IN THE COURT OF APPEALS OF IOWA

No. 0-389 / 09-1340
Filed July 14, 2010

ERIC R. JOHNSON,
Plaintiff-Appellee,

vs.

NORMA BAUM, DAVID BAUM and BARBARA RAMSEYER,
Defendants-Appellants.

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

Defendants appeal the district court order awarding plaintiff attorney fees in an action alleging failure to disclose defects on a seller's disclosure statement. **AFFIRMED**.

John B. Grier of Grier Law Firm, Marshalltown, for appellants.

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

Considered by Vaitheswaran, P.J., and Doyle and Tabor, JJ.

TABOR, J.

This appeal stems from a real estate disclosure action. The sellers of a home challenge the district court's award of $20,000 in attorney fees to the buyer who won a $12,000 jury verdict on his claim of damages for failure to disclose a defect in the property as required by Iowa Code chapter 558A (2007). Because the jury did not rule in favor of the buyer on his breach of contract claim, the sellers allege the buyer was not entitled to attorney fees, which were provided for only by the purchase agreement. We find no legal error in the district court's allowance of attorney fees.

I. Background Facts & Proceedings

Eric Johnson purchased a residence at 2512 33rd Street, Des Moines, from Norma Baum, David Baum, and Barbara Ramseyer (sellers). Johnson and the sellers signed a purchase agreement on June 3, 2006, which provided, "Sellers and Buyers acknowledge that Sellers of real property have a legal duty to disclose Material Defects of which Sellers have actual knowledge and which a reasonable inspection by Buyers would not reveal." The purchase agreement also provided the seller would pay "reasonable attorney fees" if the seller failed to fulfill the agreement and the buyer prevailed in an action at law or in equity.

At the time of the sale the sellers submitted a "Seller Disclosure of Property Condition and Lead-Based Paint Disclosure." The terms of the disclosure show it was intended to satisfy the requirements of Iowa Code chapter 558A which mandates the disclosure of important characteristics of property to be sold, including significant defects.

Johnson experienced problems with water in the basement of the home. On January 25, 2008, he sued the sellers alleging three theories: (1) failure to exercise ordinary care in obtaining information to be disclosed in the property condition statement required by chapter 558A; (2) breach of the provision in the written purchase agreement to "disclose material defects"; and (3) fraudulent statements by defendants about whether the basement of the home had previous water problems. Johnson voluntarily dismissed the third count prior to the submission of the case to the jury.

The jury did not find in favor of Johnson on the claim of breach of contract, which according to the jury instructions required the buyer to prove the sellers "failed to disclose material defects of which they had actual knowledge and which a reasonable inspection by the [buyer] would not have revealed." The jury awarded Johnson damages on the second claim, finding the sellers, "had actual knowledge of the defect or failed to exercise ordinary care in obtaining information to disclose its defect in the home on the Seller's Disclosure of Property Condition form . . . ."

Johnson filed a motion seeking $39,638.50 in attorney fees. The sellers resisted the motion, asserting Johnson was successful on his claim under chapter 558A, and no provision in that chapter allowed the award of attorney fees. They stated that while the purchase agreement contained a provision for the award of attorney fees, Johnson had not been successful on his claim based on breach of the purchase agreement. The sellers also disputed Johnson's assertion that the purchase agreement incorporated the disclosure statement.

The district court concluded an unpublished decision, *Bramwell v. Tisue*, No. 99-2057 (Iowa Ct. App. Mar. 27, 2002), was "controlling in this matter and stands for the proposition that where you have a written purchase agreement the Chapter 558A Seller's Disclosure form is incorporated by reference into the Purchase Agreement." The court determined Johnson was entitled to $20,000 of the $39,638.50 in attorney fees he requested. The sellers appeal only the district court's order on attorney fees.

II. Standard of Review

Generally, attorney fees are recoverable solely by statute or under the terms of a contract. *Miller v. Rohling*, 720 N.W.2d 562, 573 (Iowa 2006). A district court's decision that attorney fees are recoverable in a given case is reviewed for the correction of errors at law. *Security State Bank v. Ziegeldorf*, 554 N.W.2d 884, 893 (Iowa 1996). We are bound by the court's findings if they are supported by substantial evidence. *Id.* We review for an abuse of discretion a district court's decision as to the amount of attorney fees. *Id.* at 894.

III. Merits

The sellers first contend the district court erred in its statement, "[t]he court concludes that *Bramwell* is controlling in this matter . . . ." *Bramwell* is an unpublished decision of the Iowa Court of Appeals. While Iowa Rule of Appellate Procedure 6.904(2)(*c*) provides that unpublished decisions are not controlling legal authority, such cases may be cited for their persuasive value. While the district court may have overstated the precedential value of *Bramwell*, we find no reversible error in the district court's reliance on our court's reasoning in that

unpublished case, especially given *Bramwell*'s reference to the published case of *In re Estate of Kokjohn*, 531 N.W.2d 99, 101 (Iowa 1995).

The sellers next contend the district court erred in concluding the disclosure statement required by chapter 558A was incorporated into the purchase agreement. Under the doctrine of incorporation, "one document becomes part of another separate document simply by reference as if the former is fully set out in the latter." *Hofmeyer v. Iowa Dist. Ct.*, 640 N.W.2d 225, 228 (Iowa 2001) (holding reference to "administrative rule" in indigent defense contract clearly incorporated state law delineating scope of compensation for travel expenses). A contract must make a clear and specific reference to an extrinsic document for the extrinsic document to be incorporated into the contract. *Kokjohn*, 531 N.W.2d at 101.

A statute may become part of a contract under the doctrine of incorporation. *Longfellow v. Sayler*, 737 N.W.2d 148, 154 (Iowa 2007) (*citing with approval* 11 Richard A. Lord, *Williston on Contracts* § 30:19, at 202 (4th ed. 1999)). *Longfellow* involved a specific citation to a fencing-making statute in a fencing agreement between neighbors. *Id.* In both *Longfellow* and *Hofmeyer,* the Iowa Supreme Court determined that a statute or administrative rule should be considered incorporated into the contract where the contract included an express reference to the statute or rule. However, in those cases, the court was not called upon to decide whether a contract's reference to a party's "legal duty" sufficed to incorporate applicable statutes into the terms of the contract.

At least one commentator favors incorporation by reference even in the absence of the express mention to a particular statute:

> [T]he incorporation of applicable existing law into a contract does not require a deliberate expression by the parties. Except where a contrary intention is evident, the parties to a contract . . . are presumed or deemed to have contracted with reference to existing principles of law.

11 Richard A. Lord, Williston on Contracts § 30:19, at 203-04 (4th ed. 1999); *see Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 449 U.S. 117, 129-30, 111 S. Ct. 1156, 1164, 113 L. Ed. 2d 95, 107 (1991) ("Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms."). Other jurisdictions hold that a valid statute is automatically part of any contract affected by it, even if the statute is not specifically mentioned in the contract. *See, e.g., Qwest Corp. v. City of Chandler*, 217 P.3d 424, 435 (Ariz. Ct. App. 2009); *Shaw v. Sarget Sch. Dist.,* 21 P.3d 446, 450 (Colo. Ct. App. 2001); *Schiro v. W.E. Gould & Co.*, 165 N.E.2d 286, 290 (Ill. 1960).

The purchase agreement provided, "Sellers and Buyers acknowledge that Sellers of real property have a *legal duty to disclose Material Defects* of which Sellers have actual knowledge and which a reasonable inspection by Buyers would not reveal." (Emphasis added). Johnson claims the legal duty to disclose material defects in the purchase agreement refers to chapter 558A. Section 558A.2(1) provides that a person interested in transferring real property "shall deliver a written disclosure statement to a person interested in being transferred

the real property." The disclosure statement must include "information relating to the condition and important characteristics of the property . . . including significant defects in the structural integrity of the structure . . . ." Iowa Code § 558A.4(1). Generally, a person is not liable for an error, inaccuracy, or omission in the disclosure statement, "unless that person has actual knowledge of the inaccuracy, or fails to exercise ordinary care in obtaining the information." *Id.* § 558A.6(1).

The sellers assert Johnson's petition alleged one claim based on chapter 558A and another claim based on the purchase agreement and therefore, in this case, the reference in the purchase agreement to a legal duty to disclose material defects does not refer to the legal duty arising under section 558A. They note the purchase agreement includes the proviso that not only must the seller have actual knowledge of the material defect, it must also be a defect "which a reasonable inspection by Buyers would not reveal." The sellers argue this is a different standard than that found in section 558A.6(1), which creates liability if a seller has actual knowledge of an inaccuracy in the disclosure statement, or fails to exercise ordinary care in obtaining the information. The sellers contend the statutory duty differs from the contract language in that it does not include the provision relating to whether a reasonable inspection by the buyer would reveal the material defect, but it also creates liability even if the seller does not have actual knowledge of a defect if the seller "fails to exercise ordinary care in obtaining the information." *See id.* § 558A.6(1).

We conclude the term "legal duty" in paragraph 6(B) of the purchase agreement incorporates by reference the disclosure mandates of chapter 558A. When the parties entered into the purchase agreement, the sellers completed the disclosure statement as required by section 558A.2(1). As such, the sellers entered into the contract recognizing their legal duty to disclose material defects under state law. The additional reference in paragraph 6(B) to defects "which a reasonable inspection by Buyers would not reveal" did not dilute the seller's disclosure duty under chapter 558A. The parties did not evince an intent to enter into a contract that lessened the statutory disclosure duty of the seller. *See* Williston on Contracts § 30:19, at 205 ("the intent to modify applicable law by contract is effective only where it is expressly exercised by valid contractual stipulation").

Contrary to the sellers' arguments, the legal duty described in paragraph 6(B) of the purchase agreement subsumes the disclosure requirements of chapter 558A. The burden on a buyer to make a reasonable inspection of the property is not incompatible with the seller's duty to disclose material defects. The seller disclosure form in this case cautioned that it is not intended "as a substitute for any inspection" the purchaser may wish to obtain. Moreover, the jury was instructed concerning the sellers' affirmative defense of waiver based on a specific provision of the purchase agreement in which the buyer opted to have the property inspected by a person of his choice. This instruction—requested by the sellers—informed the jury that if the sellers established their affirmative defense, the buyer was not entitled to a verdict on either the breach of contract or

the chapter 558A theory of recovery. The sellers' recognition that their affirmative defense was not limited to the breach of contract claim undermines their argument that the contract described a more limited legal duty for the sellers than the disclosure requirements set out in chapter 558A.

The sellers agreed to pay reasonable attorney fees if they failed to fulfill the terms of the purchase agreement. Because we agree with the district court that the purchase agreement incorporated the disclosure requirements of chapter 558A, the sellers failed to fulfill the terms of the agreement. The district court did not err in awarding attorney fees.

AFFIRMED.