FILED
AUG 30 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-38 / 89-616

DALE CUNION and ROBERT D. TAHA, TRUSTEE FOR THE BANKRUPT DALE D. CUNION,

Appellants,

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vs.

LES CALVERT REALTY, INC., an IOWA CORPORATION, and LES CALVERT,

Appellees.

Appeal from the Iowa District Court for Polk County, Harry Perkins, Judge.

Plaintiffs appeal from a district court ruling dismissing plaintiffs' action for breach of contract, negligence, breach of fiduciary duty, and indemnification. **AFFIRMED.**

Bruce H. Stoltze of Brick, Seckington, Bowers, Swartz & Gentry, P.C., Des Moines, and Luis Herrera of Herrera & Schemmel, P.C., Des Moines, for appellants.

Douglas Fulton of Connolly, O'Malley, Lillis, Hansen & Olson, Des Moines, for appellees.

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

OXBERGER, C.J.

Dale Cunion and Robert D. Taha, Trustee for the bankrupt Dale D. Cunion, appeal a district court ruling dismissing plaintiff's action for breach of contract, negligence, breach of fiduciary duty, and indemnification. Cunion contends the district court erred in: (1) determining any negligence by Les Calvert and Les Calvert Realty, Inc. was not the proximate cause of Cunion's damages; (2) determining a supervening and intervening cause barred recovery; and (3) failing to admit a prior district court finding as res judicata on an issue in this case. We affirm.

Dale Cunion contacted Les Calvert, of Calvert Realty, in order to sell his home and build a new one. Together they contacted Ken Stone, of Stone Construction Services, regarding the construction of a new home. On June 8, 1981, Stone agreed in writing to cosign a mortgage with Cunion.

On June 16, 1981, the parties executed a written contract dated June 3, 1981, for the purchase of a house. The contract did not include the June 8, 1981, cosign agreement. It provided for two mortgages, one to be obtained by Cunion from a different source for $80,000, and two, the balance of the purchase price to be financed by a second mortgage to Stone. Calvert drafted both agreements as Cunion's agent. The June 8 cosign agreement had contemplated only one mortgage which Stone had agreed to cosign.

Cunion had immediate problems in making his payments to Stone. Stone agreed to modify the contract in April 1982. Cunion continued to have difficulty making payments, and unsuccessfully attempted to sell the house. Stone refused to cosign a mortgage with Cunion.

In June 1983 Stone filed a notice of forfeiture of real estate contract. He then brought a forcible entry and detainer action against Cunion, seeking to remove him from the house. Cunion raised Stone's agreement to cosign a mortgage as a defense. The trial court said the burden was on Cunion to prove the June 8, 1981, cosign agreement was a part of the contract signed on June 16, 1981. The court said:

> This court finds the defendant has failed to carry his burden of proof that Ex. A (cosign agreement) was not superseded but rather was intended to be a functioning part of Ex. 2 (contract June 16, 1981).

Our scope of review is limited to correction of errors of law. Iowa R. App. 4. The trial court's finding of fact are given the weight of a jury verdict and are binding if supported by substantial evidence. Iowa R. App. P. 14(f)(i).

As a general rule, even if negligence is established, it does not necessarily establish that proximate cause existed. Proximate cause must be determined separately, and the burden of proof is on the party claiming the proximate cause. Oakleaf Country Club, Inc. v. Wilson, 257 N.W.2d 739, 746 (Iowa 1977).

The trial court found:

> This Court is of the opinion that the plaintiff has failed to establish the necessary causal link. Plaintiff has offered no direct testimony as to how, in fact, Calvert's alleged negligence caused Cunion to lose his home, other than alleging it allowed Stone to renege on the contract to cosign on a mortgage. No testimony was produced having Stone cosign would, in fact, have enabled Cunion to obtain a mortgage. Only speculation existed as to that issue. Such speculation will not sustain an award of damages. See Tyron v. First National Bank of Sibley, Iowa, 462 F.2d 217, 219 (8th Cir. 1972).

We agree.

Cunion also claims the trial court erred in determining a supervening and intervening cause barred recovery. We deem it unnecessary to address this issue, as we concur in the trial court's finding on the issue of proximate cause.

Cunion's final point of claimed error is the court's ruling on res judicata. Cunion says the trial court in its ruling on the forcible entry and detainer action "determined the unenforceability of the cosign agreement which was the proximate caues (sic) of Cunion's injury."

The legal cause of Cunion's injury is whether Stone's cosignature would have produced a mortgage for Cunion that would have saved him from forfeiture. The fact the cosign agreement was not enforceable is implicit in the trial court's finding in the damage case that Calvert was negligent in not incorporating the cosign agreement in the June 16, 1981 contract to purchase the house. The evidence the cosign agreement was not enforceable does not prove

that had the cosign agreement been enforceable, Stone could have helped Cunion obtain a mortgage. We find the trial court did not err in its ruling on res judicata.

AFFIRMED.