IN THE COURT OF APPEALS OF IOWA

No. 2-908 / 12-0441
Filed November 29, 2012

THAKUR, LLC and RANBIR THAKUR Individually,
Plaintiffs-Appellants,

vs.

MAHA-VISHNU CORPORATION and MAGAN PATEL,
Defendants-Appellees.

Appeal from the Iowa District Court for Iowa County, Douglas S. Russell, Judge.

Thakur, LLC and Ranbir Thakur appeal from the district court's decision denying rescission of their contract with Maha-Vishnu Corporation and Magan Patel and granting Patel's foreclosure petition regarding the same property. **AFFIRMED.**

Robert G. Schlegel of Day Meeker Lamping Schlegel & Salazar, Washington, for appellants.

Paul J. Bieber and Ryan Weber of Gomez May LLP, Davenport, for appellees.

Considered by Potterfield, P.J., and Danilson and Tabor, JJ.

POTTERFIELD, P.J.

Thakur, LLC and Ranbir Thakur appeal from the district court's decision denying rescission of their contract with Maha-Vishnu Corporation and Magan Patel, and granting Patel's foreclosure petition. They contend the court erred in two respects: first, declining to rescind the contract on the grounds of fraudulent misrepresentation, and second, in awarding damages to Maha-Vishnu Corporation and Magan Patel based upon a summary exhibit.

We affirm, finding the district court properly found rescission inappropriate and that Thakur's argument regarding the exhibit was not preserved for our review.

I. Facts and Proceedings

Ranbir Thakur is a member of Thakur, LLC which operates two gas stations in Davenport, Iowa. Magan Patel is the president of Maha-Vishnu Corporation (Maha-Vishnu), which owned multiple hotels including one off Interstate 80 in Williamsburg, Iowa. Thakur had expressed interest in buying a hotel, and the two men met several times to discuss such a purchase over a period of one or two weeks. Ultimately, Thakur decided to buy the Williamsburg hotel. Patel and Thakur agreed that one of Patel's nephews would operate the hotel for Thakur.

This particular hotel had a capacity of over one hundred rooms; however, due to a fire prior to Patel and Thakur's meetings, only thirty-four of the rooms were functional. The building enclosing the swimming pool was also destroyed by the fire, the ceiling was falling in certain areas, and certain areas had no operational electrical lighting.

The parties entered into a contract for the sale of the hotel. In the contract, Thakur agreed to pay $600,000 for the property,[1] with a $100,000 down payment at eight percent interest and monthly payments of $4182.20 starting April 1, 2004. The signing of the real estate contract and closing on the property occurred February 27, 2004. This contract provided that if Thakur and Thakur, LLC failed to make timely payments, Maha-Vishnu could declare the entire balance due and institute a foreclosure action.

The contract also spoke to the condition of the property. It noted no franchise was associated with the motel and a franchise was not included in the sale. It provided the property was "as is" and would be taken

> without representation or warranty by or from the Seller. . . . By signing this Contract, Buyer acknowledges that Buyer has obtained from Seller all information requested concerning the premises and that Buyer desires and has had full opportunity to inspect the Premises. Buyer acknowledges that such information and opportunity to inspect the Premises is and has been adequate for Buyer to evaluate its decision to enter into this contract.

Further, the contract provided that "[t]he rear building located on the premises may not comply with existing fire code requirements for operation of the structure as a motel. Various improvements may be required . . . including without limitation the updating of the electrical service to the structure." Page one of the contract describes the hotel as only having thirty-four units, though the floor plans show one hundred and fifteen. The list of personal property included as Exhibit B to the contract notes the furniture included was "sufficient to furnish [sixty] motel rooms, of which only [thirty-four] are operational at the time of possession."

[1] Patel's original asking price was $800,000, which Thakur negotiated down. Before the property was damaged in a fire, it had sold for over one million dollars.

Finally, in noting Thakur took the premises "AS-IS" the contract stated that "the omission of any matter or condition [not specifically listed] shall not be the basis for any liability by Seller for correcting or resolving such matter or condition." Also included was a provision that the problems with the property outlined in the contract were "not intended to constitute a full listing of any nonconforming matters or conditions on the premises." The contract concluded with a merger clause stating neither party was relying upon any statement or representation made by the other not embodied in the contract. Thakur's attorney was not present at the closing, but according to Patel, Thakur's attorney had been discussing the contract with Patel's attorney. The contract also contained a provision stating both parties were represented, and named Thakur's attorney. Thakur signed on behalf of Thakur, LLC and as a personal guarantor.

Conflicting testimony was given by the parties regarding whether Thakur actually visited the hotel before the closing of the agreement. Maha-Vishnu and Patel assert he visited several times and inspected the damage. Thakur asserts that his visit several days after signing the contract was "the first opportunity he had to thoroughly inspect the premises." The district court found at trial that the contract's provisions were "convincing proof that [Thakur] knew, or should have known from the very language of the contract, that the building was damaged and only partially useable."

After taking possession and discovering the extent of the damage, Thakur asserts he contacted Patel and sought to rescind the contract. Patel and Maha-Vishnu assert that he did not complain about the condition of the premises until three years later, when Thakur began falling behind in payments. Regardless,

payments were regularly made by Thakur for the hotel for three years, and he paid real estate taxes for one year. Thakur also testified to spending over two hundred thousand dollars to rehabilitate the hotel. After seeking to settle the dispute regarding Thakur's efforts to be released from the obligations of the contract, Thakur stopped making payments to Patel and Maha-Vishnu.

Patel and Maha-Vishnu sent a demand for payment under the contract on February 24, 2010, and filed a petition for foreclosure against Thakur and Thakur, LLC on April 7, 2010. Thakur and Thakur, LLC also filed an action against Patel and Maha-Vishnu for rescission of contract based on misrepresentation and for restitution of his expenditures, actual damages, attorney fees, and punitive damages. The two cases were consolidated for trial.

At trial, the court admitted a document offered by Patel which summarized the total amount Patel believed Thakur owed under the contract. Patel testified the amounts were prepared by his accountant. This document was admitted over Thakur's objections that it contained hearsay and that insufficient foundation for its admission was laid. The district court relied on this document in its award of damages. Thakur presented no evidence of his damages, except his testimony about the renovation expenses and costs associated with removal of items indicating a franchise agreement with Days Inn.

The district court found Thakur's misrepresentation claim to be unsupported by substantial evidence and dismissed Thakur's petition, entered judgment against Thakur and Thakur, LLC in the amount of $667,067.91 on the foreclosure action, foreclosed the real estate contract, entered a deficiency judgment, and granted attorney fees to Maha-Vishnu in the amount of

$10,062.50. Thakur filed a motion to enlarge and amend, renewing its objection to the exhibit. This was denied. Thakur and Thakur, LLC appeal the dismissal of the misrepresentation claim and the grant of damages to Maha-Vishnu and Patel.

II. Analysis

Thakur's claims for rescission of contract and restitution were brought in a petition in equity, and Patel's foreclosure petition was also heard in equity; therefore our review is de novo. *Hyler v*. *Garner*, 548 N.W.2d 864, 870 (Iowa 1996). "We do, however, give weight to the findings of fact made by the trial judge." *Id.* "The appeal of an equity case does not entitle an appellant to a *trial* de novo, only *review* of identified error de novo. Therefore, we do not review each finding of fact and conclusion of law made by the trial court." *Id.*

A. Rescission

Thakur first asserts the district court's decision not to allow rescission of its contract with Maha-Vishnu on the grounds of fraudulent misrepresentation in the making of the contract was inequitable.

> To prevail on a rescission theory based on misrepresentation, the party requesting relief must prove (1) a representation, (2) falsity, (3) materiality, (4) an intent to induce the other to act or refrain from acting, and (5) justifiable reliance. We have recognized that in some instances a failure to disclose material facts may be the equivalent of a false assertion.
>
> The Restatement (Second) of Contracts speaks to the issue of nondisclosure as follows:
>
> > A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only:
> > (a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.
> > (b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic

> assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith in accordance with reasonable standards of fair dealing.
> (c) where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part.
> (d) where the other person is entitled to know the fact because of a relation of trust and confidence between them.

City of Ottumwa v. Poole, 687 N.W.2d 266, 269 (Iowa 2004) (quoting Restatement (Second) of Contracts § 161 (1981)). The court goes on to explain when a relationship of trust and confidence occurs by quoting the comments to subsection (d):

> Even where a party is not, strictly speaking, a fiduciary, he may stand in such a relation of trust and confidence to the other as to give the other the right to expect disclosure. Such a relationship normally exists between members of the same family and may arise, in other situations as, for example, between physician and patient. In addition, some types of contracts, such as those of suretyship or guaranty, marine insurance and joint adventure, are recognized as creating in themselves confidential relations and hence as requiring the utmost good faith and full and fair disclosure.

Id. (quoting Restatement (Second) of Contracts § 161 cmt. f).

Thakur asserts he did not inspect the premises prior to closing because Patel "failed to disclose" his "knowledge of substantial problems" with the premises. Thakur argues Patel had a duty to disclose this information because of a relationship of trust or confidence between them. We disagree. These two men met a few times over a period of one or two weeks. During this period, Thakur negotiated the price for the property down two hundred thousand dollars, and the agreement was memorialized in a contract containing several

disclosures as to the condition of the property. This was not a fiduciary relationship, this was not a familial relationship,[2] nor was it a patient-physician relationship; it was also not one of the special contract types listed above. We therefore conclude there was no relationship of trust or confidence between Thakur and Patel in this case, and we agree with the district court that the explicit terms of the contract disclosed the damage to the building.

We also defer to the district court's credibility finding against Thakur and his statements that he bought the hotel without inspecting it. As such, any nondisclosure would not rise to the level of misrepresentation because the damage to the hotel was in plain view. *Arthur v*. *Brick*, 565 N.W.2d 623, 626–27 (Iowa Ct. App. 1997). "[I]n Iowa a seller is required to reveal to the buyer material facts known to him but not readily observable upon reasonable inspection by the buyer concerning the property which is the subject of the sale." *Smith v*. *Peterson*, 282 N.W.2d 761, 765 (Iowa Ct. App. 1979) (citing *Loghry v*. *Capel*, 132 N.W.2d 417, 419 (1965)). As there was no nondisclosure rising to misrepresentation, the elements of common law fraudulent misrepresentation cannot be satisfied here. *See Arthur*, 565 N.W.2d at 627.

Further, we note the last paragraph of the contract contains an integration clause which states "ENTIRE AGREEMENT: Buyer and Seller acknowledge and agree that this Contract contains the entire agreement between them; any prior agreements or understandings, oral or written, are merged into and superseded

[2] Thakur urges that the parties' common East Indian origins created something akin to a familial relationship. However, we do not agree that a one or two week relationship centered in a real estate transaction can rise to the level of a familial relationship as contemplated by the Restatement.

by this Contract . . . ." Our supreme court has held the following regarding whether a fraudulent inducement action may proceed in the face of an integration clause:

> Although we have allowed fraudulent inducement claims to proceed despite an integration clause in a contract, we have done so only with regard to misrepresentations concerning facts or circumstances not included in the written contract. Such is not the case here. To allow Whalen to proceed would vitiate the parol-evidence rule.

Whalen v. Connelly, 545 N.W.2d 284, 294 (Iowa 1996). The contract between Thakur, L.L.C. and Maha-Vishnu Corporation contained explicit notice of many of the problems now complained of by Thakur. As for the remainder—such as the more specific damage regarding the pool area—as we previously stated, the damage was obvious upon inspection and not latent, and therefore Patel owed no duty to disclose the additional damage not expressly disclosed in the contract. Rescission was therefore not warranted in this case; we affirm the district court.

B. Damages

Thakur next contends the district court inequitably awarded damages to Patel in its foreclosure action based upon an exhibit entitled "Summary of Relief Requested." During his direct examination at trial, Patel explained that Thakur had missed payments and then stopped making payments altogether, and had failed to pay the taxes and insurance. Patel was asked whether he had prepared an accounting of the total amount due from Thakur on the contract, and the following exchange occurred:

> PATEL'S COUNSEL: Have you prepared an accounting of the total amount that is due on the contract? PATEL: Yes.
> PATEL'S COUNSEL: I'm going to hand you what has been marked as Respondent's Exhibit A. Would you tell us what that is, please?

> PATEL: Yeah. This is like a principal note left to pay by the end of—around October 2007, $459,012.34, and after that he made only two payments which is $8,400. Then the interest. And we pay the property tax, $72,408.18. Then the insurance money and the interest up to now came out to $667,067.91.
> PATEL'S COUNSEL: Okay. We'll offer Exhibit A.
> THAKUR'S COUNSEL: Your Honor, could I voir dire the witness quickly? THE COURT: You may voir dire for purposes of an objection.
> THAKUR'S COUNSEL: Mr. Patel, the amounts you have listed on here, where do you derive those amounts from, where did you get those amounts? PATEL: My accountant figured it out.
> THAKUR'S COUNSEL: Okay. Do you have proof of payment of taxes and insurance on this that are listed here? PATEL: Yes, I do.
> THAKUR'S COUNSEL: Okay. I mean, do you have those with you today? PATEL: I have taxes, yes. It's in my paper there.
> THAKUR'S COUNSEL: And the interest calculation, did your accountant do that as well? PATEL: Yes.
> THAKUR'S COUNSEL: Your Honor, I guess—Thank you. I guess I would object on the basis that we have raw data, and I have not seen anything that proves those payments at this time, so I would object to that. THE COURT: The Court will receive Exhibit A subject to your objection.

Exhibit A is a table with numbers including the principal note payments outstanding, a number for interest owed at eight percent from October 2007 through March 2011, interest on a different number from July 2009 to January 2010, a line for property tax paid, a line for insurance paid, and two totals less two installments totaling $8400. When Patel offered to show Thakur's counsel the tax documents, counsel did not follow up or ask to see them. The exhibit was admitted "subject to [the] objection" by Thakur's attorney that the exhibit showed "raw data, and [he had] not seen anything that proves those payments." Thakur offered no evidence of his own as to the proper damages for the foreclosure action, nor did Thakur cross-examine Patel on the exhibit except to confirm the figure for outstanding principal.

The district court wrote in its opinion regarding the admission of this exhibit and its reliance on this exhibit:

> The admissibility of Exhibit A was a cause of much deliberation for the Court. It is a summary exhibit. Summary exhibits are the subject of Rule of Evidence 5.1006. This exhibit was not offered pursuant to a stipulation. It was not supported by foundational testimony of the person who prepared the exhibit and the underlying documents which are summarized in the exhibit were not offered as evidence in the trial. . . . Nonetheless, the Court finds that the testimony presented at the trial supports the Court's conclusion that the business records of the Seller, an exception to the hearsay rule, are the proper basis for the preparation of a summary document by a witness familiar with those documents. Mr. Patel's testimony that he presented all his business records to his CPA and that the CPA prepared Exhibit A based upon them is sufficient for the Court to have received and considered the exhibit over objection of the Buyer.

Thakur again objected to the admission of this document in its motion to amend or enlarge. This time, he not only argued that the documents were inadmissible on foundational grounds, but also that the exhibit should not have been allowed as Thakur could not be held responsible for failing to request the supporting documentation at trial. Although he states in the post-trial motion that discovery deadlines had passed, he does not state he made discovery requests to which Patel failed to respond. The court file contains no motion to compel and no indication either party engaged in discovery or that there were discovery disputes. The district court reiterated its original ruling in its ruling on this motion, noting that Thakur had not argued at trial that the documents had been requested in discovery and not produced. The court further noted that Thakur presented no contrary evidence on the issue of damages.

On appeal, Thakur again attempts to raise the issue that Exhibit A should not have been admitted due to failure to give advance notice under Maha-Vishnu

and Patel's discovery obligation. As the district court did not rule on this issue, we cannot address it now. *Lamasters v. State*, __ N.W.2d __, 2012 WL 5042996 at *6 (Iowa 2012).

Further, Thakur only makes passing mention of his original grounds for objection, stating "because Plaintiff was denied an opportunity to cross-examine the author of the report, that evidence should not have been admitted and Defendant's award of damages should be reversed." Thakur makes no other mention of a hearsay objection to admissibility of Exhibit A, nor does he indicate in what respects the business records exception to the hearsay rule does not apply. Where a party fails to cite authority in a brief to support its argument, we may find that argument waived. Iowa R. App. P. 6.903(2)(g)(3). We therefore find Thakur's argument regarding the admissibility of Exhibit A was not properly preserved for our review.

We therefore affirm the decision of the district court.

AFFIRMED.