IN THE COURT OF APPEALS OF IOWA

No. 8-872 / 07-1962
Filed May 29, 2009

LARRY STEWART, d/b/a
LARRY STEWART REALTY,
Plaintiff-Appellee,

vs.

ALL STATES QUALITY FOODS, L.P.,
a/k/a ALL STATES QUALITY FOODS, INC.,
Defendant,

HIGHLAND CRUSADER OFFSHORE PARTNERS, L.P.,
Defendant-Appellant.

Appeal from the Iowa District Court for Floyd County, Bryan H. McKinley, Judge.

Highland Crusader Offshore Partners, L.P. appeals the district court's judgment for plaintiff on his claims of breach of contract and intentional interference with a contract. **AFFIRMED.**

Megan L. Gerriets and Donald P. Dworak of Stinson Morrison Hecker, L.L.P., Omaha, Nebraska, until withdrawal, and Robert A. Sims, Des Moines, for appellant.

Judith O'Donohoe of Elwood, O'Donohoe, Braun & White, Charles City, for appellee.

Roger L. Sutton of Sutton Law Office, Charles City, for defendant.

Considered by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

MANSFIELD, J.

Defendant Highland Crusader Offshore Partners, L.P. appeals a $14,000 judgment entered in favor of plaintiff Larry Stewart d/b/a Larry Stewart Realty on alternative theories of breach of contract and intentional interference with contract. For the reasons set forth herein, we affirm.

I. Background Facts & Proceedings

We summarize the facts in the light most favorable to the plaintiff, the prevailing party below. On August 29, 2001, Larry Stewart and Iowa Realty Commercial entered into a joint listing/commission agreement for 501 L Street, Charles City, Iowa. This property was owned by All States Quality Foods, L.P. On June 24, 2002, Iowa Realty and All States signed a "Uniform Agency Contract Listing Agreement" for 501 L Street that provided for a commission of ten percent of the first $500,000 of gross sales price. The listing agreement stated, "Should a bona fide offer be made by a ready, willing and able buyer meeting the terms of this contract and I fail to fulfill this agreement, then I shall pay you the agreed commission in full upon demand." The listing agreement stated it would expire on December 31, 2002.

Larry Stewart Realty found a tenant for the property. On January 3, 2003, the property was leased by Midwest Bakery, L.L.C. for a term of five years. The lease contained a provision giving Midwest Bakery the right of first refusal to purchase the property in the event that during the term of the lease All States received a bona fide offer to purchase the building.

An "Agency/Listing Change Agreement" dated December 30, 2003, signed by Larry Stewart Realty and All States, apparently extended the listing agreement for 501 L Street to December 31, 2004. A subsequent "Agency/ Listing Change Agreement" dated June 3, 2005, and signed by the same parties apparently extended the listing agreement further to June 30, 2006.[1]

In May 2006 All States was experiencing financial difficulties. All States owed approximately $6 million to Highland Crusader Offshore Partners, L.P., its secured lender. Highland Crusader hired Barrier Advisors, Inc. to wind down the business of All States. Barrier Advisors sent its employee, Harold Kessler, to oversee this process.

In the meantime, Larry Stewart Realty was continuing its attempts to sell 501 L Street. On May 13, 2006, it received an offer to purchase the building for $120,000 from Larry and Scott Tjaden. The offer was conditioned on Midwest Bakery waiving its right of first refusal and Highland Crusader releasing its lien. The manager of All States, Steve Tenney, told Larry Stewart, the owner of Larry Stewart Realty, to submit the offer to Kessler. Kessler met with several individuals on May 23, 2006, including Stewart, who gave him the offer from the Tjadens. Kessler stated he was in charge of business decisions, but that Tenney would sign any documents.

Kessler discussed the purchase offer with Stewart the next day. He authorized Stewart to obtain an extension for responding to the offer, which Stewart prepared and faxed to all parties. Larry Stewart Realty and All States

[1] The extensions referred to an underlying agreement dated August 29, 2001, rather than June 24, 2002. Highland Crusader raises an issue on appeal regarding these extensions, which we discuss below.

(through Tenney) entered into an "Agency/Listing Change Agreement" dated June 30, 2006, and extending the listing agreement to June 30, 2007. On July 7, 2006, Tenney signed a counteroffer for $140,000. Both Tenney and Roger Sutton, the attorney for All States, testified that Kessler approved the counteroffer for $140,000. The Tjadens accepted the counteroffer on July 17, 2006.

Stewart prepared a document showing All States could expect to receive a net amount of $95,064 from the sale. In response to the telephone call from Kessler, Stewart sent him a fax discussing certain items that had been deducted from the sale price. Stewart then prepared a revised document of the estimated equity to the seller, showing the amount as $105,982. During this time, a written notice of right of first refusal was sent to Midwest Bakery. On August 1, 2006, Midwest Bakery exercised its right of first refusal and agreed to purchase the building for $140,000. Stewart requested that Midwest Bakery submit earnest money of $12,000, and this was received. On August 24, 2006, Stewart informed Tenney, Kessler, and other parties that he was "ready to close by mutual agreement of the parties."

On July 19, 2006, Highland Crusader had indicated for the first time that it would not accept net proceeds of less than $130,000 from the sale of the property. Stewart stated he would reduce his commission from $14,000 (ten percent of the $140,000 sales price) to $12,212 (ten percent of the sales price less rental credits). The amount of rental credits was also adjusted. Stewart prepared a new statement showing the seller's proceeds increased to $113,942. Highland Crusader, however, refused to release its lien, and the sale fell through.

On October 2, 2006, Stewart, doing business as Larry Stewart Realty, filed a petition against All States and Highland Crusader stating he had provided a ready, willing, and able buyer and had not been paid his commission.[2] Stewart alleged claims of breach of contract and interference with contract against Highland Crusader.

Following a bench trial on the claims against Highland Crusader, the district court issued a decision on October 29, 2007. On Stewart's claim of breach of contract on an agency theory, the court determined there was ample evidence of express and implied agency, and concluded Highland Crusader was bound by the listing agreement. The court denied Stewart's claim for breach of contract based on a third-party beneficiary theory. It found Stewart had established a claim for intentional interference with a contract on the basis that Highland Crusader intentionally and improperly interfered with the listing contract by permitting a counteroffer on the property and then refusing to release its lien, halting the sale of the property. The court found Highland Crusader's actions were intended to force Stewart to reduce his commission. The court entered judgment against All States and Highland Crusader for $14,000. Highland Crusader appeals.

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. Findings of fact in a law action are binding upon an appellate court if they are supported by substantial evidence. Iowa R. App. P.

[2] Iowa Realty Commercial assigned its interest in the suit to Stewart. All States had been dissolved as a company by this time, and it did not defend against the suit. The district court found All States in default, and it did not appeal.

6.14(6)(*a*). Evidence is substantial if a reasonable person would accept it as adequate. *Chrysler Fin. Co. v. Bergstrom*, 703 N.W.2d 415, 418 (Iowa 2005). In determining whether substantial evidence exists, we view the evidence in the light most favorable to the district court's judgment. *Id.*

III. Analysis

The district court found for Stewart and against Highland Crusader on two alternative grounds—breach of contract (i.e., the listing agreement) and intentional interference with contract. The grounds are mutually exclusive, because one cannot interfere with one's own contract. Nonetheless, we will review the ruling below to determine whether it can be sustained under either of two alternative scenarios—one assuming there was an actual contract between plaintiff and defendant and the other assuming there was not.

Upon our review, we believe that the breach of contract ruling for Stewart is not supported by substantial evidence. Neither the original listing agreement nor any of the extensions indicated or even suggested that Highland Crusader was a party thereto. Stewart did not testify that he believed or understood he had a listing agreement with Highland Crusader. This is not a case like *Kanzmeier v. McCoppin*, 398 N.W.2d 826, 830 (Iowa 1987), cited by the district court, where an "order buyer" entered into an oral agreement with a seller, after notifying the seller who his principal was. Here the contract was in writing and was only with the owner, All States.

In support of its breach of contract ruling, the district court found that Highland Crusader "exercised complete and total control as to the assets and

business affairs of [All States] from and after May 2006." That is not surprising. A secured creditor dealing with a distressed borrower often exercises significant control over that borrower. However, we believe it would be inappropriate to draw from the mere fact of control the legal conclusion that the secured lender has thereby become a party to the borrower's contracts. Accordingly, we do not affirm the district court on this ground.

Thus, we turn to the interference with contract claim. In order to establish a claim of intentional interference with an existing contract, a plaintiff must show: (1) a contract with a third party; (2) the defendant knew of the contract; (3) the defendant intentionally and improperly interfered with the contract; (4) the interference caused the third party not to perform; and (5) the plaintiff suffered damages. *Kern v. Palmer Coll. of Chiropractic*, 757 N.W.2d 651, 662 (Iowa 2008). In this case there was a contract, the listing agreement, between Stewart and All States.[3] Highland Crusader, through Kessler, knew of the contract.[4] In

[3] Technically speaking, the listing agreement was between Iowa Realty and All States. However, Stewart and Iowa Realty had a separate joint listing/commission agreement dated August 29, 2001, and Iowa Realty assigned its interest in this lawsuit to Stewart. Highland Crusader also argues on appeal that the district court erred in recognizing certain extensions of the original listing agreement because they referred to August 29, 2001, the date of the joint listing/commission agreement between the two brokers, rather than June 24, 2002, the date of the original listing agreement between Iowa Realty and All States. However, the district court's finding that August 29, 2001, was a "clerical mistake" is supported by the evidence. Stewart testified that the extensions related to *both* original agreements. In addition, we reject Highland Crusader's argument that the original listing agreement had no force and effect because one of the extensions was signed after the relevant expiration date. The parties had the right to waive that deadline and clearly did so by signing an extension.

[4] The evidence shows that at all times during these transactions Kessler was acting for the benefit of Highland Crusader. Although Kessler was employed by Barrier Advisors, the district court found that during the transactions in question he was acting as an agent of Highland Crusader. *See Benson v. Webster*, 593 N.W.2d 126, 130 (Iowa 1999) (holding an agency relationship exists when there is a manifestation of consent by one person that another should act on the former's behalf subject to the former's control, and

addition, there is evidence that Highland Crusader's refusal to release its lien for less than $130,000 caused the listing agreement between All States and Stewart not to be performed. Highland Crusader claims, however, that it did not intentionally and improperly interfere with the contract. That is the fighting issue on appeal. Factors to be considered in determining whether a party acted improperly are: (1) the nature of the conduct; (2) the actor's motive; (3) the interests of the other party that have been subject to interference; (4) the interests sought to be advanced by the actor; (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other party; (6) the proximity or remoteness of the actor's conduct to the interference; and (7) the relations between the parties. *Hunter v. Bd. of Trustees of Broadlawns Med. Ctr.*, 481 N.W.2d 510, 518 (Iowa 1992) (citing Restatement (Second) of Torts § 767, at 26-27 (1981)). "[A] party does not improperly interfere with another's contract by exercising its own legal rights in protection of its own financial interests." *Green v. Racing Ass'n of Cent. Iowa*, 713 N.W.2d 234, 244 (Iowa 2006) (quoting *Berger v. Cas' Feed Store, Inc*., 543 N.W.2d 597, 599 (Iowa 1996)).

Highland Crusader was owed approximately $6 million by All States. Generally speaking, Highland Crusader had as much right to maximize its recovery on that security interest as Stewart had to try to preserve his commission. To put it another way, Highland Crusader, which was going to take a haircut in this case, normally would have had a right to ask Stewart to take a

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consent by the other person to so act). There is substantial evidence in the record to support a finding that Kessler was acting as an agent of Highland Crusader.

haircut as well. *See Green*, 713 N.W.2d at 244. However, the troubling fact in this case, as noted by the district court, is that Highland Crusader via Kessler authorized the $140,000 counteroffer to the Tjadens, without disclosing *at that point* that it would not release its lien for less than $130,000. The effect of this nondisclosure was that Stewart continued to work on the transaction from approximately July 7, 2006, the date of the counteroffer, until approximately July 19, 2006, the date of Highland Crusader's notification, under the misimpression that Highland Crusader would accept the normal deductions from a $140,000 sale price, including a ten percent sales commission.

We accept as supported by substantial evidence the district court's finding that Kessler and Highland Crusader were engaged in a "two-step process" of first securing a purchase price and then "squeez[ing] out as much net proceeds as possible for Highland by seeking concessions, including the reduction of realtor fees." As the district court put it, this was a "manipulated transaction."

After careful consideration, we believe there is sufficient evidence to support the district court's conclusion that Highland Crusader improperly interfered with the listing agreement. Highland Crusader had every right to dictate the conditions under which it would release its lien for less than the amount due. The problem here is that Highland Crusader did not just do that. Rather, it led Stewart on, taking advantage of his services and giving him reason to believe that if he found a willing and able buyer, Highland Crusader would not take issue with his commission. While one can certainly conceive of measures that Stewart could have taken to better protect his interest, such as seeking a

guarantee of his commission from Highland Crusader, on the specific facts of this case we agree that Highland Crusader's bad faith actions constitute improper interference.

Highland Crusader also challenges the $14,000 damage award, contending that it overstates Stewart's recovery even if the listing agreement had been performed. Among other things, Highland Crusader argues that Midwest Bakery's exercise of the right of first refusal meant that Stewart's commission would have been less than $14,000. However, we conclude that this issue was not raised before the district court and is not preserved for our review. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (noting we do not consider issues raised for the first time on appeal).

We affirm the decision of the district court.

AFFIRMED.