IN THE COURT OF APPEALS OF IOWA

No. 3-111 / 12-0900
Filed April 10, 2013

KWASI YEBOAH and JILL STUECKER,
Plaintiffs-Appellees,

vs.

JOSEPH M. EMANS and LISA M. SWESEY f/k/a LISA EMANS,
Defendants-Appellants.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson, Judge.

Home sellers appeal a district court order finding them statutorily liable for failure to disclose a leaking roof and damaged windows when they listed their home for sale. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Jason Springer of Springer & Laughlin Law Offices, P.C., Des Moines, for appellants.

Allison M. Steuterman and Douglas A. Fulton of Brick Gentry, P.C., West Des Moines, for appellees.

Heard by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

VAITHESWARAN, P.J.

Joseph Emans and Lisa Swesey appeal a district court order finding them statutorily liable for failure to disclose a leaking roof and damaged windows when they listed their home for sale.

I. Background Facts and Proceedings

Emans and Swesey purchased a home in West Des Moines. In 2006, Emans noticed a leak in the sunroom. He repaired the leak and experienced no further problems.

In 2009, Emans and Swesey listed the home for sale. They completed a seller disclosure form in connection with the listing.

The form included a list of questions under the heading "Property Conditions, Improvements and Additional Information." One of the questions was "Roof: Any known problems?" The sellers answered, "new 2006 approx." Another question sought the "[d]ate of repairs/replacement." The sellers did not disclose the leak in the sunroom or the repair of that leak.

The form also included a list of questions and check-box answers under the heading, "Appliances/Systems/Services." This portion of the form was designated "not mandatory" and only "for the convenience of Buyer/Seller." Among the questions was a request for information about the condition of the windows. The sellers checked the box indicating that the windows were "[w]orking."

After the home was listed, Jill Stuecker and Kwasi Yeboah viewed it and made an offer to purchase it. The offer was accepted, but was subject to the sale of the buyers' home and a buyers' home inspection. The buyers obtained

an inspection, which disclosed that the windows were not opened due to weather conditions. The report disclosed no leaks in the sunroom.[1]

Six to eight weeks after closing, the buyers noticed wetness in the northeast corner of the sunroom and wetness in the drywall on the ceiling. Yeboah tore off a deck above the sunroom and found that one wall was soft. The buyers hired contractors to repair the damage. The total cost was $17,280.92.

The buyers also found that four of the windows in the home would not open. They obtained a replacement cost estimate of $4365.

The buyers sued the sellers for fraud by concealment, fraud by false disclosure statement, misrepresentation, negligence, and statutory liability under Iowa Code chapter 558A (2011). The sellers answered and counterclaimed for attorney fees. Following trial, the district court dismissed all the claims except the statutory liability claim. On that claim, the court found the sellers "had actual knowledge of the existence of a problem involving a leak in the roof of the sunroom" and failed to disclose the leak in their disclosure statement. The court also found that the sellers "failed to exercise ordinary care to obtain information as to whether the windows in the home were functional." The court held them liable for damages of $21,645.92 plus attorney fees. This appeal followed.

[1] The report disclosed other leaks in the main portion of the home, which the sellers addressed. The sellers suggest that the buyers' knowledge of these leaks estopped them from seeking damages for non-disclosure of the leak in the sunroom. The sellers cite no authority for this proposition. Accordingly, we decline to address it.

II. Analysis

The sellers raise several issues, all of which go to the same question: whether the district court erred in finding them statutorily liable for non-disclosures or misrepresentations in the seller disclosure form. Our review is on error, with the district court's findings of fact binding us if supported by substantial evidence. *Hammes v. JCLB Props., L.L.C.*, 764 N.W.2d 552, 555 (Iowa Ct. App. 2008).

Iowa Code section 558A.2(1) requires a person interested in transferring real property to deliver "a written disclosure statement to a person interested in being transferred the real property." This disclosure is to include "information relating to the condition and important characteristics of the property . . . including significant defects in the structural integrity of the structure." Iowa Code § 558A.4(1). The seller is not liable "for the error, inaccuracy, or omission in information required in a disclosure statement, unless that person has actual knowledge of the inaccuracy, or fails to exercise ordinary care in obtaining the information." *Id.* § 558A.6(1). A person who violates this statutory provision is ordinarily liable for the actual damages that the buyer suffers. *Id.* § 558A.6.

A. Sunroom

As noted, the district court found that the sellers had actual knowledge of the leak in the sunroom roof. That finding is supported by substantial evidence.

Emans testified that he noticed a "small drip" in the corner of the sunroom and that he put a piece of plastic on the roof above it. The following week, he consulted an employee of a home improvement store and decided to fix the leak himself. He described the process as follows:

> Basically there's a—you've got a deck on top and then you have the three-season porch underneath. There was a board—flashing board, kind of a decorative board that goes over—across the horizontal line between the two. I took that off. And then you could see between the deck and the ceiling of the three-season porch. You could see that the membrane was there. Those are the pictures that I took.
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> Basically, I went in there and asked him to give me the black tar that went over top of it. I laid over a flashing and jarred that into the eavestrough that was underneath. And then I relined it with more of the black tar and then put the face board back up.

He patched the entire north side of the roof on the sunroom, "from the northwest wall to the northeast wall corner."

Swesey confirmed that she was aware of the leak. She stated that she left it to Emans to handle the problem.

Having found substantial evidence supporting the district court's finding that the sellers had actual knowledge of the leak, we address the sellers' contention that the leak was a minor condition not subject to disclosure. The sellers are correct that section 558A.4(1) only requires disclosure of "important characteristics" of the property. The district court determined that this standard was satisfied. The court characterized the problem as "significant . . . enough to require substantial repairs." This finding is supported by substantial evidence.

One of the buyers' contractors testified, "[Y]ou could clearly see from the very beginning from the ground that there was all kinds of damage, and an ongoing leaking issue had been present because all the fascia board, primarily in the northeast corner and curving on around to the north edge in the northeast corner, was rotted." He also noted "significant damage to the wood along the house." He testified, "[W]e put new insulation down and put plywood decking down, and then we put a half inch of fiberboard over the top of that because you

do not glue rubber to a plywood deck that is nailed down." Based on this evidence, the district court did not err in concluding the materiality element of the statute was satisfied.

The sellers also contend the leak was not subject to disclosure because it was fixed and they experienced no further problems. Section 558.4(1) does not limit the required disclosures to active problems. In fact, rules implementing the provision require disclosure of "[a]ny known problems" with the roof and "[a]ny known repairs," as well as the "date of repairs/replacement." Iowa Admin. Code r. 193E-14.1(6). The sunroom leak was a known problem that was repaired. The sellers had an obligation to disclose the leak and the repair, notwithstanding their belief that the issue was resolved.

We conclude the district court did not err in finding statutory liability based on non-disclosure of the sunroom leak and its repair.

We turn to the question of damages. The sellers contend the buyers "presented no evidence that the work [Emans] did in 2006 caused all the problems with the roof. . . . Therefore the proximate cause of the [buyers'] damages stemmed from a different part of the house, and not the undisclosed fixing by [Emans] in 2006." The problem with this argument is that the statutory violation was not predicated on Emans's repair of the leak but on the sellers' non-disclosure of the leak and subsequent repair. That violation entitled the buyers to "actual damages." Iowa Code § 558A.6(1). The district court found that the buyers incurred $17,280.92 for "reasonable and necessary" repairs "to the sunroom, its roof, and the main structure of the house where the sunroom

attached to it." As discussed, this finding is supported by substantial evidence. Accordingly, we affirm the district court's award of damages in that amount.

B. Windows

The sellers next contend they should not be held liable for the four windows that did not open. While substantial evidence supports the district court's finding that these windows were inoperable, our review of the statute and implementing rules leads us to conclude that liability for this problem cannot be premised on chapter 558A.

As discussed, section 558A.4(1) sets forth a general standard of disclosure. The provision authorizes the real estate commission to promulgate rules to amplify the standard. *Id.* § 558A.5(1). The commission did so. Iowa Admin. Code r. 193E-14.1. Rule 14.1(6) states "All property disclosure statements, whether or not a licensee assists in the transaction, shall contain at a minimum the information required by the following sample statement." The sample statement does not include a section requiring disclosure of the operability of windows. Additionally, the seller disclosure form used here expressly stated the portion containing the question on windows was "not mandatory."

We recognize that the rule also states, "Nothing in this rule is intended to prevent any additional disclosure or to relieve the parties or agents in the transaction from making any disclosure otherwise required by law or contract." *Id.* r. 193E-14.1(1); *see also* Iowa Code § 558A.7 ("The duties imposed upon the persons under this chapter or under rules adopted by the real estate commission shall not limit or abridge any duty, requirement, obligation, or liability for

disclosure created by another provision of law, or under a contract between parties."). While this language allowed the sellers to provide additional, non-mandatory disclosures, the question here is whether these non-mandatory disclosures can subject a seller to liability and damages under chapter 558A. Section 558A.6(1) authorizes damages for "required" disclosures. Because completion of the cited portion of the form was optional, the buyers could not obtain statutory damages for disclosure problems in that part of the document.

That said, the buyers had other non-statutory avenues of relief, including common-law fraud and negligence claims, which they pled, and which the district court rejected. Our conclusion today is simply that the statutory remedy was unavailable to them for the window disclosure.

We reverse the portion of the district court's opinion finding liability for the window problem and imposing damages of $4365.

III. Disposition

The judgment of the district court is affirmed in part and reversed in part. We remand for entry of judgment in the amount of $17,280.92.

Both parties seek attorney fees pursuant to a provision in the purchase agreement. *See* Iowa Code § 625.22 ("When 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."); *Bankers Trust Co. v. Woltz*, 326 N.W.2d 274, 278 (Iowa 1982) (determining that appellate attorney fees may also be recovered pursuant to a written agreement). We remand for a determination of appellate attorney fees as

well as a redetermination of trial attorney fees in light of our opinion. *See Bankers Trust*, 326 N.W.2d 278.

Costs on appeal are assessed one-fourth to the appellees and three-fourths to the appellants.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.