

IN THE COURT OF APPEALS OF IOWA

No. 0-121 / 09-0925
Filed May 26, 2010

HUBBELL HOMES, L.C.,
Plaintiff-Appellant/Cross-Appellee,

vs.

BILLY MICHAEL KEY and
DONNA ELIZABETH POWERS KEY, as Individuals,
Defendants-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Warren County, Darrell Goodhue,
Judge.

Hubbell Homes appeals from the district court's judgment for money damages in a suit for breach of a written real estate contract. Billy Michael Key and Donna Elizabeth Powers Key cross-appeal. **AFFIRMED AS MODIFIED AND REMANDED.**

John F. Lorentzen, Des Moines, and Anna W. Mundy of Nyemaster,
Goode, West, Hansell & O'Brien, P.C., Des Moines, for appellants.

Rodney Powell of The Powell Law Firm, P.C., Norwalk, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

POTTERFIELD, J.**I. Background Facts and Proceedings**

Hubbell Homes (Hubbell) is in the business of building and selling single-family houses and townhomes. In 2006, Hubbell began negotiating with Billy Michael Key (Mike) and Donna Elizabeth Powers Key for the sale of a new home in Norwalk, where Mike's employer had reassigned him. Mike's employer offered to pay a monthly rental housing allowance for one year as a reassignment benefit. Accordingly, the parties negotiated a Purchase Agreement for \$376,900 with a delayed closing date of October 2, 2007, to allow the Keys to take advantage of this benefit. The parties also signed a Dwelling Unit Rental Agreement (Rental Agreement), for rental of the home by the Keys from October 2, 2006, through September 30, 2007. The Rental Agreement provided that the Keys would have the option to purchase the home for \$376,900. The Rental Agreement also contained a "put" option that reserved for Hubbell the right to require the Keys to close on the purchase of the home for \$376,900 at the end of the term of the lease.

In July 2007, Mike's position was eliminated, and he became unemployed. On August 6, 2007, Hubbell notified the Keys of its intent to exercise its option to force the sale of the property to them. Under the terms of the Rental Agreement, this required the Keys to close on the property at the end of the lease term on September 30, 2007. However, on September 28, 2007, the parties negotiated a First Modification of Dwelling Unit Rental Agreement (Amended Rental Agreement). The modification extended the term of the Rental Agreement for a three-month period ending December 31, 2007. The Keys offered to go forward

with their purchase of the house at the original purchase price if Hubbell agreed to sell on contract or with Hubbell's financing. Hubbell rejected the offer, the sale did not take place, and the Keys moved out in early January 2008. Hubbell listed the house for sale at the contract price of \$376,900.

About six months later, in the summer of 2008, Hubbell accepted an offer to buy the house for \$350,000. However, the offer was contingent on the sale of the prospective buyer's current residence, a contingency which did not occur. The sale was never completed, and the house remained on the market at the time of trial at a reduced listing price.

Hubbell filed a petition against the Keys on March 26, 2008, seeking compensatory damages, consequential damages, and attorney fees. At the trial to the court, Hubbell first sought general damages of \$36,137.50 in lost profits, calculated as the difference between the contract price and the costs Hubbell had incurred to build the house. Hubbell chose to request this calculation of general damages rather than the difference between the contract price and market value, although the house had not sold at the time of trial.

Second, Hubbell sought consequential or incidental damages for repairs made to the house after the Keys moved out to restore the home to marketable condition including cleaning, repainting, millwork, and landscaping. These charges amounted to \$3334.41. Next, Hubbell sought reimbursement for utilities totaling \$2259.21, loan interest totaling \$20,676.04, and internal legal fees totaling \$354.17 paid from the time of the breach until trial. Hubbell also sought reimbursement for additional commission it would have to pay an outside realtor to sell the home, asserting that Hubbell's inside marketing agents only sell new

homes. Hubbell estimated the commission to be \$20,444.75, which was six percent of the listing price at the time of trial. Finally, Hubbell sought attorney fees for outside counsel and costs. Following trial, attorney fees were \$23,426.

The Keys asserted defenses of frustration of purpose and unconscionability. They also contended they had an independent action for misrepresentation.¹

The district court concluded there was no factual basis upon which the Keys could be granted relief on their defenses of frustration of purpose or unconscionability. Regarding Hubbell's claim for general damages, the district court determined the fair market value of the house at the time of the breach was \$350,000, relying on Hubbell's acceptance of the contingent offer as an indication of fair market value. The district court therefore awarded Hubbell damages in the amount of \$26,900, the difference between the \$350,000 value and the contract price. The court also awarded Hubbell consequential damages for internal legal fees and all repairs made to restore the house to marketable condition. The district court declined to award Hubbell consequential damages for landscaping fees, finding the record did not support a finding that landscaping was required because of the breach, or for utilities or interest, finding the property could have been sold immediately if offered at the \$350,000 value, in which case Hubbell would not have incurred utility or interest charges. The district court also declined to award Hubbell the expense of the realtor commission. In a later

¹ This claim appears to be based on problems relating to an open ditch and pooling water in the backyard of the house. It is not at issue on appeal.

ruling, the district court awarded Hubbell \$12,960 in attorney fees, fifty-five percent of the fees it requested.

Hubbell appeals, arguing the district court erred in calculating general damages. Hubbell asserts the district court should have awarded lost profits instead of the difference between fair market value and contract price. Hubbell also argues the district court erred in declining to award all of its requested consequential damages and in failing to make sufficiently detailed findings of fact for its reduction of Hubbell's attorney fee award.

The Keys cross-appeal, arguing the district court erred in failing to grant relief on their defense of frustration of purpose. The Keys also argue that the district court erred in determining a fair market value of the house when Hubbell failed to meet its burden of proof on that issue or, in the alternative, that the fair market value of the house was \$376,900, the contract price at which the Keys offered to buy the house on contract following the expiration of the lease. Finally, the Keys argue the district court erred by awarding Hubbell fifty-five percent of its requested attorney fees when it awarded only twenty-four percent of the damages initially sought.

II. Standard of Review

Because this was an action at law, our review is for correction of errors at law. Iowa R. App. P. 6.907. The district court's findings of fact have the effect of a special jury verdict and are binding if supported by substantial evidence. Iowa R. App. P. 6.904(3)(a).

III. Frustration of Purpose

The Keys have the burden of persuasion to prove their defense of frustration of purpose. See *Mel Frank Tool & Supply, Inc. v. Di-Chem Co.*, 580 N.W.2d 802, 808 (Iowa 1998). The doctrine of frustration of purpose is a defense to a contract because of an event that occurs after the contract is made. *Id.*

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

Water Dev. Co. v. Lankford, 506 N.W.2d 763, 766 (Iowa 1993) (quoting Restatement (Second) of Contracts § 265 (1981)).

We agree with the district court's conclusion that the Keys have not met their burden of persuasion on their claim of frustration of purpose. The Keys negotiated an extension of the rental agreement, continued to reside in the home, and offered to buy the house on contract after Mike lost his job, the event which they now contend frustrated the purpose of their contract with Hubbell. Though Mike's reassignment may have been the Keys' motive for purchasing the home, it was not a principal purpose of their contract for the purchase of the home.

IV. General Damages for Breach of Contract

A. Lost Profits

Hubbell recognizes that Iowa case law establishes, "In real estate contract actions, general damages are measured by the difference between the contract price and the fair market value of the real estate on the date of the breach."

Macal v. Stinson, 468 N.W.2d 34, 35 (Iowa 1991). However, Hubbell contends this measure of damages is inadequate because it would not put Hubbell in the position it would have occupied had the contract been performed. “The ‘ultimate purpose’ behind the allowance of damages is to place the injured party in the position he or she would have occupied if the contract had been performed.” *Id.* at 36.

Hubbell asserts that lost profits is the correct measure of damages when it is evident that market value does not fully compensate the non-breaching party.

The general rule on lost profits is as follows:

[P]rofits which would have been realized had the contract been performed are recoverable if their loss was within the contemplation of the defaulting party at the time the contract was made, and the profits can be proved with reasonable certainty.

Employee Benefits Plus, Inc. v. Des Moines Gen. Hosp., 535 N.W.2d 149, 156 (Iowa Ct. App. 1995).

If it is speculative and uncertain whether damages have been sustained, recovery is denied. If uncertainty lies only in the amount of damages, recovery may be had if there is a reasonable basis in the evidence from which the amount can be inferred or approximated.

Larsen v. United Fed. Sav. & Loan Ass’n, 300 N.W.2d 281, 288 (Iowa 1981) (citations omitted).

Hubbell presented evidence that the actual cost to build the home as of January 1, 2008, was \$340,762.50. Pursuant to the Purchase Agreement, the Keys were to purchase the house at a price of \$376,900. The difference represents the profits Hubbell would have realized if the Keys had performed under the contract. However, the profits actually must be lost to qualify as

damages, and any amount lost depends on the price at which the house eventually sells.

Hubbell argues on appeal that it should be awarded the full difference between the contract price and the cost to build without reference to the price at which the home may eventually sell. Since it filed its petition and proceeded to trial before the house was sold, Hubbell was not able to prove the amount of its lost profits beyond its conjecture that it would have lost every possible profit dollar. Hubbell did not prove that a future sale of the home would result in a loss of all of the profits it anticipated to receive from the sale of the home to the Keys. We must deny recovery of lost profits because it is speculative and uncertain whether and in what amount these damages will be sustained.

Further, the district court did not address the issue of lost profits. Rather, without discussing Hubbell's claim for lost profits, the district court found that the proper measure of damages was the difference between the home's fair market value and the contract price. Because the district court did not decide this issue, we need not rule on it on appeal. See *State v. Moorehead*, 699 N.W.2d 667, 675 (Iowa 2005).

For these reasons, we conclude that the proper measure of general damages in this case is the difference between the fair market value of the home and the contract price. See *Gordon v. Pfab*, 246 N.W.2d 283, 288 (Iowa 1976) (holding the measure of general damages for breach of a land contract is the difference between market value at the date of breach and the contract price).

B. Difference Between Contract Price and Fair Market Value at Time of Breach

Hubbell contends there was no market value for this home following the Keys' inability to purchase it.² Despite Hubbell's contentions to the contrary, we determine the record reflects there was a market (although a depressed one) for homes during this period.

The Keys contend the district court erred by determining a fair market value for the home when Hubbell failed to meet its burden of proving fair market value. We acknowledge the district court's findings that "neither party gave evidence of the fair market value of the residence at the time of the breach." However, we find that the record contains substantial evidence to support the district court's determination of fair market value.

In the summer of 2008, Hubbell accepted a \$350,000 contingent offer on the home. Though this sale was never completed because the contingency never occurred, the offer and acceptance to sell the home at this price is evidence of the market value of the home. Iowa courts "take a broad view in determining the sufficiency of evidence of damages." *Westway Trading Corp. v. River Terminal Corp.*, 314 N.W.2d 398, 403 (Iowa 1982). We agree with the district court that Hubbell's sale of the home in the summer of 2008 "can be considered as an indication of fair market value." This proposition is supported by numerous cases from other jurisdictions. See, e.g., *Kemp v. Gannett*, 365 N.E.2d 1112 (Ill. App. Ct. 1977) (resale price nearly a year later); *Gilmartin Bros.*,

² We find the case Hubbell cites in support of its position, *Gildner Bros. v. Ford Hopkins Co.*, 235 Iowa 191, 16 N.W.2d 229 (1944), is distinguishable, as it involved materials for which there was no market price.

Inc. v. Kern, 916 S.W.2d 324 (Mo. Ct. App. 1995) (resale price six months after breach); *Roesch v. Bray*, 545 N.E.2d 1301 (Ohio Ct. App. 1988) (resale price a year later). We therefore find the district court did not err in determining a fair market value for the house.

V. Consequential Damages for Breach of Contract

Hubbell argues the district court should have awarded consequential damages for additional real estate commission, interest costs, utility costs, and a landscaping bill.³

In addition to general damages, the non-breaching party may also seek consequential damages. *Macal*, 468 N.W.2d at 35-36. Consequential damages are recoverable if they are either the natural, direct result of the breach or foreseeable. *Id.* at 36. In determining whether the damages are foreseeable, we must examine the language of the contract, including the nature and purpose of the contract and the circumstances attending its execution. *Kuehl v. Freeman Bros. Agency, Inc.*, 521 N.W.2d 714, 718 (Iowa 1994).

A. Landscaping

We agree with the district court that Hubbell is not entitled to payment of the landscaping bill. Hubbell employees testified that the Keys returned the house in the condition in which they received it except for ordinary wear and tear. There is no evidence that the landscaping bill was connected to the Keys' breach of contract.

³ Hubbell characterized its claim for lost profits as general compensatory damages.

B. Realtor's Commission

We also agree with the district court that Hubbell cannot recover the commission it must pay an outside realtor to sell the home. We determine that this cost was not foreseeable to the Keys. When signing the purchase agreement, the Keys could not have known that if they breached the agreement, Hubbell would choose to use an outside realtor who charges more commission than their internal sales staff with whom the Keys negotiated their purchase of the home. This is not a natural, direct result of the breach.

C. Interest and Utilities

The Purchase Agreement states that if the buyers are in default of the agreement, they agree to pay costs, reasonable attorney fees, and other expenses incurred by the seller. We find this language contemplates interest and utilities paid by Hubbell. Our supreme court has ruled that "actual interest paid," as opposed to statutory interest under Iowa Code section 535.2(1)(a) (2007) for money due on express contracts, may in exceptional cases be recovered as consequential damages under two theories if they: (1) arise naturally from the breach or (2) are foreseeable by the parties. *Macal*, 468 N.W.2d at 36. Hubbell requests consequential damages for the interest it actually paid on its debt on the home at 5.25%.

It was reasonably foreseeable to the Keys when they breached the purchase agreement that Hubbell would incur carrying costs associated with the home that it would not have incurred absent the breach.

Accordingly, we find the Keys are responsible for the interest and utility expenses paid by Hubbell from January 1, 2008, through March 31, 2008, when

Hubbell ceased paying interest on the house. These expenses were a direct result of the breach and were foreseeable by the parties. Therefore, Hubbell is entitled to interest and utility expenses for the first three months following the breach.

D. Rental Deposit and Renegotiation Fee

Hubbell also argues the district court erred in crediting the Keys with the rental deposit and the fee they paid for renegotiation of the Rental Agreement. The Purchase Agreement provides, "If the BUYER(S) fails to fulfill this agreement . . . all payments made hereunder shall be the property of the SELLER" The parties contracted that the Keys would forfeit payments made under the purchase agreement. However, we find the district court properly credited the Keys with the rental deposit and the renegotiation fee. We agree with the district court that Hubbell cannot simultaneously seek actual damages plus forfeiture of monies it previously had received. These payments properly were credited to the Keys. Hubbell agrees that the district court correctly credited the Keys with an extra month's rent that they paid.

VI. Attorney Fees

Both parties dispute the award of attorney fees. We review the court's award of attorney fees for an abuse of discretion. "Reversal is warranted only when the court rests its discretionary ruling on grounds that are clearly unreasonable or untenable." *Boyle v. Alum-Line, Inc.*, 773 N.W.2d 829, 832 (Iowa 2009).

Factors normally considered in determining reasonable attorney fees include:

[T]he time necessarily spent, the nature and extent of the service, the amount involved, the difficulty of handling and importance of the issues, the responsibility assumed and results obtained, the standing and experience of the attorney in the profession, and the customary charges for similar service.

Id. at 832-33. “There is no precise rule or formula for making these determinations. However, ‘[d]etailed findings of fact with regard to the factors considered must accompany the attorney fee award.’” *Id.* at 833 (quoting *Dutcher v. Randall Foods*, 546 N.W.2d 889, 897 (Iowa 1996)).

We find that the district court’s ruling regarding Hubbell’s request for fees is sufficient to afford us effective appellate review. The district court specifically addressed several of the factors to be considered in determining reasonable attorney fees. The court found the issues to be “simple and straightforward,” considered that Hubbell was “totally successful” in refuting the affirmative defense and counterclaim, but found that the total number of hours expended on a two-day trial resulting in a less than \$23,000 verdict “indicates some slippage somewhere.” We find that the district court properly considered the relevant factors and made sufficiently detailed findings of fact for our review.

We further find that the district court did not abuse its discretion in determining the amount of the award for attorney fees. “A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.” *Hensley v. Eckerhart*, 461 U.S. 424, 439, 103 S. Ct. 1933, 1943, 76 L. Ed. 2d 40, 54 (1983). The district court properly considered the relationship between the extent of Hubbell’s success in the litigation and the attorney fee award.

VII. Conclusion

We affirm the district court's judgment and award in its entirety except that we find the Keys are responsible for the interest and utility expenses paid by Hubbell from January 1, 2008, through March 31, 2008. We remand for the district court to calculate these expenses and amend its judgment in a manner consistent with this opinion.

AFFIRMED AS MODIFIED AND REMANDED.