IN THE COURT OF APPEALS OF IOWA

FILED
JUN 29 1982
CLERK SUPREME COURT

ARLEY D. BARKER AND LOIS A. BARKER,

Plaintiff-Appellees,

vs.

ESTATE OF THELMA HARVEY, NELS W. BRANSTAD, Executor,

Defendant-Appellant.

Filed June 29, 1982

2-74
2-66070

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Appeal from Calhoun District Court --- R. K. Richardson, Judge.

Defendant-estate, appeals from an adverse judgment in this action arising from the sale of real property at an estate auction, asserting: 1) that there was not substantial evidence in the record to support trial court's finding that the property was sold as a tract consisting of four acres rather than as a tract without quantity in acres or dimensions; and, 2) that trial court applied the wrong measure of damages. AFFIRMED.

Barry L. Anderson, Mason City, for defendant-appellant.

Dan T. McGrevey, Fort Dodge, for plaintiffs-appellees.

Considered by Oxberger, C.J. and Carter and Johnson, JJ.

Defendant-seller, estate of Thelma Harvey, appeals from an adverse judgment in this action arising from the sale of real property at an estate auction. On appeal, defendant asserts: 1) that there was not substantial evidence in the record to support trial court's finding that the property was sold as a tract consisting of four acres, rather than as a tract without quantity in acres or dimensions; and, 2) that trial court applied the wrong measure of damages. We affirm.

The land giving rise to this dispute consisted of approximately 80 acres, less a railroad right-of-way. It was divided into two parcels for the purpose of sale at an auction. The first consisted of virtually all the farmland and the other consisted of the house and surrounding land. Plaintiffs purchased the latter tract at the auction. They subsequently discovered that the property described in the contract of sale contained only two and a quarter acres, rather than the four acres they claimed to have been led to expect by defendant's agent, the auctioneer. Plaintiffs filed a declaratory judgment action asking trial court to rule that a material mistake had been made in the real estate contract and praying for a reduction in plaintiffs' purchase price. Trial court held in favor of plaintiffs on the basis that they reasonably relied upon defendant's agent's representation that the parcel they purchased consisted of four acres. Defendant appeals from this judgment.

I. Scope of Review. Since this is an action at law, our review is for correction of errors only. Iowa R. App. P. 4. The principles governing our review of trial court's findings are well settled. Trial court's findings of fact have the effect of a special verdict and are equivalent to a jury verdict; if supported by substantial evidence they are binding upon us and the judgment will not be disturbed on appeal. Iowa R. App. P. 14(f)(1). A finding of fact is supported by substantial evidence if the finding may reasonably be inferred from the evidence.

Briggs Transp. Co. v. Starr Sales Co., 262 N.W.2d 805, 808 (Iowa 1978). The record is reviewed in a light most favorable to the judgment. Pillsbury Co. v. Ward, 250 N.W.2d 35, 38 (Iowa 1977). We will not weigh the evidence or pass on the credibility of the witnesses. Thomas Truck and Caster Co. v. Buffalo Caster and Wheel Corp., 210 N.W.2d 532, 536 (Iowa 1973); Northrup v. Foster, 204 N.W.2d 889, 890-91 (Iowa 1973).

II. Responsive Pleadings. Prior to our consideration of the substantial evidence issue, we must address one threshold question. Plaintiffs argue that defendant's failure to file a responsive pleading places defendant in default and limits trial court's consideration to the issue of damages. We disagree. The record in this case reflects a full and complete trial on the issues presented in the petition. Where evidence is introduced to prove an issue and the other party does not object, the issue is tried by consent. See Beneficial Finance Co. of Waterloo v. Lamos, 179 N.W.2d 573, 578 (Iowa 1970), quoting Nelson v. Leaders, 258 Iowa 919, 922-923, 140 N.W.2d 921, 923-924 (1966).

III. Substantial Evidence of Breach. Defendant argues that trial court erred in determining that the tract of land was advertised and sold as a tract containing four acres. Defendant asserts the evidence shows that the land was sold as a tract with no definite acreage or dimensions represented or guaranteed and, thus, attacks trial court's decision as being unsupported by substantial evidence. When considering the issue of substantial evidence to support trial court's findings, the question before the court is not whether there is sufficient evidence to warrant a decision the fact finder did not make, rather it is whether there is sufficient evidence to warrant a decision it did make. See Deaver v. Armstrong Rubber Co., 170 N.W.2d 455, 464 (Iowa 1976).

The evidence in this case was conflicting. Evidence was introduced that indicated the entire tract for sale was reported as containing about 80 acres, the farmland being about 76 acres, and the homestead about 4 acres. Plaintiffs presented witnesses who supported their contention that the tract of land was

represented as comprising approximately four acres. In addition, the contract specifically referred to four acres, "more or less," in the description. Notwithstanding defendant's evidence to the contrary, we find this record provides substantial evidence to support trial court's finding.

The legal significance of the phrase "more or less" has been discussed by the Iowa supreme court in a strikingly similiar case. ". . .[W]hen land is sold as containing so many acres 'more or less,' if the quantity or actual survey and estimation either overruning or falling short of the contents named be small, no compensation should be recovered by either party. The words 'more or less' must be intended to meet such result. But if the variance be considerable, the party sustaining the loss should be allowed for it." Gardner v. Kiburz, 184 Iowa 1268, 1275, 168 N.W. 814-817 (1918).

> Indeed the rule deducible from the great weight of authority is that the question whether the sale is in gross or otherwise does not depend solely upon the presence or absence of an expressly stated price per acre, in the written contract or subsequent deed; but, if the terms of these instruments be such as to make it plain that the land is bought and sold upon the mutual understanding and agreement that it contains a definitely stated number of acres, then the obligation to make good any material deficiency exists, and the purchaser may recover for any loss thus sustained by him.

Id. at 1275-76, 168 N.W. at 817. As stated above, we believe the evidence supports trial court's findings that plaintiffs relied upon defendant's agent's representation that the tract consisted of four acres, and its conclusion that plaintiffs had a right to so rely. A purchaser has a right to rely upon representations as to acreage, even though the purchaser has an opportunity to examine the property. Holcomb v. Hoffschneider, 297 N.W.2d 210, 212-13 (Iowa 1980). We also believe that a deficiency of nearly half the represented acreage cannot be said to be so inconsiderable as to be an allowable discrepancy under the words "more or less."

Finally, while the petition does not clearly indicate the thoughts of the

pleaders as to whether their action was founded upon breach of the original contract, upon breach of warranty of representation in the deed, upon fraud, or for recovery for an overpayment, they pled and set forth the instrument conveying the property and the alleged fact that there was a material shortage in the acreage conveyed to them. They further set forth their demand for judgment for the relief to which they deemed themselves entitled. It follows, under our rules of pleadings, that if the facts stated disclose a right of action on any theory, the plaintiffs are entitled to judgment in their favor. See Iowa R. Civ. P. 69. The evidence in this case clearly indicates that plaintiffs did not receive what they had bargained for. We conclude, therefore, that the acreage deficiency amounts to a breach of contract and supports plaintiffs' action for recovery of damages.

IV. Damages. Defendant also disputes the method which trial court used in computing damages. The court determined damages by multiplying the amount of the acreage deficiency by the price paid per acre for the remaining parcel. We agree with trial court's determination.

In Iowa, the measure of damages for breach of contract is the amount that may reasonably be considered as arising naturally from the breach of contract. New Hampshire Ins. Co. v. Christy, 200 N.W.2d 834,844 (Iowa 1972). As applied to this case, the proper measure of damages supported by the record is plaintiffs' loss of the benefit of their bargain. That is, plaintiffs are entitled to the difference between the value of the property they would have received had the property been as represented and the value of the property they actually received. See also Holcomb, 297 N.W.2d at 213; Watson v. Lewis, 272 NW.2d 459, 463-65 (Iowa 1978); Prenosil v. Pelton, 186 Iowa 1235, 1246, 173 N.W. 235, 238-39 (1919). "In ascertaining the value of property, its owner is a competent witness to testify as to its market value. [citation] Likewise, he is competent to give his opinion on what the property would have been worth if it had been as represented. [citations] He may also state his opinion on the difference between the two values."

Holcomb, 297 N W 2d at 213

Plaintiff, Arley Barker, testified as to his opinion of the relative values of the property as represented and as received In so computing his damages, plaintiff multiplied the acreage deficiency by the purchase price of the surrounding acres sold at the same auction The cost of acquiring adjoining property to increase plaintiffs' tract also is clearly a relevant consideration in determining the value of the deficient acreage We thus find competent evidence upon which trial court could reasonably determine damages in the instant case; and we thereby reject defendant's assertion that trial court's award is devoid of support in the evidence Further, we regard trial court's determination as reasonable under the circumstances of this case

Finding no error, we affirm trial court's judgment

AFFIRMED