IN THE COURT OF APPEALS OF IOWA

No. 6-1025 / 06-0272
Filed April 11, 2007

DOVETAIL BUILDERS, L.L.C.,
Plaintiff-Appellee,

vs.

WARREN WOEPKING and
PATRICIA WOEPKING,
Defendants-Appellants.

Appeal from the Iowa District Court for Louisa County, Cynthia Danielson, Judge.

Patricia and Warren Woepking appeal from a district court judgment finding them liable for breach of a real estate purchase agreement. **AFFIRMED AS MODIFIED AND REMANDED.**

William Tharp of Allbee, Barclay, Allison, Denning & Oppel, P.C., Muscatine, for appellants.

Brandy Dulceak of Stanley, Lande and Hunter, Muscatine, for appellee.

Heard by Zimmer, P.J., and Miller and Baker, JJ.

ZIMMER, P.J.

Patricia and Warren Woepking appeal from a district court judgment finding them liable for breach of a real estate purchase agreement. The court found the Woepkings breached their agreement with Dovetail Builders, L.L.C. (Dovetail) by failing to complete the purchase of a home built by Dovetail. We affirm the district court's judgment with some modification to the award of damages.

I. Background Facts and Proceedings

In August 2004 Patricia and Warren Woepking approached Brandon Pratt, a realtor representing Dovetail, about a home being built by Dovetail in Muscatine. On September 5, 2004, the Woepkings executed a residential real estate purchase agreement offering to purchase the property for $211,500 and deposited $1000 earnest money. Dovetail accepted the Woepkings' offer. The parties' contract provided for a closing date of November 12, 2004.

The contract contained a financing contingency stating, "[c]onventional [f]inancing w/ contingency to be released by September 8, 2004." No language in the contract addressed specific mortgage terms, such as a maximum interest rate. The Woepkings told Pratt their current residence in Columbus Junction was going to be purchased by Mike and Sandy Jamison, so the contract did not include a contingency for the sale of their home. They also told Pratt they could not pay cash for the full price of the home, so they planned to finance part of the purchase price.

The Woepkings applied for loan preapproval for the home under construction by Dovetail at Community Bank in Muscatine. They advised their

banker, Jane Phillips, that their current residence was being sold and they only needed to borrow $100,000 to complete their purchase of the home being built by Dovetail. Phillips informed the Woepkings the bank would need proof of the sale of the Columbus Junction property before releasing funds to purchase the Muscatine home.

Community Bank issued a loan commitment to the Woepkings on September 9, 2004. The bank faxed a copy of the commitment to Dovetail the following day. The parties considered the financing contingency satisfied upon receipt of the loan commitment, so construction continued.

After receiving the loan commitment from the bank, Dovetail's operations manager met with Patricia Woepking regarding selections and specifications for completion of the home. The Woepkings had Dovetail make significant changes to the floor plan. They moved the master bedroom by eliminating the only other bedroom on the first floor. This change made the home a one-bedroom residence. They modified the master bath by installing a stall style shower and eliminating a bathtub; they moved the den; they removed the formal dining room, leaving the home with an eat-in kitchen; they left the basement unfinished; and they modified the kitchen layout. In addition, the Woepkings further customized the home by modifying the brick exterior, selecting kitchen countertops, selecting colors and finish material, upgrading the kitchen cabinets, selecting bathroom cabinets, selecting fixtures for all the rooms, choosing French doors for the den, altering landscape plans, and directing electrical work for the lower level of the home.

In early November 2004, Warren Woepking told Pratt he did not think Patricia would move to Muscatine. Wendi Ingram, Pratt's assistant, received similar information from Warren during the week prior to the scheduled closing. Warren informed Ingram his wife had a change of heart and just did not want to move.

On November 9, 2004, the Woepkings' attorney notified Dovetail by letter that the Woepkings would not follow through with the purchase of the customized home. The letter provided no explanation for the Woepkings' decision. The parties had scheduled a walk-through of the home for November 11, 2004, but the Woepkings did not attend.

During the period from September 5 through October 31, the Woepkings never told Dovetail or Community Bank they were concerned about selling their residence in Columbus Junction. Pratt asked the Woepkings to complete the closing, and he offered to sell the Columbus Junction property for them. The Woepkings did not accept his offer. In addition, the Woepkings never contacted the bank about pursuing additional financing for the purchase of the home Dovetail had constructed.

Dovetail listed the home it had built for the Woepkings and pursued other potential buyers from November 2004 through November 2005. Dovetail only received one offer on the Muscatine property. That offer would have required Dovetail to make significant modifications and improvements to the home in exchange for a higher price than Dovetail had contracted with the Woepkings. This sale was never completed.

After the Woepkings failed to close on the Muscatine property, Dovetail filed its petition on November 15, 2004, alleging breach of contract. Dovetail asked the court for specific performance on the contract and damages. Both parties filed motions for summary judgment, which the district court denied. The case proceeded to bench trial in September 2005.

At trial Patricia testified she and her husband never had any concerns about selling their Columbus Junction property because they "had somebody ready to buy the house." The Woepkings both testified they thought their home would be sold to Mike and Sandy Jamison.[1] Patricia testified that sometime around November 1 she and her husband suspected the Jamisons would not purchase the Columbus Junction property. The Woepkings admitted they did not engage the services of a realtor to facilitate the sale of the Columbus Junction property. They did not advertise the property in a newspaper or on the Internet. Furthermore, they did not post a "for sale" sign at the property.

Jane Phillips testified the bank withdrew the Woepkings' application for a loan on November 16, 2004, because it had expired. Phillips also said the Woepkings never sought approval for a loan for more than the partial purchase price of the Muscatine home. During trial, Warren testified, "[w]hether or not we could get the loan didn't seem to us to be the issue."

Dovetail's experts testified the changes the Woepkings made to the custom-built home were so significant it was unlikely another buyer would be interested in the home without requiring further modifications and improvements. Dovetail estimated the cost for such modifications was $33,750.

[1] The Jamisons did not testify at trial.

On November 8, 2005, Dovetail filed a motion requesting leave for supplemental pleading to address post-trial developments in the case, including the sale of the Muscatine property to a third party for $229,000. Dovetail withdrew its prayer for specific performance and updated the damages it had claimed in its closing brief.

The district court issued a ruling on January 6, 2006. The court found the contract did not contain a contingency limiting the conventional financing to the dollar amount listed in the loan commitment and further found the Woepkings were unwilling to pursue conventional financing. The court also concluded the Woepkings did not make a good faith effort to sell the Columbus Junction property.

The court entered judgment in favor of Dovetail against the Woepkings on the breach of contract claim. The court awarded Dovetail $43,335.60 in damages with interest on the judgment set at 4.23% per year and assessed court costs to the Woepkings. The Woepkings now appeal.

II. Scope and Standards of Review

We review breach of contract cases for the correction of errors at law. Iowa R. App. P. 6.4; *East Broadway Corp. v. Taco Bell Corp*., 542 N.W.2d 816, 819 (Iowa 1996). The court's findings of fact are binding on us if supported by substantial evidence. Iowa R. App. P. 6.14(6)(*a*); *Hartzler v. Town of Kalona*, 218 N.W.2d 608, 609 (Iowa 1974). We consider evidence substantial when a reasonable mind would accept it as adequate to reach a conclusion. *Falczynski v. Amoco Oil Co.*, 533 N.W.2d 226, 230 (Iowa 1995).

III. Breach of Contract

The Woepkings contend the district court erred when it found the contract was breached and did not find the contract null and void due to nonperformance of a condition precedent. The Woepkings maintain the real estate purchase agreement was contingent upon them obtaining a loan commitment for conventional financing and claim they did not obtain a loan commitment that satisfied the contingency in the contract. They argue the loan commitment document provided by Community Bank contained a condition precedent, the sale of their current residence, which was not released.

A breach of contract occurs when a party fails to perform any promise that forms a whole or a part of the contract without legal excuse. *Employers Mut. Cas. Co. v. United Fire & Cas. Co.*, 682 N.W.2d 452, 455 (Iowa Ct. App. 2004). In breach of contract claims, the complaining party must prove: (1) the existence of a contract, (2) the terms and conditions of the contract, (3) that it has performed all the terms and conditions required under the contract, (4) the defendant's breach of the contract in some particular way, and (5) that the plaintiff has suffered damages as a result of the breach. *Molo Oil Co. v. River City Ford Truck Sales, Inc*., 578 N.W.2d 222, 224 (Iowa 1998).

For the reasons that follow, we find no merit in any of the Woepkings' arguments. The district court found the only financing contingency in the contract was satisfied when the Woepkings provided Dovetail with the loan commitment. We agree. The parties' contract provides for "[c]onventional [f]inancing w/ contingency to be released by September 5th, 2004." The contract does not contain a provision making the Woepkings' purchase of the Muscatine property

subject to the sale of the Woepkings' residence in Columbus Junction. Furthermore, the contract does not include any specific mortgage terms even though the preprinted language on the contract form was available if the parties had opted to condition the sale on specific mortgage terms. We conclude the financing clause of the contract was satisfied with the provision of a loan commitment.[2]

Even if the sale of the Woepkings' current residence had been a condition precedent to obtaining financing and satisfying the financing contingency in the real estate purchase agreement, we agree with the district court's conclusion the Woepkings did not make reasonable efforts to sell their home. The Woepkings never listed their Columbus Junction Property for sale with a realtor or advertised it in any manner. They never put a "for sale" sign on their property. The Woepkings continued to customize the Muscatine property. The last change order was signed on October 26, 2004. It was not until November 4 that any question arose regarding the closing on the Muscatine property. Even at this point, Warren only told Dovetail he and his wife would not follow through with the purchase because Patricia had changed her mind and did not want to move to Muscatine. When the Woepkings' attorney formally notified Dovetail the Woepkings would not complete the purchase, he did not mention his clients had failed to sell their Columbus Junction home. When Pratt offered to use his

[2] Although the Woepkings argue the loan commitment added a subject-to-sale contingency to the real estate purchase agreement, we find the terms of the loan commitment were not incorporated into the contract. Under the doctrine of incorporation, one document becomes part of another separate document simply by reference as if the former is fully set out in the latter; however, a clear and specific reference is required to incorporate an extrinsic document by reference. *Hofmeyer v. Iowa Dist. Ct.*, 640 N.W.2d 225, 228 (Iowa 2001).

professional skills as a realtor to market and sell the Columbus Junction property, the Woepkings refused his assistance. Substantial evidence supports the district court's conclusion that the Woepkings failed to make a good faith effort to sell their property. A party cannot rely on a condition precedent when by its own conduct, it has made compliance with that condition impossible. *Conrad Bros. v. John Deere Ins. Co*., 640 N.W.2d 231, 240 (Iowa 2001).

We also agree with the district court's conclusion the evidence does not support a finding the Woepkings were unable to obtain conventional financing. Prior to November 2004, the Woepkings never expressed a concern to Dovetail or Community Bank that their house would not sell. Moreover, the Woepkings never asked the bank if a loan could be issued without the sale of their Columbus Junction home. Nothing in the record suggests the bank refused to proceed with the loan. The record indicates the Woepkings were unwilling rather than unable to obtain conventional financing.

We find substantial evidence supports the district court's finding that the Woepkings breached the real estate purchase agreement. In reaching this conclusion, we recognize the district court had the advantage of listening to and viewing the witnesses. *Weinhold v. Wolff*, 555 N.W.2d 454, 458 (Iowa 1996). In matters of witness credibility, we are particularly inclined to give weight to the district court's findings. *Id.*

IV. Damages

The Woepkings contend the district court erred in calculating damages. Dovetail eventually sold the Muscatine property to a third party for $229,000. The price contracted with the Woepkings after change orders was $214,685.

Dovetail spent $33,750 in renovations to bring the property to a sellable state. The court subtracted the cost of renovations ($33,750) from the sale price ($229,000) to arrive at a net sale price of $195,250. The court then awarded Dovetail the sum of $19,435, which is the difference between the Woepking contract price ($214,685) and the net sale price ($195,250). The court also awarded Dovetail the realtor's commission on the sale ($16,030), closing costs ($720.60), costs for continuation of the abstract ($150), and attorney fees and litigation expenses ($7000). The total damage award was $43,335.60.

When a contract has been breached, the nonbreaching party is generally entitled to be placed in as good a position as he or she would have occupied had the contract been performed; this type of damage is the injured party's "expectation interest" or "benefit of the bargain" damages. *Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.*, 579 N.W.2d 823, 831 (Iowa 1998). The nonbreaching party's recovery under this theory of damages is limited to the loss he or she actually suffered by reason of the breach, and the party is not entitled to be placed in a better position than he or she would have occupied if the contract had not been breached. *Id.* Damages based on breach of a contract must have been foreseeable or have been contemplated by the parties when the parties entered into the agreement. *Kuehl v. Freeman Bros. Agency, Inc*., 521 N.W.2d 714, 718 (Iowa 1994).

The Woepkings argue that because the November 2005 sale price of the Muscatine property exceeded the price the Woepkings had agreed to pay at the November 12, 2004 closing, Dovetail sustained no loss. We disagree. The record reveals the modifications ordered by the Woepkings on the Muscatine

property created a customized home. The custom features of the home negatively affected the resale value and marketability of the property. The home as customized by the Woepkings had only one bedroom, no formal dining room, an unfinished basement, and a master bathroom with only a shower and no bathtub. The record reveals the property was actively marketed in its customized state with no success. Dovetail was only able to sell the property after it agreed to modify the home to suit the requirements of the third party buyer. We find the district court did not err in allowing Dovetail to recover the cost of renovations necessary to sell the home to a third party.

The district court also awarded Dovetail damages for commission to realtors, closing costs, and continuation of the abstract. The Woepkings contend the court erred by awarding consequential damages for these expenses. We agree with the Woepkings that these fees are not foreseeable damages. If the anticipated closing had occurred on November 12, 2004, Dovetail would have been responsible for paying a commission to the realtor, the closing costs, and for the continuation of the abstract. Because that closing did not occur, Dovetail did not incur any such costs until closing a year later with third parties.

We believe these fees are expenses incidental to being a property owner and seller of real estate. We conclude Dovetail is not entitled to a windfall in damages by recovering expenses it would have incurred regardless of the Woepkings' breach and regardless of the identity of the buyer of the Muscatine property. We modify the district court's award of damages to exclude the $16,030 in commission to the realtors, $720.60 in closing costs, and $150 for continuation of the abstract.

V. Attorney Fees

Under the contract at issue here, the prevailing party in a legal action to enforce its rights under the contract is entitled to recover attorney fees. The Woepkings argue the district court erred in awarding attorney fees to Dovetail. Dovetail requested $26,791.50 in attorney fees and litigation expenses. The district court awarded $7000 in attorney fees to Dovetail.

We review the district court's award of attorney fees for an abuse of discretion, and we will only reverse the award if the court rests its discretionary ruling on grounds that are clearly unreasonable or untenable. *GreatAmerica Leasing Corp. v. Cool Comfort Air Conditioning & Refrigeration, Inc.*, 691 N.W.2d 730, 732 (Iowa 2005). Because we find no abuse of discretion here, we affirm the district court's award of attorney fees.

Dovetail has requested an award of appellate attorney fees. Accordingly, we remand this case to the district court for consideration of this request. *See Lehigh Clay Prods., Ltd. v. Iowa Dep't of Transp.*, 545 N.W.2d 526, 528 (Iowa 1996).

VI. Conclusion

We affirm the district court's judgment finding the Woepkings liable for breach of the real estate purchase agreement. We modify the district court's award of damages to exclude the following damages from the court's award: $16,030 in commission to the realtors, $720.60 in closing costs, and $150 for continuation of the abstract. We remand to the district court for determination of Dovetail's appellate attorney fees.

AFFIRMED AS MODIFIED AND REMANDED.