

IN THE COURT OF APPEALS OF IOWA

FILED

MAY 22 1984

CLERK SUPREME COURT

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RICHARD D. RAYMON,

)

Plaintiff-Appellant,

)

Filed May 22, 1984

vs.

)

JOHN A. LEEPERS and
NANCY A. LEEPERS,

)

)

4-108
83-993

Defendants-Appellees.

Appeal from the Iowa District Court for Linn County - William L. Thomas,
Judge.

Plaintiff appeals from a judgment for defendants in this contract rescission
action arising out of the dissolution of a real estate partnership. AFFIRMED.

Peter C. Riley of the Tom Riley Law Firm, Cedar Rapids, Iowa, for
plaintiff-appellant.

William G. Nicholson and Timothy S. White of White & Warbasse, P.C.,
Cedar Rapids, Iowa, for defendants-appellees.

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

Plaintiff appeals from a judgment for defendants in this contract rescission action arising out of the dissolution of a real estate partnership.

Plaintiff, an attorney, and defendant, John Leefers,¹ a realtor, were partners in a real estate partnership for several years. The partnership, known as Bulldog Equities, purchased a number of properties. In 1980 the parties had a dispute over the receipts from laundry machines in the buildings owned by the partnership. Plaintiff testified that he lost all confidence in defendant, and the two men agreed to dissolve the partnership. All of the property was distributed by agreement except for an apartment building known as Robinwood Building D. The parties tried to sell the building which contained 36 rental units, but were unsuccessful. Eventually they agreed that plaintiff would buy defendant's interest in the building for \$36,000. The partnership had made a downpayment of \$72,000 when it purchased the property from the building contractors.

After plaintiff became the owner of the building in July of 1981, it became clear that the cash flow was not sufficient to cover the expenses. Plaintiff deeded the building back to the seller to avoid foreclosure. Plaintiff then commenced this suit seeking rescission of the contract of sale on the grounds that defendant concealed material information about the condition of the building, the number of vacant apartments, and the back taxes in breach of his fiduciary duties as a partner. Defendant counterclaimed for a portion of the consideration allegedly owed to him.

The trial court held that plaintiff had not met his burden of proving fraud. The court found that plaintiff was a very experienced real estate investor and had not relied on any representation made by defendant. The court also held that

¹ Although Leefers' wife is also named as a defendant, she appears to have taken no part in the transactions leading to this lawsuit.

rescission was unavailable since plaintiff had deeded the building back to the original contract sellers and could no longer restore defendant's interest. The court entered judgment for \$18,628.65 for defendants on the counterclaim.

On appeal plaintiff asserts: (1) the trial court erroneously placed the burden on plaintiff to show fraud by clear and convincing evidence rather than requiring defendant to prove the fairness of the transaction; (2) the trial court's finding that there was no fraud is unsupported by the evidence; and (3) the trial court should have set aside the transfer since it violated the duties of honesty and fairness required in transactions between partners.

Our review of this equity action is de novo. Iowa R. App. P. 4. We are not bound by the findings of the trial court, but we do give weight to them, especially where the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7).

I. Burden of Proof. It has been held that partners occupy the position of fiduciaries to one another and owe each other a duty to exercise the utmost good faith. Joseph v. Mangos, 192 Iowa 729, 732, 185 N.W. 464, 465 (1921). Plaintiff maintains that because of this duty defendant should have been required to disprove the allegations of fraud.

In Clinton Land Co. v. M/S Associates, Inc., 340 N.W.2d 232, 234 (Iowa 1983), the supreme court noted that where breach of a fiduciary duty is alleged, ordinarily the burden shifts to the fiduciary to show that he properly discharged his obligation. The court stated, however, that the burden does not automatically shift to the fiduciary. The court observed:

The shift does not occur simply by reason of the label attached to the relationship. Rather, the shift results from facts that often occur in such a relationship. There is no shift of the burden unless, under the facts presented, the fiduciary is shown to be in a position to take advantage over the principal, or appears to have closer access to the facts.

Id. at 235 (emphasis added). The court held that the burden of persuasion was properly placed on the plaintiffs notwithstanding the fact that defendant-real

estate broker was a fiduciary. The court cited the absence of any indication of self-dealing or breach of stewardship on the part of the fiduciary. Id.

Likewise in In re Hewitt's Estate, 245 Iowa 369, 372, 62 N.W.2d 198, 200 (1954), the court held that the burden was on plaintiffs to show fraud by clear, satisfactory, and convincing evidence. The court stated that even assuming a partnership existed, "mere partnership and a conveyance by one partner to another of partnership assets does not make a presumptive fraud or establish a confidential relationship." The court noted that there was no showing that either party dominated or advised the other on business matters. Id.

Finally, in the older case of Curtis v. Armagast, 158 Iowa 507, 138 N.W. 873 (1912), the same issue was considered. There the court maintained:

As between such persons [fiduciaries], a contract by which the one having the advantage of position profits at the expense of the other will be held presumptively fraudulent and voidable, and the burden is placed upon him who claims the benefits thereof to rebut that presumption by an affirmative showing that such contract was fairly procured without undue influence or other circumstance tending to impeach its fairness. Though strictly of differing signification, the phrases "fiduciary relations" and "confidential relations" are ordinarily used as convertible terms and have reference to any relationship of blood, business, friendship, or association in which the parties repose special trust and confidence in each other and are in a position to have and exercise, or do have and exercise, influence over each other. The rule or presumption to which we have referred is more particularly applicable where one of the parties to such relation has by reason of his stronger character, greater ability, and wider experience, or by his hold upon the affection, trust, and confidence of the other, obtained a dominating influence over him.

Id. at 520-21, 138 N.W. at 878 (emphasis added). See also 68 C.J.S. Partnership § 403(d) (1950) (a partnership settlement is presumptively correct, and the burden of proof rests on the partner seeking to invalidate it to show fraud, duress, or mistake).

In the present case we hold that the trial court correctly left the burden with plaintiff to show fraudulent conduct by defendant. The two parties are both

experienced real estate investors. Plaintiff, an attorney, testified that he had been involved in real estate since he was seventeen years old and had bought and sold approximately 1,200 pieces of property. He also testified that he was a licensed real estate broker, and that he reviewed ten real estate appraisals per week which were prepared in his law firm. After testifying so fully on direct examination concerning his experience in order to lend credibility to his opinion as to the value of a piece of property, plaintiff's claim on cross-examination that his experience in real estate was "nominal" is incredible. Furthermore, there was no evidence that defendant had a superior access to relevant information than did plaintiff. Although plaintiff testified that he was unable to obtain certain information about building D from defendant, there was evidence that plaintiff had access to all of the relevant information. The apartment building was available to plaintiff, the person to whom the property tax payments were to be made was a friend of the plaintiff, and the accountant who maintained the books was not shown to be under the domination or influence of the defendant. Lastly, there does not appear to have been any special relationship of confidence or trust between the parties at the time the contract was executed. Plaintiff testified that he had lost all confidence in defendant after the prior dispute which led to a dissolution of the partnership.

Since the record shows that defendant was not in a superior position, that he exercised no control over plaintiff, and that he was not the recipient of plaintiff's confidence, we see no reason to shift the burden of persuasion and require defendant to show that the transaction voluntarily entered into by both parties at the instigation of the plaintiff involved no fraud.

II. Allegations of Fraud. Plaintiff maintains that even if he had the burden of proving fraud the evidence produced was sufficient to meet that burden. Plaintiff claims that defendant concealed from him material facts concerning the condition of the building, the number of vacancies in the building, and the amount of taxes due.

Ordinarily in an arms length transaction mere silence on the part of one party as to material facts discoverable by the other party does not constitute fraud. First National Bank v. Brown, 181 N.W.2d 178, 182 (Iowa 1970). However, this rule changes where there is a special relationship between the parties. Id. A partner may not deceive his copartner by misrepresentations or concealments. Joseph v. Mangos, 192 Iowa at 732, 185 N.W. at 465. This obligation to exercise utmost good faith extends to transactions entered into in the course of dissolving the partnership. Id. In order to establish fraud in a law action, the evidence must prove: (1) misrepresentation or concealment; (2) materiality; (3) scienter; (4) intent to deceive; (5) reliance; and (6) resulting injury and damage. First National Bank v. Brown, 181 N.W.2d at 181. However, in equity cases the rules are less strict. Fraud may be constructed from circumstances, whereas the law must find it as a fact. Equity may grant relief without proof of scienter or pecuniary damage. Id.

After a de novo review of the record in this case, we agree with the trial court's conclusion that plaintiff failed to show that the defendant made false statements or concealed material facts. Since the credibility of the two parties is crucial on this issue, we give more weight to the findings of the trial court. Iowa R. App. P. 14(f)(7). Plaintiff claims that defendant should have disclosed that the building needed some repairs. There was no evidence presented, however, that defendant had been in the building for a substantial period of time prior to the execution of the agreement or that defendant had been informed as to the condition of the building. Plaintiff also asserts that defendant fraudulently failed to disclose that the original contract vendor required one-twelfth of the property taxes to be paid to him each month and this that was not done in April, May, or June of 1981. Defendant claims that there was no such arrangement with the contract vendor. There was also evidence that defendant told plaintiff that there were some taxes due. Finally, plaintiff claims that the number of vacancies in the

building was more than he was led to believe by defendant. Plaintiff admits that defendant told him that there were vacancies and did not specify the number, but plaintiff claims he got the impression that the number of vacancies was not unusual.

Reviewing the whole record with regard to all of plaintiff's allegations, it appears that there were not misrepresentations or fraudulent concealments but rather differing interpretations of what was said and a failure of the parties to effectively communicate. Therefore, plaintiff has not met his burden of showing fraud.

III. Fairness of the Transaction. Plaintiff's final argument is that the transaction should be set aside because it is inherently unfair and violates the spirit of fair dealing required between partners. He claims that the asset had a negative value. Although there was a negative cash flow, we cannot say that the asset was of no value. Furthermore, the transaction appears reasonable on its face since plaintiff paid defendant for his interest one-half of the downpayment made by the partnership. Finally, it has been held that a transfer of one partner's interest to a copartner will not be set aside for fraud where as here the parties had equal means of ascertaining the truth of the situation. 68 C.J.S. Partnership § 102(c) (1950).

AFFIRMED.