IN THE COURT OF APPEALS OF IOWA

No. 7-847 / 07-0085
Filed December 28, 2007

ERIC REYNOLDS AND MARY REYNOLDS,
d/b/a AMANA COLONY RV SERVICE & REPAIR,
Plaintiffs-Appellants,

vs.

SOLON STATE BANK,
Defendant-Appellee,

and AMANA SOCIETY, INC.,
Defendant.

Appeal from the Iowa District Court for Johnson County, Marsha M. Beckelman, Judge.

Plaintiffs appeal the jury's verdict on their claim of negligence, and the district court's grant of a directed verdict on their claims of fraudulent misrepresentation, fraudulent nondisclosure, and breach of fiduciary duty. **AFFIRMED.**

Edward M. Blando and James W. Affeldt of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellants.

H. Raymond Terpstra II and Gregory J. Epping of Terpstra, Epping & Willett, Cedar Rapids, for appellee.

Heard by Vogel, P.J., and Mahan, J. and Robinson, S.J.* Baker, J. takes no part.

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

ROBINSON, S.J.

I. Background Facts & Proceedings

Eric and Mary Reynolds operated a recreational vehicle (RV) repair service. In 1999 they proposed to open a RV repair center near an Amana Colony RV park. Amana Society, Inc. agreed. The Amana Society picked the location for the RV repair center building and built the building to the Reynolds' specifications. The Amana Society and the Reynolds entered into a lease agreement for the building, with an option to purchase.

The Reynolds financed the project with a loan for $88,100 from Solon State Bank. The loan was guaranteed by the Small Business Association (SBA). The SBA agreement required that if "any portion of the collateral is located in a special flood hazard zone, Lender must require Borrower to obtain Federal flood insurance, or other appropriate special hazard insurance . . . ." At the time of the SBA loan, in June 1999, the site for the building had not been finally determined. Moreover, the Reynolds did not have an ownership interest in the building, and it was not used for collateral. The Reynolds' residence in Oxford, Iowa, was used for collateral. The Solon State Bank obtained a statement that the Oxford residence was not in a flood zone.[1]

In 2001, the Reynolds decided to exercise their option to purchase the building. In December 2001, George Davis of Appraisal Resources Company performed an appraisal on the building and valued it at $300,000. The appraisal report noted, "Subject is located partially in a flood plane area. There is a creek

[1] A representative of Solon State Bank admitted a flood zone determination should have been done on the building, not because the building was collateral, but because tools and equipment which were collateral were used in the building.

that borders the east side of the site." None of the parties apparently noticed this statement. The Reynolds obtained a loan for $146,637 from Solon State Bank to purchase the property in April 2002.

The Reynolds had problems servicing all of their debts. They borrowed $6000, and then an additional $2200 from the Solon State Bank late in 2002. In 2003, they began looking for financing for a proposed new business called EMR Innovations, which would design, produce, and sell after-market RV products. The Reynolds were unable to obtain additional financing from Solon State Bank. They negotiated with Corridor Management Company, a venture capital firm, but no agreement was reached.

The Reynolds then approached Roger Hoffman, senior vice-president for State Central Bank of Keokuk. Hoffman met them at the RV repair center building in September 2004 to discuss their new business proposal. Hoffman noticed the creek immediately outside the back of the building, and asked how much they paid for flood insurance. This brought the issue of the flood plain to the Reynolds' attention.

Mary Reynolds contacted Steven Berner of Solon State Bank concerning the question about flood insurance. Solon State Bank received a statement from First American Flood Data Services on October 11, 2004, that the building was not in a flood zone. The next day, however, on October 12, 2004, they received a revised statement that the building was in a special flood hazard area. Federal flood insurance was not available because the Amana Society did not participate

in the Federal Flood Insurance Program. Due to the issue of flood insurance, State Central Bank did not agree to lend funds to the Reynolds.

In November 2004, the Reynolds learned that prior to the construction of the building, the Amana Society should have obtained a permit from the Iowa Department of Natural Resources because the property was in a flood plain. The building was about 0.1 feet below the 100-year flood plain mark.

On March 11, 2005, the Reynolds filed suit against Solon State Bank and the Amana Society, claiming they were damaged because the defendants failed to advise them earlier that the property was in a flood zone. Eventually the Reynolds entered into a settlement agreement with the Amana Society. As part of the agreement the Reynolds sold the building back to the Amana Society. The Reynolds used the settlement proceeds to pay their loans to Solon State Bank.

The district court granted Solon State Bank's motion for summary judgment on the issues of interference with prospective contractual relationship, breach of good faith and fair dealing, violation of federal banking regulations, and interference with an existing contract. The case proceeded to a jury trial on the issues of negligence, breach of fiduciary duty, negligent misrepresentation (including fraudulent nondisclosure), and fraudulent misrepresentation.

By the agreement of the parties, Solon State Bank made its motion for directed verdict at the close of all the evidence. The district court granted a directed verdict on the issues of breach of fiduciary duty, fraudulent misrepresentation, and fraudulent nondisclosure, finding there was insufficient

evidence to support these issues. The court also determined the issue of punitive damages would not be submitted to the jury.

The district court drafted jury instructions on the claims of negligence and negligent misrepresentation. The Reynolds objected to the court's failure to give their requested jury instruction No. 13, which was a listing of federal statutes and regulations relating to the loans guaranteed by the SBA and regulated by the Federal Deposit Insurance Corporation (FDIC). The court overruled the objection.

The jury returned a verdict finding Solon State Bank was at fault, but its fault was not a proximate cause of the Reynolds' damages. The jury found the Amana Society was at fault, and its fault was the proximate cause of plaintiffs' damages. The jury assessed fault 100% to the Amana Society. The district court denied plaintiffs' motion for a new trial. The Reynolds now appeal.

II. Standard of Review

This case was tried at law, and our review is for the correction of errors at law. Iowa R. App. P. 6.4. In law actions, findings of fact are binding upon the appellate court if supported by substantial evidence. Iowa R. App. P. 6.14(6)(*a*).

III. Jury Instructions

The Reynolds contend the district court should have submitted their proposed instruction No. 13 to the jury. We review jury instructions to decide if they are a correct statement of the law and are supported by substantial evidence. *Bride v. Heckart*, 556 N.W.2d 449, 452 (Iowa 1996). Evidence is substantial when a reasonable mind would accept it as adequate to reach a

conclusion. *Id.* If a court errs in admitting or refusing to submit an instruction, we will reverse only if the error has caused prejudice. *Kessler v. Wal-Mart Stores, Inc.*, 587 N.W.2d 804, 806 (Iowa Ct. App. 1998).

Generally, a court should give a requested instruction if it correctly states the law applicable to the facts of the case and if the concept is not found in the other instructions. *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 287 (Iowa 1994). However, "[i]nstructions should not marshal the evidence or give undue prominence to any particular aspect of a case." *Stover v. Lakeland Square Owners Ass'n*, 434 N.W.2d 866, 868 (Iowa 1989). Jury instructions should not "give undue emphasis to any particular theory, defense, stipulation, burden of proof, or piece of evidence." *Olson*, 522 N.W.2d at 287. As long as the issues involved in a case are adequately covered, the court may choose its own language, and parties are not entitled to any particular instruction. *Hutchinson v. Broadlawns Med. Ctr.*, 459 N.W.2d 273, 275 (Iowa 1990).

Jury Instruction No. 15 provided:

> The plaintiffs claim the defendant was at fault in one or more of the following particular(s):
>
> a. In failing to obtain a flood plain determination for the location where the equipment would be placed in connection with the June 15, 1999, SBA loan;
>
> b. In failing, contrary to FDIC regulations, to give notice to plaintiffs or failing to arrange for the Amana Society to give notice that the building was located in a flood plain for which no federal flood plain insurance was available because Iowa County did not participate in the National Flood Insurance Program prior to execution of the April 30, 2002, building purchase loan.

The Reynolds claim the instruction is insufficient because it did not instruct the jury that Solon State Bank was required to give them notice advising whether

flood insurance was available on the collateral securing the loan, or warn them the property was in a flood zone. We conclude the instruction given by the court adequately covered these concepts. The Reynolds' proposed instruction contained the same concepts, but in more technical and less understandable language. The Reynolds' proposed instruction would have unduly emphasized their theory of the case, and furthermore, the court was free to choose the language of the instructions. The court's instruction was a clear, plain English statement of plaintiffs' claim of negligence.

We conclude the district court did not err in rejecting plaintiffs' proposed jury instruction No. 13.

IV. Directed Verdict

Our standard of review on appeal from the grant of a motion for directed verdict is for correction of errors at law. *Mensink v. American Grain*, 564 N.W.2d 376, 379 (Iowa 1997). The court should review the evidence in the light most favorable to the nonmoving party to determine whether a fact issue was generated. *Dettman v. Kruckenberg*, 613 N.W.2d 238, 250-51 (Iowa 2000). Where substantial evidence does not exist to support each element of a plaintiff's claim, the court may sustain the motion. *Olson v. Nieman's Ltd.*, 579 N.W.2d 299, 313 (Iowa 1998).

A. Fiduciary Duty

The Reynolds claim they were in a fiduciary relationship with Solon State Bank. They state they placed full trust and confidence in Steven Berner from the Bank, and relied upon him for business decisions. The Reynolds contend Solon

State Bank breached its fiduciary duty to them by failing to inform them that the RV repair center building was in a flood zone.

"A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." *Kurth v. Van Horn*, 380 N.W.2d 693, 695 (Iowa 1986) (citing Restatement (Second) of Torts § 874, cmt. a, at 300 (1979)). The relationship between a customer and a bank does not automatically create a fiduciary relationship. *Engstrand v. West Des Moines State Bank*, 516 N.W.2d 797, 799 (Iowa 1994). For a fiduciary relationship to exist there must be evidence of "domination and influence" and "a reposing of faith, confidence and trust, and the placing of reliance by one upon the judgment and advice of the other." *Weltzin v. Cobank ACB*, 633 N.W.2d 290, 294 (Iowa 2001) (citations omitted).

In *Irons v. Community State Bank*, 461 N.W.2d 849, 852-53 (Iowa Ct. App. 1990), we stated:

> The Irons apparently feel because they reposed some trust in the bank, a fiduciary relationship was created. However, not only does the record fail to show a fiduciary relationship based on the facts, but also there is no evidence the bank ever assented to or was aware of the fiduciary relationship. The various conversations Craig Irons had with bank officers concerning loan repayments, price and sale or crops, and other matters certainly do not raise the relationship to the special and elevated rank of fiduciary.

(Citation omitted). In ruling on the motion for directed verdict, the district court stated, "I don't believe there is a shred of evidence here that the bank had knowledge that the Plaintiffs were relying upon them for advice in the manner that's been asserted."

We determine the district court did not err in its conclusion. There was no evidence Solon State Bank was aware the Reynolds were relying on the Bank for advice. Furthermore, the evidence shows the Reynolds consulted with Joni Thornton of the Institute for Social and Economic Development for business advice, and had also consulted with Jerry Trudo of the Iowa Business Growth Company concerning their business plan. There was no evidence of "domination and influence" over the Reynolds' business decisions by Solon State Bank. *See Kurth*, 380 N.W.2d at 695.

We conclude the district court did not err by granting a directed verdict for Solon State Bank on the issue of breach of fiduciary duty.

B. Fraudulent Misrepresentation

The elements of fraudulent misrepresentation are: (1) representation; (2) falsity; (3) materiality; (4) scienter; (5) intent to deceive; (6) justifiable reliance; and (7) resulting injury. *Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388, 391 (Iowa 2001). Reliance is considered justifiable if a person acting with reasonable and ordinary prudence and caution would have a right to rely on the representations. *Kaiser Agric. Chems. v. Ottumwa Prod. Credit Ass'n*, 428 N.W.2d 681, 683 (Iowa Ct. App. 1988). A party must prove a claim of fraudulent misrepresentation by clear, satisfactory, and convincing evidence. *Smidt v. Porter*, 695 N.W.2d 9, 22 (Iowa 2005).

The Reynolds claim Berner told them all conditions for the 1999 SBA loan had been complied with, and also all conditions for the 2002 loan. They also claim Berner told them the property was not in a flood zone. The Reynolds claim

these statements were false, and were made with the intent that the Reynolds rely upon them. They state that if they had known the true facts they would not have borrowed money in 1999 or 2002, and would not have purchased the building.

The plaintiffs failed to establish by clear, satisfactory, and convincing evidence the element of scienter, that Solon State Bank knew the statements were false. At the time the SBA loan closed on June 15, 1999, Solon State Bank did not know the location of the building, because the site had not been finalized. Therefore, Solon State Bank could not have had knowledge the building was in a flood zone. Furthermore, there was insufficient evidence the Bank had an intent to deceive the plaintiffs. There was no evidence the Bank made intentional misrepresentations to the Reynolds.

We conclude the district court did not err in granting a directed verdict to Solon State Bank on the issue of fraudulent misrepresentation.

C. Fraudulent Nondisclosure

The tort of fraudulent nondisclosure may arise if a party fails to disclose material information and the party had a duty to communicate that information. *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 174 (Iowa 2002). Fraudulent nondisclosure may occur "when one with superior knowledge dealing with inexperienced persons who rely on him or her, purposely suppresses the truth respecting a material fact involved in the transaction." *Kunkel Water & Elec., Inc. v. City of Prescott*, 347 N.W.2d 648, 653 (Iowa 1984). A duty of disclosure may arise "from a relation of trust, a relation of confidence, inequality of condition and

knowledge, or other circumstances as show by a particular fact situation." *Irons*, 461 N.W.2d at 854.

In discussing fraudulent nondisclosure, the supreme court has stated:

> In other words, there must be a concealment – that is, the party sought to be charged must have had knowledge of the facts which, it is asserted, he allowed to remain undisclosed – and the silence must, under the conditions existing, amount to fraud, because it is an affirmation that a state of things exists which does not, and because the uninformed party is deprived to the same extent that he would have been by positive assertion.

Wilden Clinic Inc. v. City of Des Moines, 229 N.W.2d 286, 293 (Iowa 1975) (citing 37 Am. Jur. 2d *Fraud & Deceit* § 145 (1968)).

In discussing the issue of fraudulent misrepresentation, we find there was insufficient evidence Solon State Bank knew the building was in a flood zone, and either misrepresented this fact or failed to disclose this fact to plaintiffs. In addition, there is insufficient evidence Solon State Bank acted with an intent to deceive the Reynolds. Based on the same reasoning as the issue of fraudulent misrepresentation, we determine there is insufficient evidence of fraudulent nondisclosure.

We conclude the district court did not err in granting a directed verdict to Solon State Bank on the issue of fraudulent nondisclosure.

After considering all issues raised in this appeal, we affirm the decision of the district court.

AFFIRMED.