IN THE COURT OF APPEALS OF IOWA

No. 8-215 / 07-0153
Filed July 16, 2008

JERRY CEPELAK JR., MARK CEPELAK, JERRY F. CEPELAK, and SHIRLEY J. CEPELAK,
Plaintiffs-Appellants,

vs.

DONALD D. SEARS, DAPHNE A. SEARS, ROBERT DONALDSON, TOWN OF UNION, IOWA, and JOE KNIGHT, MAYOR,
Defendants-Appellees.

JOE KNIGHT, MAYOR, and TOWN OF UNION, IOWA,
Cross-Claimants,

vs.

DONALD D. SEARS, DAPHNE A. SEARS, ROBERT DONALDSON, JERRY CEPELAK JR., AND GARY I. EVERTSEN,
Cross-Claim Defendants.

JERRY CEPELAK JR., MARK CEPELAK, JERRY F. CEPELAK, and SHIRLY CEPELAK,
Plaintiffs-Appellants,

vs.

TOWN OF UNION, IOWA, and JOE KNIGHT, MAYOR,
Defendants-Appellees.

Appeal from the Iowa District Court for Hardin County, Carl D. Baker, Judge.

This appeal involves two related nuisance cases arising out of junk yard nuisances present at two locations in the town of Union, Iowa. **AFFIRMED.**

Jim Sween of Sween & Tilton, P.C., Eldora, for appellants.

Lawrence Cutler and Michael Smith of Craig & Smith, L.L.P., Eldora, for appellee Town of Union.

Steven Kloberdanz, Marshalltown, for appellees Gary I. Evertsen and Donald and Daphne Sears.

Heard by Vogel, P.J., Zimmer, J., and Nelson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

ZIMMER, J.

This appeal involves two related nuisance cases arising out of junk yard nuisances present at two locations in the town of Union, Iowa. Following the district court's September 2006 ruling, Jerry Cepelak Jr., Mark Cepelak, Jerry Cepelak, and Shirley Cepelak raise five issues on appeal. We affirm the decision of the district court.

I. Background Facts and Proceedings.

In 1963 Jerry and Shirley Cepelak purchased their home in Union. In the 1970s Donald and Daphne Sears bought the land across the street from the Cepelaks. At some point after purchasing the land, the Sears began operating a junk yard on the property. In the early 1990s the Sears began to rent property from Robert Donaldson to use as a junk yard. Neither the Sears nor Donaldson obtained a license or permit from the town to maintain a junk yard on these properties.

On January 23, 1996, Jerry Cepelak Jr., Mark Cepelak, Jerry Cepelak, and Shirley Cepelak (Cepelaks) filed a nuisance action for damages and abatement against the Sears and Donaldson in case LACV078083 (1996 case). The town of Union and its mayor, Joe Knight, were joined as defendants in a mandamus action. The town of Union and its mayor (Union) defended the mandamus claim by filing a cross-claim for abatement against the Sears and Donaldson. After the lawsuit was filed, Donaldson conveyed the property rented by the Sears to the Sears. The counts on money damages were tried before a jury. The jury returned a verdict in favor of the Cepelaks against the Sears, but against the Cepelaks in favor of Donaldson. The remaining counts were tried

before the bench. In a decree issued on November 3, 1997, the district court ruled in favor of Union and found a nuisance existed on the properties owned by Sears and the Sears were required to abate it. The court reserved jurisdiction as to the execution of the abatement decree, the assessment of court costs, and the issue of whether Donaldson could also be required to abate the property.

The parties then filed motions pursuant to Iowa Rule of Civil Procedure 179(b) (now rule 1.904(2)). The Cepelaks requested a clarification as to the mandamus issue and whether or not Donaldson would also have to abate the property. Donaldson filed a similar motion and a resistance to the Cepelak motion. On January 9, 1998, the court issued a ruling on the post-trial motions. The court denied the Cepelaks' rule 179(b) motion finding the issues raised in their petition were moot as it had already ordered the Sears to abate the nuisance. In its ruling, the court ordered that the nuisance maintained on the Sears property be abated by April 1, 1998.

On January 2, 1998, prior to the court's ruling on the post-trial motions, the Sears applied for a junk yard license on the property they had purchased from Donaldson. On January 5 Union approved the application on the condition that the Sears place a fence around the property so it would be in compliance with the applicable law of junk yards. Union gave the Sears until July 1, 1998, to comply with the conditions of the application. However, the Sears never placed a fence around the property, and Union never granted the junk yard license.

On March 13, 1998, the Sears filed for bankruptcy and further proceedings were stayed. In August 1998 Jerry Cepelak Jr. (Cepelak) purchased property from the Sears through an auction held as part of the bankruptcy proceedings.[1]

On July 28, 2000, the Cepelaks filed a petition against the town of Union in a separate case, case LACV078864 (2000 case). The first count of the Cepelaks' petition was a money judgment action against Union for the damages to the property now owned by Cepelak, and the second count was a mandamus action requesting Union abate the nuisance on the property still owned by the Sears. The Cepelaks claimed that Union had not obeyed the abatement order obtained by Union in the 1996 case. The Cepelaks also claimed that Union had aided and abetted the creation, maintenance, and continuation of the nuisance on the property formerly owned by Donaldson. Union filed an answer denying the Cepelaks' allegations. Additionally, Union filed a motion for partial summary judgment asserting it had no duty to abate the nuisance, and a motion to stay based upon the pending bankruptcy action filed by the Sears. The Cepelaks resisted these motions. On January 31, 2001, the court filed its ruling on the motions. In its ruling, the court granted Union's motion for partial summary judgment and dismissed the Cepelaks' first count in its entirety. The court also granted Union's motion to stay the mandamus action raised in the second count of Cepelaks' petition.

On February 28, 2001, the Cepelaks dismissed the mandamus action that was raised in count two of their petition, and appealed the ruling on the partial

[1] This property purchased by Cepelak was the property that had been conveyed to the Sears by Donaldson.

summary judgment concerning the issues raised in count one of their petition. On March 13, 2002, this court initially upheld the dismissal of count one and found that Cepelak had failed to preserve the issues of "duty to follow a court order" and "duty to not aid and abet" for review. However, Cepelak then filed a petition for rehearing on the ground that the appeal was interlocutory. This court agreed the appeal was interlocutory, and vacated our prior decision on April 1, 2002, concluding that resolution of the issues should await the entry of a final judgment.

On July 9, 2004, Union filed an application for instructions from the court and a motion for joinder of the parties in the 1996 case. The court allowed the joinder of Cepelak as the current owner of one of the properties that was the subject of that case. On September 14, 2004, Union then filed a cross-claim petition against the current owners of the properties, the Sears, Cepelak, and Gary Evertsen.[2] Union sought to require all the defendants to abate the remaining nuisance on the properties that were the subject of the action and to assess the costs against the named defendant and cross-claim defendants. Cepelak denied that he was continuing or maintaining a nuisance and raised several affirmative defenses, including waiver, estoppel, and laches. Trial was scheduled for May 2, 2006.

On April 21, 2006, the Cepelaks brought a motion to consolidate the 1996 case and the 2000 case. They also filed a motion to lift the stay in the 2000

[2] On December 1, 2003, a bill of sale was issued by the trustee of the bankruptcy estate of the Sears to Evertsen.

case. On April 27, 2006, the court granted the motion to consolidate and the motion to lift the stay.

On April 28, 2006, the Cepelaks brought a rule 1.904(2) motion in which they requested the court amend, enlarge, and modify the January 31, 2001 order on partial summary judgment. The Cepelaks asserted that (1) the court did not address Union's duty to refrain from aiding and abetting private persons in the creation, maintenance, and continuance of a nuisance and (2) the court did not address Union's duty to obey the court's previous ruling that directed the Sears to abate the nuisances found to exist on their properties. Union filed a resistance. Prior to trial, the court orally ruled that the Cepelaks' rule 1.904(2) motion was untimely.

Trial was held in this case on May 2, May 31, and June 28, 2006. The court entered its ruling on September 13, 2006. In its order, the court repeated its prior oral ruling that found the Cepelaks' rule 1.904(2) motion untimely. Notwithstanding this finding, the court then addressed the merits of the motion and ruled that (1) the town of Union had not aided and abetted in the creation and maintenance of a nuisance and (2) neither the town of Union nor the mayor had the duty to obey the court's previous ruling in the 1996 case, which ordered the Sears to abate the nuisances on their properties. The court also found Cepelaks' affirmative defenses to be without merit, and ruled that the current owners of the property, the Sears, Cepelak, and Evertsen, were required to abate the nuisances on or before April 1, 2007.[3]

[3] Following the court's ruling, Cepelak filed a rule 1.904(2) motion raising sixteen issues. In its order issued on December 21, 2006, the court amended its September 2006 ruling

The Cepelaks now appeal from the court's September 2006 ruling. They contend the district court erred when it ruled their rule 1.904(2) motion in the 2000 case was untimely. They also contend the district court erred when it sustained Union's motion for partial summary judgment and ruled as a matter of law that the town did not have a duty to abate the nuisance on the Donaldson property. The Cepelaks further contend the trial court improperly held Cepelak was responsible for the abatement of a nuisance that he did not create, continue, or maintain. In addition, the Cepelaks contend the district court failed to apply the doctrines of equitable estoppel and unclean hands to Union's claim that Cepelak was responsible for abatement of nuisances on the property formerly owned by Donaldson. Finally, the Cepelaks contend the district court erroneously concluded that Donaldson was not responsible for abating the junk yard nuisance on the property once owned by him.

II. Scope and Standards of Review.

We review the district court's summary judgment rulings for the correction of errors at law. Iowa R. App. P. 6.4; *Faeth v. State Farm Mut. Auto. Ins. Co.*, 707 N.W.2d 328, 331 (Iowa 2005). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Grinnell Mut. Reins. Co. v. Jungling*, 654 N.W.2d 530, 535 (Iowa 2002).

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on two issues concerning the sale of iron and steel on Cepelak's property and court costs, and denied the other fourteen issues raised in Cepelak's motion.

We review petitions seeking abatement of a nuisance de novo. Iowa R. App. P. 6.4. Although we are not bound by the district court's findings of fact, we give weight to the court's findings. *Perkins v. Madison County Livestock & Fair Ass'n*, 613 N.W.2d 264, 267 (Iowa 2000).

III. Discussion.

A. Rule 1.904(2) Motion and Summary Judgment Ruling.

In its September 2006 ruling, the court denied the Cepelaks' rule 1.904(2) motion in the 2000 case as untimely, and then, notwithstanding this finding, addressed the issues raised in the motion and concluded they were without merit. The Cepelaks contend the district court erred when it ruled their rule 1.904(2) motion was untimely. On January 31, 2001, the district court sustained Union's motion for partial summary judgment raised in count one of the Cepelaks' petition and stayed further proceedings raised in count two. The Cepelaks argue that because summary judgment was never entered on the entire case, they were not required to file a rule 1.904(2) motion. *See* Iowa R. Civ. P. 1.981(3); *Tenney v. Atlantic Assocs.*, 594 N.W.2d 11, 14 (Iowa 1999). Union asserts the district court was correct in finding Cepelaks' rule 1.904(2) motion was untimely because after Cepelak dismissed the mandamus claim raised in count two of the 2000 case, the January 31, 2001 ruling became a final judgment, and the Cepelaks failed to file their motion within the appropriate timeframe. *See* Iowa R. Civ. P. 1.1007 (stating a rule 1.904(2) motion "must be filed within ten days after filing of the verdict, report, or decision . . . unless the court, for good cause shown and not ex parte, grants an additional time not to exceed 30 days"). The Cepelaks argue that even if the dismissal of the

mandamus claim turned the court's earlier ruling on the motion for partial summary judgment into a summary judgment rendered on the entire case, the stay of further proceedings in the 2000 case was still in effect and therefore they were unable to file a rule 1.904(2) motion. This court previously found that the Cepelaks' appeal of the partial summary judgment from the January 31, 2001 ruling was an interlocutory appeal, and, in vacating our prior ruling on the issues raised, concluded that resolution of these issues should await the entry of a final judgment.

Because we conclude the district court was correct in sustaining Union's motion for partial summary judgment and finding the issues raised in the Cepelaks' post-trial motion are without merit, we find it unnecessary to determine whether the district court erred in finding the Cepelaks' rule 1.904(2) motion in the 2000 case was untimely.

In its January 31, 2001 ruling, in response to Union's motion for partial summary judgment, the district court found that a reading of Union Ordinance section 50.09[4] and Iowa Code section 364.12(3)(h) (2001)[5] resulted in the conclusion that the town of Union and the mayor were under no legally compelled duty to abate the nuisance existing on the Sears' properties. The court concluded the decision by municipalities, such as Union, to abate a nuisance is a matter of discretion. *See* Iowa Code § 4.1(30)(a),(c) (explaining the "word 'shall' imposes a duty" and the "word 'may' confers a power"). The

[4] Union Ordinance section 50.09 states that if a person fails to abate a nuisance, "the City may perform any action which may be required . . . ."

[5] Iowa Code section 364.12(3)(h) provides that if a property owner fails to abate, "a city may perform the required action and assess the costs against the property for collection in the same manner as a property tax."

court found that neither the town ordinance nor the state statute imposed a duty on Union to abate the nuisance on the Sears' property. The Cepelaks assert that the reliance by the trial court on the town nuisance and the state statute was faulty because it does not address the claims made by the Cepelaks in the 2000 case. The additional claims that Cepelaks argue should have been addressed were those raised in their rule 1.904(2) motion. In that motion they requested the court to address Union's duty to refrain from aiding and abetting private persons in the creation, maintenance, and continuation of a nuisance, and Union's duty to obey the court's order for the Sears to abate the nuisances on their properties that arose out of Union's cross-claim against the Sears. For the reasons discussed below, we find Cepelaks' claim to be without merit.

The immunities provided by Iowa Code section 670.4 provide a statutory defense to both the common law theories of "aiding and betting" and "duty to obey a court order" under the facts of this case. Iowa Code section 670.4(3) provides a municipality is immune from

> [a]ny claim based upon an act or omission of an officer or employee of the municipality, exercising due care, in the execution of a statute, ordinance, or regulation, whether the statute, ordinance or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the municipality or an officer or employee of a municipality, whether or not the discretion is abused.

In determining whether the discretionary function immunity of section 670.4(3) applies, we apply the test announced by the United States Supreme Court in *Berkovitz v. United States*, 486 U.S. 531, 536-37, 108 S. Ct. 1954, 1958-59, 100 L. Ed. 2d 531, 540-41 (1988). *See Goodman v. City of LeClaire*, 587 N.W.2d 232, 237 (Iowa 1998) (adopting the *Berkovitz* test). The first step is to determine

whether there was an element of judgment or discretion involved in the city's decision. *Doe v. Cedar Rapids Cmty. Sch. Dist.*, 652 N.W.2d 439, 443 (Iowa 2002). If a choice was exercised in abating the nuisance, then we determine whether this kind of judgment is the type the discretionary function immunity was designed to shield from liability. *Id.* If the answer to either of these questions is negative, then the discretionary function immunity is not a defense. *Id.*

In this case, the town ordinance and the state statute provide that the city "may" perform any action that may be required in abating the nuisance. *See* Iowa Code § 364.12(3)(h); Union Ordinance § 50.09. Therefore, the first prong of the *Berkovitz* test is met. Turning to the second prong, we determine whether this judgment is the type the discretionary function immunity was designed to shield from liability, because "not all actions involving discretion are immune from liability." *Graber v. City of Ankeny,* 656 N.W.2d 157, 164 (Iowa 2003).

> [A]n immune governmental action is one that weighs competing ideals in order to promote those concerns of paramount importance over the less essential, opposing values. Whether or not the city actually made its decision with policy considerations in mind is not determinative. Instead, the city's actions in [abating the nuisance] must be amenable to a policy-based analysis. The circumstances must show the city legitimately could have considered social, economic, or political policies when making judgments as to the [abating of the nuisance].

Id. at 165. Reviewing the circumstances of this case, it is apparent that Union legitimately could have considered various social, economic, and political policies in choosing to abate the nuisance. Therefore, we conclude the actions or omissions of Union regarding this nuisance abatement are protected by the immunity granted in Iowa Code section 670.4(3).

Additionally, we find Union was granted immunity under Iowa Code section 670.4(10). That section provides

> [a]ny claim based upon an act or omission of an officer or employee of the municipality, whether by issuance of permit, inspection, investigation, or otherwise, and whether the statute, ordinance, or regulation is valid, if the damage was caused by a third party, event, or property not under the supervision or control of the municipality, unless the act or omission of the officer or employee constitutes actual malice or a criminal offense.

Iowa Code § 670.4(10). Cepelaks claim the conditional approval of the junk license is an act that gives rise to the tort theories of "aiding and abetting" and "failure to obey the court order." We disagree. Union only conditionally approved the junk yard license; they never issued it. The reasonable interpretation of this conditional approval is a good-faith effort to get the properties into compliance with ordinances regarding junk and junk yards. There is no showing of malice or criminal offense that would prevent Union from asserting its immunity under section 670.4(10) against Cepelaks' claim that it failed to obey the court's order. Once the court entered its January 9, 1998 order requiring the nuisance maintained on the Sears' property be abated, Union filed a pleading specifically setting forth its proposal for a manner of abatement, including reference to a lawful junk yard. Based on these documents, it appears they were attempting to comply with the court directives. Thus, the immunity of section 670.4(10) applies as to the junk license issue raised by the Cepelaks. Accordingly, we conclude the issues raised in Cepelaks' rule 1.904(2) motion are without merit, and the district court's ruling on summary judgment in the 2000 case should be upheld.

B. Abatement Ruling Concerning Cepelak.

The Cepelaks also contend the trial court improperly held Cepelak was responsible for the abatement of a nuisance that he did not create, continue, or maintain. Cepelak asserts that the Sears and Donaldson created the nuisance and that as a vendee/transferee of a property on which a nuisance existed, he is not responsible for abatement if it is found that he neither continued nor maintained that nuisance. Upon our review, we find Cepelaks' argument to be without merit.

Cepelak was sent a notice to abate nuisance on June 24, 2004. This notice gave Cepelak forty-five days to abate the nuisance on his property and alerted him of his right to request a hearing with the Union City Council in writing within five days of the service of notice. Cepelak did not make a written request.

A vendee or transferee of property may be liable at common law for failing to abate a nuisance after taking possession, even if the vendee had no part in its creation. Restatement (Second) of Torts § 839 (1979); 58 Am. Jur. 2d *Nuisances* § 123 (2002). As the district court noted, the operative fact in such cases is the knowledge of the vendee/transferee. Restatement (Second) of Torts § 839(a); 58 Am. Jur. 2d *Nuisances* § 123. In this case, Cepelak purchased the property from the Sears "as is," and with full knowledge of its condition.

Both the town ordinance and the state statute create liability for property owners in this case. Iowa Code section 657.3 discusses penalties for nuisances and states that "[w]hoever is convicted of erecting, causing, or continuing a public or common nuisance" can be held liable. Union Ordinance section 50.03 also states that "creation or maintenance of a nuisance is prohibited." Additionally,

Union Ordinance sections 50.04 and 50.06 read together show that the property owners will be responsible for nuisances by directing the notice to abate must be sent to the property owner. Furthermore, Union Ordinance section 50.12 imposes liability on property owners for failure to abate when they cause or maintain a nuisance and fail to abate within "the reasonable time required and specified in the notice to abate."

Cepelak contends he should not have been compelled to abate by Union under the common law or the statutes because he claims to have been abating the nuisance in a reasonable manner. Cepelak testified that he did cleanup on a regular basis, asserting that he spent eighteen to twenty hours per day working on the property in all kinds of weather. The mayor testified that although Cepelak has made an effort to abate the nuisance on the property since his purchase in 1998, the property remains in a nuisance condition. The reasonableness of Cepelak's abatement was analyzed in more detail by the district court. Although we are not bound by the district court's findings of fact, we give weight to the court's findings. *Perkins*, 613 N.W.2d at 267. Upon our de novo review, we do not believe that Cepelak was abating the nuisance on his property in a reasonable manner. We agree with the district court's ruling that a nuisance existed on Cepelak's property and he is responsible for abating this nuisance.

C. Affirmative Defenses.

The Cepelaks further contend the district court failed to apply the doctrines of equitable estoppel and unclean hands to Union's claim that Cepelak was responsible for abatement of nuisances on the property formerly owned by Donaldson. Upon our review, we disagree. The doctrine of equitable estoppel is

a common law doctrine that prevents a party who has made certain representations from taking unfair advantage of another when the party making the representations changes its position to the prejudice of the party who relied on the representations. *ABC Disposal Sys., Inc. v. Department of Natural Res.*, 681 N.W.2d 596, 606 (Iowa 2004). The elements of equitable estoppel are (1) false representation or concealment of material facts, (2) lack of knowledge of the true facts on the part of the actor, (3) the intention that the false representation or concealment be acted upon, and (4) reliance on the false representation or concealment by the actor to his or her prejudice and injury. *City of Akron v. Akron-Westfield Cmty. Sch. Dist.*, 659 N.W.2d 223, 226 (Iowa 2003). The doctrine of unclean hands considers whether the party seeking relief has engaged in inequitable conduct that has harmed the party against whom he seeks relief. *Ellwood v. Mid States Commodities, Inc.*, 404 N.W.2d 174, 184 (Iowa 1987).

In this case, there were no false representations made by Union. Cepelak knew the condition of the property he purchased "as is." When Cepelak purchased the property in August 1998, he was aware that Union had filed a cross-claim against the property owners in the original abatement action in 1996. Union did not make any statements or actions that would have caused Cepelak to rely on such statements or acts as the basis for purchasing a property on which he knew a significant nuisance existed.

Cepelak asserts that he was forced to buy the property during the Sears' bankruptcy proceedings. However, there was no court order, document, or legal doctrine that mandated Cepelak to purchase the property. Cepelak is unable to

prove by clear and convincing evidence that some kind of "unclean" conduct caused injury, damage, or prejudice to him. Although Union decided to wait until all properties could be moved against at one time in filing their petition against the current property owners in September 2004, "delay in asserting one's rights is not the sort of conduct which gives rise to unclean hands." *Anita Valley, Inc. v. Bingley*, 279 N.W.2d 37, 41 (Iowa 1979). Therefore, we conclude the district court correctly found Cepelak's affirmative defenses to be without merit.

D. Abatement Ruling Concerning Donaldson.

Finally, the Cepelaks contend the district court erroneously concluded Donaldson was not responsible for abating the junk yard nuisance on the property that was at one time owned by Donaldson and subsequently purchased by Cepelak. As we have noted in the lengthy procedural background of this case, the district court entered its ruling on the original cross-claim brought by Union to force abatement of the nuisance on November 3, 1997. In that order, the court granted Union's request that the nuisance on the Sears' property be abated by the Sears and reserved jurisdiction to determine whether Donaldson could be required to abate the property. The Cepelaks brought a rule 179(b) motion specifically requesting that the court find Donaldson had a duty to abate the nuisance on the property he sold to the Sears. In the court's order issued on January 9, 1998, it ruled the claim made by the Cepelaks against Donaldson was dismissed as moot. The Cepelaks had thirty days to appeal this decision. Iowa R. App. P. 6.5(1). The Cepelaks did not file an appeal within this time period. Therefore, we will not review this claim on appeal. *See Doland v. Boone*, 376

N.W.2d 870, 876 (Iowa 1985) (noting it is the court's duty to refuse to entertain an appeal if it is untimely).

IV. Conclusion.

We conclude the issues raised in the Cepelaks' rule 1.904(2) motion are without merit, and the district court's ruling on summary judgment in the 2000 case should be upheld. We conclude Cepelak was responsible for abating the nuisance on his property. Additionally, we find Cepelak's affirmative defenses are without merit. Finally, we find the Cepelaks failed to file a timely appeal concerning Donaldson's responsibility to abate the junk yard on the property once owned by him, and, therefore, we will not review this claim on appeal. Accordingly, we affirm the decision of the district court.

AFFIRMED.