing was omitted from both the white and yellow pages. Pursuant to a tariff on file with the Iowa State Commerce Commission limiting defendant's liability on the white pages omission, plaintiff's account was credited monthly in the tariff amount of one-half of the local exchange service charges for the period of the omission until a new directory was published.

Plaintiff sued defendant for the yellow pages omission under both contract and tort theories, requesting \$250,000 in damages. Defendant answered, denying liability beyond the tariff amount for the white pages omission, and asserting liability limitations for the yellow pages omission by reason of the terms of the contract for the advertising entered into by plaintiff and defendant. The contract contained the following language:

If the telephone company shall omit said advertisement or any additional advertising from any issue of its directory, in whole or in part, or shall make errors therein, its liability therefore shall in no event exceed the amount of charges for the advertising which was omitted or in which the error occurred in such directory issue.

After undertaking some discovery, defendant moved for summary judgment on the grounds that plaintiff and defendant had entered into the contract for the yellow

pages advertising, defendant's liability for omission of plaintiff's listings was limited by the tariff provision and the contract limit, and defendant had fulfilled its obligation under those terms, leaving plaintiff with no other right or remedy. Plaintiff resisted generally, stating affirmatively only that the contract paragraph cited was but a partial provision of the contract. Plaintiff's attorney attached a personal affidavit to plaintiff's resistance in which he stated there was a genuine issue of material fact and that it was up to a jury to decide whether or not defendant had any liability limitations. Citing the reasons given by the defendant, the trial court sustained defendant's motion for summary judgment.

In order to be entitled to summary judgment, the moving party is required to show that there is no genuine issue of material fact involved in the case and that he is entitled to a judgment as a matter of law. Anita Valley, Inc. v. Bingley, 279 N.W.2d 37, 40 (Iowa 1979); Iowa Department of Transportation v. Read, 262 N.W.2d 533, 536 (Iowa 1978). In considering such a motion, a court is required to examine the record in the light most favorable to the party opposing the motion to determine whether the movant has met his burden. Id., Tasco, Inc. v. Winkel, 281 N.W.2d 280, 282 (Iowa 1979).

We have considered the information available to the trial court when it ruled on defendant's motion for summary judgment and find no basis for overturning its decision. Plaintiff did not allege, either in her original petition or in her resistance to the summary judgment motion, any material facts different from those alleged by defendant. It is true that the quoted contract provision was but a part of the whole contract; defendant never alleged otherwise. Furthermore, the whole contract, including plaintiff's signature attached thereto, was an exhibit and before the court for its consideration. Plaintiff did not plead lack of assent to the yellow pages advertising contract, unfair surprise, lack of notice, disparity of bargaining power, or substantive unfairness. See C & J Fertilizer, Inc. v. Allied Mutual Insurance Co., 227 N.W.2d 169, 181 (Iowa 1975). She did not plead

unconscionability of the contract.¹ Iowa R. Civ. P. 237(h) requires a short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Defendant did so; plaintiff's resistance, as well as the other materials before the court, provided nothing to negate defendant's assertions.

Trial court's granting of defendant's motion for summary judgment is therefore affirmed.

AFFIRMED.

¹ On the merits of plaintiff's contentions raised by a "Motion to Reconsider" in the trial court, the supreme court has previously approved both the tariff liability limitation and the yellow pages liability limitation. See Windburn v. Northwestern Bell Telephone Co., 275 N.W.2d 403, 405 (Iowa 1979).