

ORIGINAL

FILED

05/05/2020

Bowen Greenwood  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Case Number: DA 19-0101

DA 19-0101

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 117N

GARY LUTMAN,

Plaintiff and Appellee,

v.

CRAIG AMES, KAREN AMES and DOES 1-10,

Defendants and Appellants.

FILED

MAY 05 2020

Bowen Greenwood  
Clerk of Supreme Court  
State of Montana

APPEAL FROM: District Court of the Sixth Judicial District,  
In and For the County of Park, Cause No. DV 16-67  
Honorable Brenda R. Gilbert, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Karl Knuchel, Eric T. Oden, Karl Knuchel, P.C., Livingston, Montana


For Appellee:

Todd A. Stubbs, Stubbs Law, P.C., Manhattan, Montana

Submitted on Briefs: November 6, 2019

Decided: May 5, 2020

Filed:

  
Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Appellants Craig and Karen Ames (Ames) appeal a judgment entered in the Sixth Judicial District Court, Park County, following a jury verdict and award of punitive damages in favor of Appellee Gary Lutman (Lutman). Ames also appeals the denial of their Motion for Summary Judgment, maintaining that the statute of frauds bars Lutman's claims. We affirm.

¶3 Ames purchased real property in Livingston, Montana, with the intent of constructing a house. Lutman is a builder and orally agreed to build Ames's house and put \$30,000 toward its construction. In return, Lutman would share equally in the net proceeds from the sale of the house; or, if Ames decided to reside in the house following its construction, Lutman would receive fifty percent of the equity held in the house at the time of completion.

¶4 Ames decided to reside in the house upon its completion but refused to pay Lutman the fifty percent equity he was owed. Lutman filed a complaint against Ames, including claims for breach of contract, anticipatory breach, breach of the implied covenant of good faith and fair dealing, unjust enrichment, promissory estoppel, actual fraud, constructive fraud, deceit, tortious interference with prospective economic

advantage, and negligent misrepresentation. Lutman alleged he provided countless hours in construction of the house and made a cash payment to Ames totaling \$30,000.

¶5 Ames moved for summary judgment contending Lutman's claims were barred by the statute of frauds. The District Court denied summary judgment after concluding the parties had partially performed the agreement. The District Court also concluded there were disputed facts regarding both the amount of hours Lutman worked and his payment of \$30,000. The house sold for \$220,000 during the pendency of these proceedings.

¶6 A jury trial was held on December 18 and 19, 2018. The jury returned a verdict in Lutman's favor on nine of the ten claims and found Lutman should be awarded punitive damages. After the verdict was read, a separate proceeding commenced regarding punitive damages. Prior to beginning the punitive damages phase of the trial, the District Court and parties' counsel discussed and agreed to the procedure for the jury to determine punitive damages.

¶7 Ames first argues the District Court erred by not following § 27-1-221, MCA, respecting the jury's award of punitive damages. A district court's interpretation and application of a statute is a question of law reviewed de novo for correctness. *Cote v. Smith-Cote*, 2019 MT 10, ¶ 13, 394 Mont. 68, 433 P.3d 221. Specifically, Ames argues the District Court erred by not holding a separate hearing to determine their financial condition and net worth. Ames also asserts the District Court failed to issue findings of fact and conclusions of law stating the reasons for not increasing or decreasing the jury's award. Lutman asserts Ames waived the procedural requirements

for an award of punitive damages by agreeing to the procedure undertaken by the District Court.

¶8 The record shows the District Court held a separate proceeding to determine punitive damages. After the jury returned its verdict for an award of punitive damages, the District Court gave the jury an instruction consistent with the Montana Pattern Jury Instruction on punitive damages. The jury then awarded Lutman \$25,000 in punitive damages. Prior to the jury's determination, the District Court inquired of the parties: "[A]re counsel wanting to put on any testimony, at all, or just give the jurors the instruction and send them back in?" Counsel for Ames replied: "I think that's all we can do, right now. We aren't prepared to put on financial information." This Court will not hold a district court in error for an action in which the appealing party acquiesced or actively participated. Acquiescence takes away the right to object to the alleged error. *City of Kalispell v. Salsgiver*, 2019 MT 126, ¶ 42, 396 Mont. 57, 443 P.3d 504. We conclude Ames acquiesced to the procedure conducted by the District Court in handling the punitive damages phase of the trial.

¶9 Next, Ames asserts the District Court erred in denying their motion for summary judgment based on the statute of frauds. A district court's grant or denial of a motion for summary judgment is reviewed de novo, using the same criteria of M. R. Civ. P. 56 as the district court. *Pilgeram v. Greenpoint Mortg. Funding, Inc.*, 2013 MT 354, ¶ 9, 373 Mont. 1, 313 P.3d 839. Summary judgment should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show there is no genuine issue of material fact and the movant is entitled to judgment as a

matter of law. *Feller v. First Interstate Bancsystem, Inc.*, 2013 MT 90, ¶ 16, 369 Mont. 444, 299 P.3d 338 (quoting M. R. Civ. P. 56(c)(3)). In denying summary judgment, the District Court determined that all of the arguments “hinge[d]” on two points: (1) the \$30,000 payment from Lutman; and (2) partial performance. The District Court held that “[w]hile all parties agree there is no written contract, there is a genuine issue of material fact regarding whether Lutman gave Ames \$30,000, and for what.” Based on the record, this Court agrees there was a dispute of fact regarding the \$30,000 payment, and the District Court correctly concluded that the oral agreement had been partially performed.

¶10 Next, Ames asserts the District Court erred by denying their motion for mistrial. Ames argues Lutman’s counsel improperly commented on a separate lawsuit between Ames and another homebuilder during opening statements. We review a district court’s grant or denial of a motion for mistrial for an abuse of discretion. *State v. White*, 2008 MT 129, ¶ 8, 343 Mont. 66, 184 P.3d 1008.

¶11 After reviewing the record, we conclude that remarks made by Lutman’s counsel had little, if any, effect on the jury’s decision. In his opening, Lutman’s counsel briefly commented on an ongoing breach of contract lawsuit between Ames and another homebuilder. Following Ames’s motion for mistrial, the District Court held an in-chambers conference on the record and observed: “what’s happened, thus far, is [Lutman’s counsel] raising this reference in his argument. There is no testimony or evidence in the record.” The District Court denied the motion for mistrial and ordered that there be no further argument concerning the other ongoing lawsuit involving Ames.

The District Court offered to allow Ames's counsel to address the comments in his opening statement. Based on this record, we conclude the District Court did not abuse its discretion in denying Ames's motion for mistrial.

¶12 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶13 Affirmed.

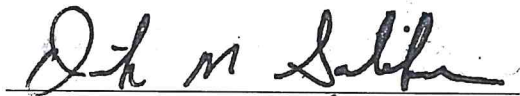


Justice

We concur:



Chief Justice



Justices