IN THE COURT OF APPEALS OF IOWA

FILED
JAN 27 1988
CLERK SUPREME COURT

117

ANN L. JUNGMANN, and ANN L. JUNGMANN, and DAVID E. STEPHENS as Executors of the Estate of LARRY L. JUNGMANN, Deceased,

Plaintiffs-Appellants,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee,

FIRST NATIONAL BANK OF IOWA CITY as Trustees of the E.C.M. Trust, RAYMOND W. HENNINGS, and KAREN SUE HENNINGS,

Defendants.

Filed January 27, 1988

7-597
87-381

Appeal from the Iowa District Court for Scott County (No. 67894) - J. L Burns, Judge.

Plaintiffs appeal from an adverse judgment in an action for breach of contract. **AFFIRMED.**

William R. Stengel, Jr., and Jerry A. Soper of Coyle, Gilman & Stengel, and Lori S. Paulus, Walcott, for plaintiffs-appellants.

Thomas J. Miller, Attorney General, and David A. Ferree, Assistant Attorney General, for defendant-appellee Iowa Department of Transportation.

Heard by Oxberger, C.J., and Sackett, and Habhab, JJ. Schlegel, J., takes no part.

SACKETT, J.

In this appeal we address the issue of whether the trial court correctly determined the Iowa Department of Transportation was not under a contractual obligation to pave a city street in Eldridge, Iowa. We affirm the trial court.

In March 1981, Plaintiffs Larry L. and Ann L. Jungmann purchased from Defendants Raymond and Karen Hennings about fifty-two acres of what had been a sixty-acre tract. The Hennings had sold eight acres of the sixty acres to the Defendant State of Iowa Department of Transportation for highway right-of-way for a new Highway 61. The contract between the Hennings and the DOT was entered into October 31, 1979. The building of the new highway cut off the Hennings' access to the existing county road system. The contract between the Hennings and the DOT provided "access to sellers' remaining property will be via the new city street between county road F-45 and sellers' south property line."

An access road was constructed and was surfaced with gravel. The access road was located in the City of Eldridge, Iowa. Since approximately 1979 the City of Eldridge has had an ordinance providing that all newly dedicated city streets shall be surfaced with Portland cement.

This action was commenced by plaintiffs alleging the DOT had breached its contract by failing to build a paved access road in conformance with the City of Eldridge's requirement for a new city street. The matter was tried to the court. The court found plaintiffs failed to prove there was a breach of contract or that they had been damaged thereby.

Plaintiffs appeal from the judgment contending (1) the court erred in allowing extrinsic evidence to be introduced to establish the intent of the parties when the court found no ambiguity in the contract, (2) the trial court erred

in finding no breach of contract, (3) the trial court's findings the parties to the contract did not intend the access road to be paved is not supported by substantial evidence, and (4) the trial court's findings plaintiffs were not damaged is not supported by substantial evidence.

The trial court determined and we agree the contract between the Hennings and the DOT provided for access by city street but made no provision for who was to build the city street or how it was to be constructed. We reject plaintiffs' contention the contract clearly provided the DOT should build a new street.

We next look to the evidence introduced to determine whether it supports the trial court's ruling. We review the evidence in the light most favorable to the judgment. Spilman v. Board of Directors, 253 N.W.2d 593, 595 (Iowa 1977). The findings of fact made by the trial court will not be disturbed on appeal if they are supported by substantial evidence. Iowa R. App. P. 14(f)(1).

At the time of the taking, the Hennings' access to the county road system was by gravel road. Three different proposals for a road were made. The gravel access road is open to public travel and is used and maintained the same as other gravel streets in the city. The city owns the underlying fee title. Raymond Hennings testified the DOT told him the street would be built in compliance with city ordinances but he did not know what that meant and was not concerned. Karen Hennings' testimony was similar and she testified no one told her the road would be paved.

Although in the city limits the land is not subdivided, representatives of the DOT testified they never intended to pave the road and the city was aware a gravel access was proposed. One DOT employee further testified the city accepted ownership and only required the access be fifty feet in width. The access purchased cost $70,000. To pave the street would have cost $200,000.

We find substantial evidence to support the trial court's finding the parties to the contract did not contemplate the DOT would pave the access road. We need not reach the issue of damages.

AFFIRMED