

**IN THE COURT OF APPEALS OF IOWA**

No. 0-096 / 09-1160  
Filed April 8, 2010

**SAMANN L.C. and BASSMAN  
REAL ESTATE,**  
Plaintiffs-Appellees/Cross-Appellants,

**vs.**

**VICTORY LODGING, INC.,**  
Defendant-Appellant/Cross-Appellee.

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Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Appeal and cross-appeal from the district court rulings in a breach-of-contract suit. **REVERSED ON APPEAL; AFFIRMED ON CROSS-APPEAL.**

William B. Serangeli and Joseph M. Borg of Smith, Schneider, Stiles & Serangeli, P.C., Des Moines, for appellant.

Michael J. Carroll of Babich, Goldman, Cashatt & Renzo, P.C., Des Moines, for appellees.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

**SACKETT, C.J.**

Steven Bassman,<sup>1</sup> acting for Bassman Real Estate, generated an accepted offer made by Samann L.C.<sup>2</sup> on property owned by Victory Lodging, Inc. (“Victory”). After the sale failed to close, Bassman Real Estate successfully sued Victory for a broker’s commission. Samann unsuccessfully sued Victory for breach of contract. Victory appeals, contending the district court erred in ordering the payment of a commission where there was no written listing agreement meeting the rule of the Iowa Real Estate Commission. Samann cross-appeals, contending the district court erred in failing to find for it on its breach-of-contract claim. Victory and Samann both address the issue of an award of attorney fees to Samann. Victory claims the court erred in ordering the payment of attorney fees where Samann failed to prevail on its breach-of-contract claim, and Samann contends the district court erred in failing to award it attorney fees.<sup>3</sup> We reverse on appeal and affirm on cross-appeal.

**SCOPE OF REVIEW.** This is a law action tried to the court, and the parties agree, as do we, that we review for errors at law. *Schaer v. Webster County*, 644 N.W.2d 327, 332 (Iowa 2002).

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<sup>1</sup> Bassman Real Estate is owned by Steven Bassman, a licensed commercial real estate broker.

<sup>2</sup> Samann L.C. is a limited liability company owned by Steven Russell Smith, a licensed real estate broker and investor.

<sup>3</sup> Initially the district court awarded Samann attorney fees, despite finding it had prevailed on its breach-of-contract claim. However, in a subsequent order addressing attorney fees the district court reversed its ruling. Victory, in raising its challenge, acknowledges this argument is probably moot but raises it out of an abundance of caution to preserve it and to insure Samann is not awarded costs and attorney fees.

**BACKGROUND AND PROCEEDINGS.** Victory, an Alabama corporation, owned a Ramada Inn Hotel in Clive, Iowa. Manish Patel was the controlling stockholder. The property was not listed for sale. Steve Bassman, a real estate broker and the owner of Bassman Real Estate, presented Patel with two separate offers to buy the real estate. Bassman Real Estate did not have a written listing agreement, though apparently on at least one occasion Steve Bassman left one with Patel, but it was never signed. The first offer to buy was made by Steve Bassman alone and rejected by Patel. A second offer for \$3,100,000 was made by Samann, presented to Patel by Steven Bassman on April 11, 2006, and accepted by Victory on April 13, 2006. The offer noted, among other things, that Steve and Jill Bassman, licensed real estate professionals in Iowa, would be part of the purchase and ownership of the hotel. Problems with the closing arose, and Victory sent a letter on August 15, 2006, terminating the real estate contract.

On September 18, 2007, Samann and Bassman Real Estate filed suit contending Victory breached the April 2006 contract to sell the Ramada. Samann sought out-of-pocket expenses and attorney fees and costs. Victory answered, admitting its signature on the contract but alleging the contract was so ambiguous that there was no meeting of the mind such as to form an enforceable contract. Victory also affirmatively alleged there was no contract or statute that entitled Samann to attorney fees.

In the same suit Bassman Real Estate further alleged that the contract that was the subject of the action provided at paragraph 14 "that if the seller fails

to fulfill the agreement, the listing broker may maintain an action at law against seller for collection of the listing broker's commission." It sought a commission of \$100,000 as well as attorney fees and the costs of the action. Victory also affirmatively alleged that any claim Bassman Real Estate had for brokerage fees was unenforceable as a matter of law.

The case was tried to the court beginning on April 28, 2009. At the conclusion of the trial the court agreed to leave the record open to allow Samann and Bassman Real Estate to supplement the records with documentation supporting their claimed damages. No additional documentation was filed and on May 28, 2009, the court closed the record. The court filed its ruling on June 31, 2009. It found that Samann had a valid purchase agreement with Victory for the sale of the Ramada that Victory breached. The court went on to find that Samann had failed to prove its claimed damages, consequently it was only entitled to costs of the action including attorney fees. A hearing on Samann's claim for attorney fees was then scheduled for July 13, 2009.

The court found that Bassman Real Estate was bound by the rules and regulations of the Iowa Real Estate Commission and Steve Bassman acknowledged that his agency did not have a written commission agreement with Victory, yet in the absence of an agreement sought a commission. The court found that the purchase agreement at issue provided "at time of closing, Seller agrees to pay to Bassman Real Estate a commission of \$100,000." The court then disagreed with Victory's contention that a written commission agreement was required for Bassman Real Estate to recover a broker's commission, noting

that the rule is to prevent disputes where the agreement for a commission is based upon an oral agreement only. The court found that Patel's testimony was that he understood Bassman Real Estate would get a commission at closing and the fact was memorialized in a writing attached to the purchase agreement. Thus, the court concluded, Bassman Real Estate's claim was not based only on an oral agreement and Bassman Real Estate was entitled to the \$100,000 commission.

On September 29, 2009, the court filed a ruling wherein it noted that plaintiff<sup>4</sup> filed its motion for attorney fees on July 29, 2009, and defendant Victory filed its resistance on September 18 of the same year, not questioning the amount of attorney fees requested (\$13,721.53) but questioning whether attorney fees were justified. In addressing the motion the district court noted that Victory argued that Samann did not prevail in the breach-of-contract claim because no damages were awarded; therefore, it should not be entitled to attorney fees. The court noted that Samann argued because it prevailed on the breach-of-contract claim, even though no damages were awarded, and its claim is so intertwined with Bassman Real Estate's claim and Bassman prevailed on its claim that Samann is entitled to attorney fees. The court went on to say that plaintiff Samann would be entitled to attorney fees under the written contract if it were the prevailing party but noted that the purchase agreement provided that "*if buyers prevail* then sellers agree to pay costs and reasonable attorney fees"; therefore, to be awarded fees, plaintiffs would have to prevail, but they did not because

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<sup>4</sup> It appears here that the court was referring to Samann.

they failed to establish damages. (Emphasis added.) The court also did not believe that Bassman's commission was so intertwined with the purchase agreement that Samann, a buyer, is entitled to recover attorney fees because the broker, Bassman, was entitled to a real estate commission under the terms of the attachment to the real estate purchase agreement. The court then found Samann was not entitled to attorney fees. Samann, Bassman Real Estate, and Victory all appealed. The supreme court granted a motion made to consolidate the appeals.

**REAL ESTATE COMMISSION.** Victory contends that Bassman is not entitled to the \$100,000 commission in that it failed to obtain a listing or written brokerage agreement. Bassman Real Estate contends that while it did not have a written listing or brokerage agreement this is not fatal to its claim for a commission. It argues Patel's admission at trial that he knew Bassman Real Estate was entitled to a commission of \$100,000 on the sale of the Ramada should not bar enforcement of the oral agreement and that the language in the attachment of the purchase agreement is further evidence to support its position. It further argues the district court, having determined that Victory's breach was the reason the sale was not completed, should have determined Bassman Real Estate was entitled to its commission.

The offer to purchase in paragraph 14 concerning remedies of the parties provides: "If Sellers fail to fulfill this Agreement, . . . Listing broker may maintain an action at law against Sellers for the collection of listing broker's commission."

The attachment to the offer to purchase provided: "At the time of closing, Seller agrees to pay Bassman Real Estate a commission of \$100,000." The testimony of Patel that Bassman Real Estate relies on is as follows:

Q. You are not saying, are you, that you did not know that Steven Bassman was a real estate broker? A. No, he said he was a real estate broker.

Q. And you knew he was the broker in this sale, correct? A. I as far as I knew that he is the broker.

Q. As far as you knew, he was the broker? A. He is the only Broker.

Q. And you knew that he was going to be paid a commission at the closing of this deal? A. Yes.

Bassman never obtained a signed listing or brokerage agreement. He testified he left some with Patel to sign but they were never signed. The language that Bassman relies on to support Victory's agreement to pay a commission provides for the payment of the commission at the time of closing, an event that never happened.

The purchase agreement in this case does not substantially comply with the requirements of a valid listing or brokerage agreement. The purchase agreement only recites that, "[a]t the time of closing, Seller agrees to pay to Bassman Real Estate a commission of \$100,000." The agreement fails to identify "all of the terms and conditions" or a "definite expiration date" required of listing agreements. Iowa Admin. Code r. 193E-11.1. The purchase agreement also fails to include the contents required of a brokerage agreement as provided in Iowa Code sections 543B.56A and 543B.57 (2005) and Iowa Administrative Code rule 193E-11.3. Furthermore, the purchase agreement, if it were intended to serve as, or construed to be, a listing agreement or brokerage agreement, is so deficient in terms that the conditions or performance necessary to entitle

Bassman to the commission cannot be ascertained. See *Business Consulting Servs., Inc. v. Wicks*, 703 N.W.2d 427, 430 (Iowa 2005) (noting that parties to a listing agreement may frame their agreement to make a broker's right to compensation depend on a designated event or fulfillment of a particular set of circumstances rather than the procurement of a purchaser). As succinctly stated by another court, "[i]n determining whether a commission is due to a broker, the court must look to the terms and conditions of the listing agreement." *Trimble v. Wescom*, 673 N.W.2d 864, 867 (Neb. 2004). Here, there are insufficient terms to support the judgment award. We reverse the district court's award of the real estate commission.

**FAILURE TO AWARD SAMANN DAMAGES.** We review of errors of law. *Jones v. Lake Park Care Ctr, Inc.*, 569 N.W.2d 396, 372 (Iowa 1997).

At trial Jill Mollison, the daughter of Steve Bassman, testified as to amounts paid apparently by Samann, which Samann represented damages it suffered because Victory failed to perform under the purchase agreement. She said \$31,000 was paid to NorthMarq for origination fee and appraisal; \$2,343.50 to Peldz Engineering for an engineering report; \$20,500 to Carlisle Credit for mortgage broker; \$10,000 to Kelly's Inn, a property management company; \$409.50 to Dickinson Law Firm to recover costs; and \$7,140.00 to Brown Winick Law Firm for title work.

In rejecting these claimed damages the district court said:

Mollison testified to the aforementioned expenses incurred by the plaintiff as a result of the Purchase Agreement. However even though requested during Mollison's deposition and the court leaving the record open to provide supporting documentation no

such documentation was provided. There was no proof of payment of the expenses by canceled checks. There was no proof showing the Plaintiff was even billed for these expenses. Furthermore as pointed out by Defendant Mr. Kesterson who was allegedly owed \$20,500.00 was called to testify at trial and no testimony regarding Plaintiffs' obligation to him was elicited. Nor does the court find credible that Kelly's, Inc., a motel management company, is entitled to \$10,000 for services never rendered.

For the reasons stated above the court finds that the Plaintiff has failed to establish damages for expenses claimed.

Samann challenges these findings correctly arguing that the failure to provide written evidence of its alleged damages is not fatal to its claim. See *Natkin & Co. v. R.F. Ball Const. Co.*, 255 Iowa 1156, 1169, 123 N.W.2d 415, 423 (1963).

Under Iowa law, 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. *Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.*, 579 N.W.2d 823, 831 (Iowa 1998). This type of damages is sometimes referred to as the injured party's "expectation interest" or "benefit-of-the-bargain" damages. *Id.* Under this theory of damages, the nonbreaching party's recovery "is limited to the loss he has actually suffered by reason of the breach; he is not entitled to be placed in a better position than he would have been in if the contract had not been broken." *Id.* In determining the amount of damages, we must also be mindful that "the measure of damages recoverable for a breach of contract in each case must have relation to the nature and purpose of the contract itself, as viewed in connection with the character and extent of the injury." *Id.* In addition, courts must also consider the foreseeability of damages. *Kuehl v. Freeman Bros. Agency, Inc.*, 521 N.W.2d 714, 718 (Iowa 1994).

While the trier of fact “is not warranted in arbitrarily or capriciously rejecting the testimony of a witness, neither is it required to accept and give effect to testimony it finds to be unreliable, although it may be uncontradicted.”

*Kaiser v. Stathas*, 263 N.W.2d 522, 526 (Iowa 1978).

Testimony may be unimpeached by any direct evidence to the contrary and yet be so contrary to natural laws, inherently improbable or unreasonable, opposed to common knowledge, inconsistent with other circumstances established in evidence, or so contradictory within itself, as to be subject to rejection by the court as trier of the facts.

*Id.*

While Mollison’s testimony was evidence of damages, whether it was credible evidence is best left to the trial judge who was in the best position to judge the credibility and make the judgment call as to whether the damages were sustained by the evidence, and if they were, what the damages were worth. See *Lantz v. Cook*, 256 Iowa 409, 413, 127 N.W.2d 675, 677 (1964).

Given the lack of supporting evidence coupled with Mollison’s failure to supply supporting documents after depositions or in the lengthy period between the taking of other evidence and the closing of the record, we think the trial court was fair in rejecting the claimed damages. See *Matthess v. State Farm Mut. Auto. Ins. Co.*, 521 N.W.2d 699, 704 (Iowa 1994).

While the documentation was not necessary for a finding of damages the failure to support any documentation raises a suspicion as to the validity of the damage claim.

We also reject the argument that because the court found the contract breached, Samann should have nominal damages. We recognize that in certain

cases nominal damages may be properly recoverable for breach of contract. *Graves v. Iowa Lakes Community College*, 639 N.W.2d 228 (Iowa 2002), *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co.*, 510 N.W.2d 153, 156 (Iowa 1993). The district court did not error in not awarding nominal damages here. We affirm the district court's determination Samann did not prevail in its breach-of-contract claim.

Having concluded Samann did not prevail, we need not and do not address Samann's claims it was entitled to attorney fees. We affirm on this issue also.

**REVERSED ON APPEAL; AFFIRMED ON CROSS APPEAL.**