IN THE COURT OF APPEALS OF IOWA

No. 3-207 / 12-0579
Filed May 15, 2013

D & W DEVELOPMENT, INC.,
Plaintiff-Appellant,

vs.

THE CITY OF MILFORD, Dickinson County, Iowa and BRYAN H. READ,
Defendants-Appellees.

Appeal from the Iowa District Court for Dickinson County, Patrick M. Carr, Judge.

D & W Development appeals from the dismissal on summary judgment of its claims against the City of Milford and Bryan Read. **AFFIRMED.**

Donald J. Hemphill of Hemphill Law Office, P.C., Spencer, for appellant.

David J. Stein Jr. of Stein Law Office, Milford, for appellee City of Milford.

Thomas W. Lipps of Peterson & Lipps, Algona, for appellee Bryan H. Read.

Heard by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

D & W Development (D & W) appeals from the grant of summary judgment in favor of the City of Milford (City) and Bryan Read. D & W argues the district court improperly granted summary judgment as to its claims of negligence, unjust enrichment, negligent misrepresentation, and legal fraud. The City and Read respond that the district court correctly granted summary judgment on D & W's claims, and re-assert their defenses of the statute of limitations and statutory immunity under various code provisions.

We affirm, finding the district court properly found D & W's general negligence claim against Read to be barred by the economic loss doctrine, recovery under unjust enrichment is improper where a contract is void due to failure to fulfill statutory requirements, Read was a party to the transaction and did not act in an advisory capacity to be liable for negligent misrepresentation, and D & W could not establish the requisite scienter to support a legal fraud claim. Because we affirm the district court's decision on D & W's claims, we do not reach the affirmative defenses raised by Read and the City.

I. Facts and Proceedings.

D & W entered into a series of agreements with the City for the development of land. The first project, "Hunter Hills," was initially developed by another entity but the lots were purchased by D & W in 2003. The second project, "The Ponds at Hunter Hills Phase I" began development in 2004. D & W agreed to install streets, sewer lines, water mains and other improvements. In turn, the City agreed to reimburse D & W for its development through tax incentive financing (TIF). TIF agreements are governed by Iowa Code section

403 (2011), which allows municipalities to designate certain areas as "urban renewal areas" and take certain actions to incentivize development of these areas. The contract between D & W and the City for Phase I provided the City had established an urban renewal area and "ha[d] adopted a tax increment ordinance for [this] area." This agreement is not at issue on appeal.

In 2005 D & W began work on another project—"The Ponds at Hunter Hills Phase II" (Phase II). D & W expected this phase to proceed with TIF financing in the same way as the prior phase. On September 24, 2007, D & W was instructed by then City administrator Read that the Phase II project was eligible for TIF funds. This letter said:

> The Milford City Council has determined that The Ponds at Hunter Hills—Phase II is eligible for TIF rebate funds and ha[s] authorized the development of a TIF plan. The City's consultant is currently developing the plan and I anticipate that I will receive the TIF plan within the next two weeks. The Milford City Council should take final action on the TIF plan before October 31, 2007.

D & W and the City then entered into a Tax Increment Financing Rebate Agreement (TIF Agreement) dated October 8, 2007. The TIF agreement set forth the payment through tax increments to D & W for the installation of improvements in the Phase II area. The agreement stated "the City *will* establish The Ponds at Hunter Hills—Phase II Urban Renewal Area and *will* adopt a tax increment ordinance for the Urban Renewal Area." (Emphasis added).

In 2009 the City realized it had not followed procedures to implement the tax increment ordinance or establish the urban renewal area. Both parties agree on appeal that this failure of the City renders the October 2007 TIF Agreement void and unenforceable. While the City adopted the appropriate ordinances on

December 28, 2009, the parties have been unsuccessful in negotiating a new agreement. D & W has also struggled with performing its duties under the original TIF Agreement, which contains a provision making any deviation from these duties "a material and substantial breach."

D & W filed suit against the City and against Read personally on January 31, 2011, alleging various causes of action including breach of contract, quantum meruit, unjust enrichment, equitable fraud, legal fraud, negligence, and negligent misrepresentation. The City and Read filed a joint motion for summary judgment November 29, 2011. The motion alleged the 2007 TIF Agreement was void as a matter of law, the City was immune from claims in connection with the assessment of taxes, D & W's claims were barred by the statute of limitations, D & W's breach of the TIF Agreement nullified the agreement, D & W's negligence claim was barred by the economic loss doctrine, D & W's claims were generally barred, punitive damages and attorney fees could not be recovered, and the City had statutory immunity for its actions. D & W resisted this motion, and the court issued a ruling February 22, 2012.

In its ruling, the court first denied the City and Read's affirmative defenses. It found statutory immunity under Iowa Code 670.4(2), which provides immunity from claims in connection with the assessment or collection of taxes, was inapplicable. It explained that D & W's claims did not involve the assessment or collection of taxes, instead they involved "only the distribution of tax funds" and that finding immunity would undermine the TIF program. It next found statutory immunity for discretionary duty under Iowa Code 670.4(3) was inapplicable as this exception does not apply where a city employee violates a mandatory

regulation. Because the City did not meet the requirements of the mandatory regulation to establish a TIF district, the court concluded, no statutory immunity applied.

Next the court found the TIF Agreement was null and void as an ultra vires exercise of power by the City and that D & W could not recover under a theory of breach of contract.[1] The court then considered D & W's unjust enrichment claim, concluding it was "unclear if the Plaintiff has suffered any detriment at the expense of the Defendant other than an expectancy interest that is not recoverable in claims of unjust enrichment." The court similarly rejected D & W's quantum meruit claim, finding D & W had "no equitable claim to increased property tax revenue and the City has not received any benefit in the form of property or services for City property."

The court then turned to D & W's fraud and negligence claims. It rejected the City and Read's argument that these claims were barred by the two-year statute of limitations found in the Iowa Municipal Torts Act, as issues of material fact existed as to when the claim began to accrue. The court found D & W's negligence claim was barred by the economic loss and public duty doctrines. It denied D & W's claim for unjust enrichment, finding no injustice in the City's receipt of additional tax revenue. It also rejected D & W's claim for negligent misrepresentation, finding the City and Read were not in the business of supplying information. The court rejected D & W's legal fraud claim, as D & W could not establish intent to deceive on the part of the City or Read.

[1] D & W does not appeal this aspect of the ruling.

D & W appeals the district court's grant of summary judgment regarding its negligence claim against Read, its claim of unjust enrichment as to the City, and its claim of negligent misrepresentation and legal fraud as to both Read and the City. The City and Read did not cross-appeal, but reassert their claims of statutory immunity under Iowa Code section 670.4(2) and 670.4(3),[2] and re-allege the statute of limitations set forth in the Municipal Tort Claims act bars D & W's action.

II. Analysis.

We review the grant of a motion for summary judgment in this primarily law action for errors at law. *Annett Holdings*, *Inc*. *v*. *Kum & Go*, *L*.*C*., 801 N.W.2d 499, 502 (Iowa 2011). We first look to the entire record to determine whether a material fact is in dispute and then, if no dispute is found, examine whether the district court correctly applied the law. *Id.*

A. Negligence.

D & W argues the district court erred in finding its negligence claim against Read was barred by the economic loss doctrine.[3] We disagree. Our supreme court in *Annett Holdings* explained:

> When two parties have a contractual relationship, the economic loss rule prevents one party from bringing a negligence action against the other over the first party's defeated expectations—a subject matter the parties can be presumed to have allocated between themselves in their contract. . . . [T]he doctrine is by no means limited to the situation where the plaintiff and the defendant are in direct contractual privity.

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[2] Read also asserts he is statutorily immune under Iowa Code 670.12, however, the district court did not rule on this claim below and so we will not address it for the first time on appeal. *Bowman v. City of Des Moines Mun. Hous. Agency*, 805 N.W.2d 790, 797 (Iowa 2011).

[3] D & W limits this claim on appeal to the city administrator, Read.

Id. 503–04 (internal citations omitted). The court went on to describe three exceptions to the rule: for professional negligence against attorneys and accountants, for negligent misrepresentation claims, and for claims arising out of a principal-agent relationship. Annett Holdings' claim did not fit into any of these exceptions, and therefore it was barred by the economic loss doctrine, even though Annett Holdings had no direct contractual remedy. *Id.* at 504. Similarly, here, we are asked to consider a situation which involves a contractual dispute and which D & W concedes does not fall into any of these exceptions. Though D & W argues we should look to the dissent in *Annett Holdings* and expand these exceptions to include its claims against Read, we are bound by our precedent. *See id.* at 513 (Wiggins, J. dissenting).

D & W states, "The essence of [its] general negligence claim against Read is that he failed to implement the decisions and the directions of the City Council in implementing the 2007 Tax Rebate Agreement." D & W's requested recovery is solely economic in nature—it is seeking to recover the money it expected to receive under its contract with the City. The district court correctly ruled its claim of negligence against Read is barred by the economic loss rule.

B. Unjust Enrichment.

D & W argues summary judgment was improper on its unjust enrichment claim as the court improperly determined the City was not enriched at D & W's expense. The City responds that a party cannot recover under a quasi-contract theory where a contract is void for failure to follow statutory requirements.[4]

[4] While the district court denied D & W's unjust enrichment claim on the grounds that D & W had not suffered a detriment, the City and Read raised the argument that failure

Discussing the requirements for contracts with municipalities, our supreme court has stated there is an inherent risk to any party who enters into a contract with a governmental body:

> It is also irrelevant that the other party has detrimentally relied upon the municipal contract, by fully or partially performing the contract or making expenditures, even if the municipality benefited from the other party's reliance. Consequently, the municipality is not required to restore the status of the party, pay damages, or provide any other type of remedy to the contracting party. The rationale supporting this well-established principle is that those who contract with a municipality are charged with notice of the limits on the authority of the municipality. If the party fails to take notice of the statutory limits, the party is bound at the party's own peril. Moreover, this principle coincides with the presumption that parties incorporate applicable statutes into their contracts. In addition, if we permitted parties to enforce void contracts, we would essentially allow municipalities to do indirectly what they are statutorily prohibited from doing directly.

Miller v. *Marshall Cnty*., 641 N.W.2d 742, 751 (Iowa 2002) (internal citations omitted). Because D & W's contract with the City is void because it was not in compliance with statutory provisions, equitable relief is not available. "Courts of equity . . . are bound by positive provisions of a statute equally with courts of law and where the contract is void because not in compliance with express statutory provisions, a court of equity cannot give validity to the contract." *Madrid Lumber Co*. *v*. *Boone Cnty*., 121 N.W.2d 523, 527 (Iowa 1963). Unjust enrichment is a quasi-contract, equitable avenue of recovery which "arises from the equitable principle that one shall not be permitted to unjustly enrich oneself by receiving property or benefits without making compensation therefor." *Ahrendsen ex rel*.

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to follow statutory requirements precludes a quasi-contract recovery in their motion. We therefore may consider the argument here. *Moyer v. City of Des Moines*, 505 N.W.2d 191, 193 (Iowa 1993) (holding we may affirm on any ground "urged in the district court but not considered by that court").

Ahrendsen v. Iowa Dep't. of Human Servs., 613 N.W.2d 674, 679 (Iowa 2000). We have previously disallowed recovery under a similar theory—quantum meruit—where a party failed to fulfill statutory requirements, stating, "The [statutory] provision in question explicitly prohibits recovery on oral contracts of employment; plaintiff cannot now attempt to bypass this mandate by relying on an equitable theory of recovery, whether it be quantum meruit or equitable estoppel." *Buckingham v. Stille*, 379 N.W.2d 30, 33 (Iowa Ct. App. 1985); *see Equal Access Corp. v. Utils. Bd., Utils. Div. Iowa Dep't of Commerce*, 510 N.W.2d 147, 150 (Iowa 1993) ("Revenues received without proper [statutory] authority would be illegal, and therefore uncollectible under an equitable theory."); *see also Horrabin Paving Co. v. City of Creston*, 252 N.W. 480, 487 (Iowa 1935) (finding where municipality violated a statutory provision in entering contract, no recovery in unjust enrichment could be made). The *Horrabin Paving* court stated,

> In view of the reasons underlying public policy as applied to contracts of municipal corporations, to which reference has heretofore been made, it would, in our opinion, be contrary to public policy to allow one to thus evade provisions which have been enacted by law for the protection of the public, to foist upon the municipality materials and services that could not be returned, and then, when the evasion has been discovered and the contracts declared invalid, to recover on the theory that the municipality has received a benefit for which it should pay.

252 N.W. at 487. D & W cannot bypass statutory requirements by bringing its contract claim in unjust enrichment. We therefore affirm the district court.

C. Negligent Misrepresentation.

D & W next argues the district court improperly granted summary judgment regarding negligent misrepresentation as it should have found Read

was in the business of supplying information.[5] "[W]hen deciding whether the tort of negligent misrepresentation imposes a duty of care in a particular case, we distinguish between those transactions where a defendant is in the business or profession of supplying information to others from those transactions that are arm's length and adversarial." *Sain v. Cedar Rapids Comm. Sch. Dist.*, 626 N.W.2d 115, 124 (Iowa 2001). "This means the tort does not apply when a defendant directly provides information to a plaintiff in the course of a transaction between the two parties, which information harms the plaintiff in the transaction with the defendant." *Id.* at 126. In *Pitts v. Farm Bureau Life Ins. Co.*, our supreme court analyzed what sort of relationship gives rise to a negligent misrepresentation claim in the context of an insurance agent and insured, stating:

> On the one hand, an insurance agent, like a retailer, sells a product to a customer. This is clearly an arm's-length transaction—the type of relationship that cannot give rise to an action for negligent misrepresentation. Any information given to the prospective customer at this time would be incidental to the negotiations. At the time Schiffer sold the policy to Tom, their relationship was that of seller and buyer, a relationship that is clearly arm's-length and adversarial, as opposed to advisory, in nature. Farm Bureau states, "The only transaction at issue in this case is the purchase of the Policy from Schiffer." If that were the case, then Schiffer would not be a proper defendant in a negligent misrepresentation action.

818 N.W.2d 91, 112 (Iowa 2012).[6] At the time of the communication between Read and D & W, the parties were engaged in an arms-length transaction. Any

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[5] D & W also limits this claim on appeal to city manager Read, claiming the court erred in failing to analyze its claim against Read separately. We find it did analyze this claim separately and therefore it is preserved for our review. *Bowman*, 805 N.W.2d at 797.

[6] The *Pitts* court proceeded to find recovery under negligent misrepresentation was allowed, stating "When [the insurance agent] allegedly advised Tom and Michele that Tom's daughter was no longer the primary beneficiary on the policy, he was functioning as Tom's agent. The advisory nature of the principal–agent relationship supports allowing a claim of negligent misrepresentation." *Id.* at 113. At no point did Read act as an agent for D & W. Further, the *Pitts* court noted, "The information [the insurance

advice given by Read was to further the agreement between his employer—the City—and D & W. Read was not acting in an advisory capacity to third parties; he participated in the transaction itself by communicating the City's status with the project on behalf of the City. The district court properly granted summary judgment on this claim.

D. Legal Fraud.

Finally, D & W argues the district court improperly granted the motion for summary judgment regarding its claim against the City and Read for legal fraud because it found no intent to deceive.

> To establish a claim for fraudulent misrepresentation, [a party] has the burden of proving each of the following elements: (1) representation, (2) falsity, (3) materiality, (4) scienter, (5) intent to deceive, (6) reliance, and (7) resulting injury and damage. These elements must be established by a preponderance of clear, satisfactory, and convincing proof.

Van Sickle Const. *Co*. *v*. *Wachovia Commercial Mortg*., *Inc*., 783 N.W.2d 684, 687 (Iowa 2010) (internal citations and quotations omitted). The district court found D & W was unable to establish that Read or the City had any intent to deceive at the time they entered into the TIF Agreement. The same general analysis is used for scienter and intent to deceive—both may be shown when the speaker has "'actual knowledge of the falsity of his representations or speaks in reckless disregard of whether those representations are true or false.'" *Id.* (quoting *Garren v*. *First Realty*, *Ltd*, 481 N.W.2d 335, 338 (Iowa 1992)). D & W does not point to any testimony in the summary judgment record which supports

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agent] provided was not given for his own benefit but was instead provided for the benefit of Michele and her husband." *Id*. Here, Read's information was provided for the benefit of his employer.

its argument that Read knew his statements were false, whether before or after the signing of the TIF Agreement. Although D & W cites to Read's deposition testimony, the answers on the cited pages were vague and evasive, and do not support an inference he intended to deceive D & W.

We therefore affirm the district court's grant of summary judgment in favor of the City and Read.

AFFIRMED.