IN THE COURT OF APPEALS OF IOWA

No. 1-818 / 11-0211
Filed December 21, 2011

CY & CHARLEY'S FIRESTONE, INC.,
and HEARN PROPERTIES, L.L.C.,
Plaintiffs-Appellants,

vs.

RICHARD D. RUNNING and
BONNIE R. RUNNING,
Defendants-Appellees.

Appeal from the Iowa District Court for Buchanan County, Bradley J. Harris, Judge.

Plaintiffs appeal district court orders denying their claims for breach of contract, unjust enrichment, and promissory estoppel, and awarding defendants attorney fees. **AFFIRMED AND REMANDED.**

Robert S. Hatala, Matthew J. Adam, Robert E. Konchar, and Kerry A. Finley of Simmons, Perrine, Moyer & Bergman, P.L.C., Cedar Rapids, for appellants.

Joseph T. Moreland of Hayek, Brown, Moreland & Smith, L.L.P., Iowa City, for appellees.

Heard by Tabor, P.J., Mullins, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MULLINS, J.

This case involves a dispute that arose from the sale of two parcels of real estate. For the reasons stated herein, we affirm the district court's order denying plaintiffs' claims for breach of contract, unjust enrichment, and promissory estoppel, and the order awarding attorney fees to the defendants.

I. Background Facts and Proceedings.

Ronald Hearn owns two businesses, Cy & Charley's Firestone, Inc. and Hearn Properties, L.L.C.[1] Cy & Charley's is a general automotive and appliance sales business in Independence. Richard and Barbara Running are Wisconsin residents, who have real estate investments in Iowa. Kurt Mills is a general contractor from Wisconsin, and is the Runnings' daughter-in-law's father.

The Runnings and Mills have previously worked together when making real estate investments. In these instances, Mills found the property and negotiated the price and terms for purchase, and the Runnings would actually purchase the property. The Runnings, in turn, would give Mills a finder's fee and priority in any construction needed for the property.

In October 2005, while Mills was building a restaurant on land purchased by the Runnings in Independence, Mills saw a parcel of land across the street that he believed could be an excellent investment opportunity. Mills contacted the Runnings and was given permission to pursue the purchase of the property.

---

[1] We will refer to Hearn and his businesses collectively as "Hearn" unless specifically noted otherwise herein.

The property, located on 3rd Avenue SE near the Highway 20 exchange, was owned by a local developer, Edgar Larson (the Larson Property). On April 3, 2006, the Runnings purchased the Larson Property for $110,000.

Prior to the Runnings purchasing the Larson Property, Mills was already in communication with several prospective purchasers of the Larson Property from the Runnings. One of these prospective buyers was Hearn, who had been given the opportunity in 2005 to purchase the Larson Property for $98,000 as a possible new location for Cy & Charley's, but declined to do so because he could not find a buyer for his current Cy & Charley's location (Cy & Charley's Property), and was hesitant about building a new facility. According to Hearn, during their communications, Mills suggested performing a like-kind exchange in selling the Larson Property and the Cy & Charley's Property. *See* 26 U.S.C. § 1031 (setting forth like-kind exchanges under the Internal Revenue Code).

Eventually, Hearn, Mills, and Richard Running met and discussed the two parcels of real estate. During this meeting, Hearn agreed to purchase the Larson Property for $350,000 without negotiations. The Runnings also agreed to purchase the Cy & Charley's Property, but after negotiating the price down from $450,000 to $429,000. During their meeting, Hearn was told Mills and the Runnings wanted the Cy & Charley's Property tested to ensure it was environmentally sound.

On April 19, 2006, the Runnings (as Sellers) and Hearn (as Purchaser) enter into a real estate purchase agreement for the Larson Property. The purchase price was $350,000. The contract included the provision:

> Purchaser may identify property as replacement property as part of an IRC 1031 like kind exchange. Seller agrees to cooperate with Purchaser's efforts to qualify this transaction with the understanding that said treatment will not give rise to additional expense or closing costs to seller.

The contract also contained a provision stating that Hearn would enter into a contract with Mills for the construction of a building on the Larson Property as a new location for the Cy & Charley's business. Hearn entered into the contemplated construction contract with Mills in June 2006 for $798,900. The construction of the new facility was to be substantially completed by October 2006. Closing on the sale of the Larson Property to Hearn occurred on April 25, 2006. A warranty deed for the Larson Property was filed on May 18, 2006.

Simultaneously with the closing of the Larson Property on April 25, 2006, the Runnings and Hearn entered into a separate contract for the Runnings to purchase the Cy & Charley's Property for $429,000 with a $1000 earnest money deposit. Under the agreement, possession was to be delivered to the Runnings on the "date [the] new building is ready for occupancy," referring to the building Mills was constructing for Hearn on the Larson Property. The agreement further provided:

> 10. ENVIRONMENTAL MATTERS.
> . . . .
> B. BUYERS may at their expense, within 10 days after the date of acceptance, obtain a report from a qualified engineer or other person qualified to analyze the existence or nature of any hazardous materials, substances, conditions or wastes located on the Property. In the event any hazardous materials, substances, conditions or wastes are discovered on the Property, BUYERS' obligation hereunder shall be contingent upon the removal of such materials, substances, conditions or wastes or other resolution of the matter reasonably satisfactory to BUYERS. However, in the event SELLERS are required to expend any sum in excess of $0.00 to remove any hazardous materials, substances, conditions or

> wastes, SELLERS shall have the option to cancel this transaction and refund to BUYERS all earnest money paid and declare this Agreement null and void. The expense of any inspection shall be paid by BUYERS. The expense of any action necessary to remove or otherwise make safe any hazardous material, substances, conditions or waste shall be paid by SELLERS, subject to SELLERS' right to cancel this transaction as provided above.

The underlined portions above were typed in separately. The agreement also included the following provision:

> Seller may identify property as replacement property as part of an Internal Revenue Code Section 1031 Like-Kind Exchange. Buyer agrees to cooperate with Seller's efforts to qualify this transaction with the understanding that this treatment will not give rise to additional expenses or closing costs to the Buyers.

Even though Mills was not a party or signatory to the contract, it recited that Hearn had agreed with Mills to build a facility on the Larson Property. A reference to the Runnings being named with Mills as the contractor was scratched out and initialed by the parties. The contract also stated that "[i]n the performance of each part of this agreement, time shall be of the essence." Finally, under paragraph 17, the contract contained the following remedy provisions:

> B. If SELLERS fail to timely perform this Agreement, BUYERS have the right to have all payments made returned to them.
>
> C. BUYERS and SELLERS are also entitled to utilize any and all other remedies or actions at law or in equity available to them, and the prevailing parties shall be entitled to obtain judgment for costs and attorney fees.

At 5:36 p.m. on April 25, 2006, Mills received a fax from Braun Intertec. Braun had previously been hired by Mills to perform a Limited Phase II Environmental Site Assessment on the Cy & Charley's Property. Soil samples

and groundwater assessments collected on April 12 showed environmental substances exceeding statewide standards.

Over the summer months, problems with the construction of the new Cy & Charley's facility on the Larson Property mounted. By October 2006, Mills left the project and a new contractor was brought in to finish the building. With the new contractor the building was not completed until February 15, 2007.

On October 13, 2006, Hearn's attorney sent a letter to the Runnings stating that "we are close to closing" the purchase of the Cy & Charley's Property. Hearn's attorney testified he sent this letter to ensure that the closing date meet the 180-day deadline to qualify as a like-kind exchange. *See* 26 U.S.C. § 1031(a)(3). On November 14, 2006, Hearn's attorney sent another letter demanding that closing take place no later than November 18.

On November 16, 2006, the Runnings' attorney replied by letter stating the Runnings were not willing to waive the environmental contingency, and questioned how closing could occur when construction on the new facility was not complete. The Runnings' attorney further wrote that Hearn's attorney had acknowledged he had a copy of the Braun report since last April and was aware of its contents. The letter closed with the Runnings' attorney stating that the Runnings would fulfill their obligation to purchase if and when Hearn fulfilled his obligation to remediate the hazardous substances.

Hearn and his attorney both testified they did not receive or have any notice of the Braun report until after this correspondence from the Runnings' attorney. Hearn testified he was present when Braun took its samples on April

12 and that he was told by Braun that it "smells a little funny" on a part of the Cy & Charley's Property, but they would not know anything until testing was completed. Hearn further testified that sometime between April 12 and April 25, Mills told him that "there was a little benzene in the finding or whatever, but that it didn't matter to them and that the deal was still good." Hearn further testified that after Mills' statement he didn't worry about the report or environmental hazards.

After the Runnings' November 16 correspondence, Hearn retained Black Hawk Environmental Testing, Inc. to see what remediation work needed to be performed on the Cy & Charley's Property. The Braun report that Hearn's attorney faxed to Black Hawk on November 17, 2006, consisted of forty-five pages with cover sheet. However, the report possessed by the Runnings' attorney only consisted of twenty pages. Based upon this discrepancy, the district court determined that Hearn's attorney did not receive the Braun report from the Runnings' attorney, but received it prior to mid-November 2006, most likely from Hearn or a prior attorney for Mills and the Runnings.

After construction was completed on February 15, 2007, Hearn notified the Runnings he was ready to close on the Cy & Charley's Property. However, at this time, the environmental problems had still not been resolved. Thus, the Runnings refused to close. On March 30, 2007, the Runnings notified Hearn that they were terminating the agreement.

Hearn, through his companies, subsequently filed suit against the Runnings alleging breach of contract, promissory estoppel, and unjust

enrichment. The Runnings answered and counterclaimed seeking the return of their $1000 earnest money deposit and attorney fees.

Trial was held on the petition on October 13-14, 2010. The district court entered an order dismissing plaintiffs' claims on January 11, 2011. The district court determined that Hearn failed to comply with the environmental contingency in paragraph 10(B) of the Cy & Charley's Property purchase agreement, and thus could not claim a breach of contract by the Runnings. The district court further dismissed the unjust enrichment and promissory estoppel claims based upon the express words of the two purchase agreements. The district court stated:

> Plaintiff presented evidence that they would not have purchased the Larson Property if they had not been able to sell the original building location. In addition, they point to those provisions in both contracts . . . which allow plaintiffs to identify property as replacement property for tax purposes. They contain language that plaintiffs may identify property as replacement property for Internal Revenue Code Section 1031 like-kind exchange. However, at no time in either [purchase agreement] is the real estate identified. Further, at no time in either contract is the other contract referenced or mentioned.
>
> This court cannot use parol evidence to add to either contract a provision which makes that contract contingent upon the other. Nor can this court use parol evidence to subtract from the contract for the purchase of the original building location paragraph 10 which places a contingency upon the sale of the property. Therefore, the court concludes that the contract for purchase and sale of the Larson property . . . and the contract for the sale of the original building location . . . are two separate and distinct contracts and not contingent upon each other.

The district court then determined that the Runnings were entitled to a return of their earnest money deposit and an additional hearing for an attorney fees award.

The Runnings subsequently filed documentation in support of an award of attorney fees. At the hearing on the attorney fees issue, Hearn argued the claim for attorney fees should be reduced by two-thirds because the claims for promissory estoppel and unjust enrichment could not be recovered under paragraph 17(C) of the contract. Hearn further argued the Runnings' attorney's documentation was too vague and imprecise to warrant fees.

On March 21, 2011, the district court entered an order rejecting Hearn's arguments. After making reductions on other grounds, the district court awarded the Runnings $40,448.46 in costs and attorney fees.

Hearn appeals from both the order dismissing his claims and the order awarding attorney fees. Hearn argues: (1) the Runnings waived their right to exercise the environmental contingency in the purchase agreement for the Cy & Charley's Property, (2) their unjust enrichment claim was proper because the consideration for the purchase of the Larson Property was the Runnings' purchase of the Cy & Charley's Property, (3) their promissory estoppel claim was proper because extrinsic evidence showed it was the parties' intention to make a like-kind exchange, and (4) attorneys fees only should have been awarded for the breach of contract claim, and the documentation submitted by Runnings' attorney was too vague and imprecise for meaningful review.

II. Real Estate Claims.

A. Standard of Review. Hearn seeks both legal and equitable remedies on appeal. When "both legal and equitable relief are demanded, the action is ordinarily classified according to what appears to be its primary purpose or its

controlling issue." *Mosebach v. Blythe*, 282 N.W.2d 755, 758 (Iowa Ct. App. 1979). Here, the dominant issue was which party breached the contract. In addition, the matter was tried to the court at law, the trial court ruled on objections, and the court issued a ruling and judgment entry, not a decree. *Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174, 179 (Iowa 2010).

Consequently, our review is for the correction of errors at law. Iowa R. App. P. 6.907. The trial court's factual findings carry the force of a special verdict, and are binding if supported by substantial evidence. Iowa R. App. P. 6.904(3)(a). However, we are not bound by the trial court's legal conclusions. *Van Sloun*, 778 N.W.2d at 179.

B. Breach of Contract. Hearn first asserts that the Runnings waived their right to enforce the environmental contingency in the purchase agreement for the Cy & Charley's Property when they failed to disclose the Braun report within a reasonable amount of time. Hearn argues the Runnings intentionally delayed disclosing the report to Hearn until November 2006 and then used the report "as a pretext to terminate the agreement."

The environmental contingency located in paragraph 10(B) of the purchase agreement is an explicit condition precedent. *Mosebach*, 282 N.W.2d at 759 (defining "conditions precedents"). Proof of performance of a condition precedent is necessary to a breach of contract action. *Id*. "If performance is not proved or excuse or justification for delay is not established, plaintiff cannot prevail." *Id*.

Hearn cannot show excuse or justification for delay in his performance. Even if we were to find Hearn did not have notice of the Braun report until November 2006 (an assertion questioned by the district court), the closing on the purchase agreement was not scheduled to occur until the new Cy & Charley's building was completed. This was not until February 15, 2007. Accordingly, Hearn had three months to remove any hazardous substances. He failed to do so. The evidence conclusively shows that the condition precedent has not been satisfied, and thus Hearn cannot recover on his breach of contract claim. *Id*.

To the extent Hearn continues to argue that the Runnings failed to comply with the ten-day time frame for the environmental contingency or that Mills, acting as the Runnings's agent, waived the environmental contingency when he told Hearn that "the deal was still good," we find the arguments to be without merit. The evidence shows Mills obtained the report from Braun Intertec after the purchase agreement for the Cy & Charley's Property was entered into. We also agreed with the district court's finding that Mills' statement was not sufficiently specific to constitute a waiver of the environmental contingency. *See Williams v. Stroh Plumbing & Elec., Inc.*, 250 Iowa 599, 602, 94 N.W.2d 750, 753 (Iowa 1959) (defining waiver as "the voluntary relinquishment of a known right" and stating "[w]here acts and conduct are relied upon as proof of waiver, the intention of the party charged to waive his rights must clearly appear").

C. Unjust Enrichment. Hearn's claim for unjust enrichment is premised on the assertion that the consideration for the purchase of the Larson Property

for $240,000 more than what the Runnings paid for it sixteen days earlier was the Runnings's purchase of the Cy & Charley's Property.

Express and implied contracts cannot, however, coexist on the same subject matter, and where an express contract and implied contract purport to cover the same subject matter, the former supersedes the latter. *See Chariton Feed & Grain, Inc. v. Harder*, 369 N.W.2d 777, 791 (Iowa 1985). "Generally, the existence of a contract precludes the application of the doctrine of unjust enrichment." *Johnson v. Dodgen*, 451 N.W.2d 168, 175 (Iowa 1990).

Here, the express language of the purchase agreement provided that Hearn would pay $350,000 and the Runnings would tender a warranty deed to the Larson Property. The Larson Property purchase agreement does not reference and is not made contingent on the Cy & Charley's Property purchase agreement. Rather, the Larson Property purchase agreement only states that Hearn "may identify property as replacement property" as part of a like-kind exchange, and the Runnings would "cooperate" with Hearn's efforts to qualify the transaction as such. No such replacement property was ever identified though. There is not failure of consideration, and the district court did not err in dismissing Hearn's unjust enrichment claim.

D. Promissory Estoppel. Hearn further argues the district court erroneously determined that the parol evidence rule precluded it from considering any promises made by the Runnings in connection with the like-kind exchange that were not contained within the four corners of the real estate purchase agreement.

The theory of promissory estoppel allows individuals to be held liable for their promises despite an absence of the consideration typically found in a contract. *Schoff v. Combined Ins. Co. of Am.*, 604 N.W.2d 43, 48 (Iowa 1999). Courts have applied the principle of estoppel in effect to form a contract, when the promisee suffered detriment in reliance on a promise. *Id*. However, because promissory estoppel is invoked to form a contract, "promissory estoppel does not apply when the dispute arises out of a valid contract between the parties." 28 Am. Jur. 2d *Estoppel and Waiver* § 54, at 523 (2011); 31 C.J.S. *Estoppel and Waiver* § 116, at 472 (2008) ("Promissory estoppel applies only where there is no contract."); *see also Harder*, 369 N.W.2d at 791 (addressing the coexistence of express and implied contracts). Here, Hearn entered into two valid and enforceable agreements. Accordingly, we do not find promissory estoppel to be applicable in this case.

Nonetheless, even assuming it could be applicable, the district court correctly applied the parol evidence rule in this case. The parties entered into two purchase agreements, neither of which referenced or was made contingent upon the other. In addition, the purchase agreement for the Cy & Charley's Property expressly contained an environmental contingency. Hearn's extrinsic evidence does not seek to provide meaning to the contracts, but to alter them such that the contracts are made contingent upon one another or to eliminate the environmental contingency in the purchase agreement for the Cy & Charley's Property.

> But generally a writing will be reformed only if the party seeking reformation clearly and convincingly establishes that it does not

> express the true agreement of the parties because of fraud or duress, mutual mistake of fact, mistake of law, or mistake of one party and fraud or inequitable conduct on the part of the other.

Montgomery Prop. Corp. v. Economy Forms Corp., 305 N.W.2d 470, 474 (Iowa 1981). Hearn cannot prove any of these grounds. Accordingly, the legal conclusion is that the purchase agreements contained the parties' true intent, and it would be impermissible for us to make a new or different contract. *Id*.

III. Attorney Fees.

A. Standard of Review. An award of attorney fees is reviewed for an abuse of discretion. *NevadaCare, Inc. v. Dep't of Human Serv.*, 783 N.W.2d 459, 469 (Iowa 2010). We will not reverse a court's discretionary ruling unless it rests on grounds that are clearly unreasonable or untenable. *Id*. The burden is on the party seeking to recover fees to prove both the services were reasonably necessary and the charges were reasonable in amount. *Ales v. Anderson, Gabelmann, Lower & Whitlow, P.C.*, 728 N.W.2d 832, 842 (Iowa 2007).

B. Trial Attorney Fees. Hearn argues the district court erred in awarding attorney fees on the claims other than the breach of contract, and that the fees requested were too vague and imprecise to be granted. We disagree.

"As a general rule, an award of attorney fees is not allowed unless authorized by statute or contract." *W.P. Barber Lumber Co. v. Celania*, 674 N.W.2d 62, 66 (Iowa 2003). "When a judgment is recovered upon a written contract containing an agreement to pay an attorney fee, the court shall allow and tax as a part of the costs a reasonable attorney fee to be determined by the court." Iowa Code § 625.22. In this case, paragraph 17(C) of the purchase

agreement for the Cy & Charley's Property and paragraph 15(c) of the Larson Property purchase agreement contained clear and express provisions for the award of attorney fees. These provisions applied whether the case was brought at law or in equity. Thus, we find no merit to the argument that the award should be limited only to Hearn's breach of contract claim. In addition, we do not find the documentation submitted by the Runnings' attorney supporting the requested attorney fees award to be too vague or imprecise, such that we need to reverse the attorney fees granted by the district court.

> The factors to consider when awarding reasonably necessary attorney's fees "include the time necessarily spent, the nature and extent of the service, the amount involved, the difficulty of handling and importance of the issues, the responsibility assumed and results obtained, the standing and experience of the attorney in the profession, and the customary charges for similar service. The district court must look at the whole picture and, using independent judgment with the benefit of hindsight, decide on a total fee appropriate for handling the complete case."

Ales, 728 N.W.2d at 842 (quoting *Lynch v. City of Des Moines*, 464 N.W.2d 236, 238 (Iowa 1990)). The district court properly considered these factors including "the time necessarily spent, [and] nature and extent of the service" claimed by the Runnings' attorney. We find no abuse of discretion in the amount awarded.

C. Appellate Attorney Fees. The Runnings further request the award of $10,000 in appellate attorney fees. Appellate attorney fees are authorized under section 625.22, to the extent they are authorized in the trial court. *Bankers Trust Co. v. Woltz*, 326 N.W.2d 274, 278 (Iowa 1982). The Runnings have prevailed in their defense of Hearn's claims on appeal. Therefore, they are entitled to appellate attorney fees. We remand so the district court can hold an evidentiary hearing to determine an appropriate award of appellate attorney fees. *Id*. at 279.

IV. Conclusion.

We find the district court properly dismissed Hearn's claims for breach of contract, unjust enrichment, and promissory estoppel. We further find the district court properly awarded the Runnings trial attorney fees, and remand for further proceedings so the district court can award appellate attorney fees.

AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS.