IN THE COURT OF APPEALS OF IOWA

No. 0-394 / 09-1452
Filed October 6, 2010

RUHL & RUHL REAL ESTATE, L.L.C.
d/b/a RUHL & RUHL REALTORS,
Plaintiff-Appellee,

vs.

ROBERT C. KENT and KAY HOLLAND
a/k/a KAY HOLLAND KENT,
Defendants-Appellants.

Appeal from the Iowa District Court for Scott County, Mark J. Smith, Judge.

The defendants appeal from the district court's order finding they fraudulently induced the plaintiff to terminate a real estate listing contract. **AFFIRMED.**

Michael J. McCarthy of McCarthy, Lammers & Hines, Davenport, for appellants.

Terry M. Giebelstein of Lane & Waterman, Davenport, for appellee.

Heard by Vogel, P.J., and Doyle and Mansfield, JJ.

VOGEL, P.J.

Robert Kent and Kay Holland Kent (Kents) appeal from the district court's order finding they fraudulently induced Ruhl & Ruhl Real Estate, L.L.C. (Ruhl & Ruhl) to terminate a real estate listing contract between the parties, and entering a judgment in the amount of $43,920 against the Kents and in favor of Ruhl & Ruhl. The Kents challenge the sufficiency of the evidence that they made a fraudulent misrepresentation. We affirm.

I. Background Facts and Proceedings.

The Kents were real estate agents with Ruhl & Ruhl, retiring in 2004. When the Kents were interested in selling their own home, they interviewed several realtors, including Ivy Davey of Ruhl & Ruhl. Davey researched comparable home sales and recommended a listing price between 1.25 and 1.3 million dollars. Davey testified that when she suggested the listing price, Robert was belligerent, telling her that she was "crazy" and he would never sell the house for such a low amount. Following this exchange, Davey communicated to the Kents that she was not going to take the listing. However, Kay later apologized for Robert's behavior and Davey agreed to list their home.

On October 9, 2006, the Kents signed a listing agreement, which provided for a listing price of $1,370,000, a commission of six percent to Ruhl & Ruhl, and a listing term of October 9, 2006 to April 9, 2007. The listing agreement was a form contract, but the Kents made several handwritten changes to it. One of those changes was that after the termination of the contract, Davey and Ruhl & Ruhl would not receive a commission for the sale of the home regardless of whether Davey found the buyer during the term of the contract. The listing

agreement was then signed by Davey and the manager for the Ruhl & Ruhl Moline office, Ann Cunningham.

Davey then began marketing the home with signs and flyers in the Kents' yard, as well as advertisements in magazines and newspapers and on television—all subject to Kay's pre-approval. The cost to Davey for her marketing efforts was $3700. Davey testified that there was interest in the property, she participated in two showings and two other showings also occurred. According to Davey, until mid-December the Kents were pleased with her work, gave her compliments on how well things were going, and "never had a negative comment."

In mid-December, Davey showed the Kents' house to Emily Fisher, a realtor with Mel Foster Company, and Fisher's clients, Monte and Camille Cox. After a second showing on December 18, the Coxes offered to purchase the home for $1,000,000. At 8:30 p.m., the offer was faxed to Davey, who then phoned the Kents to inform them that she had received an offer on the house. Davey described Robert as being "irate" that the offer was faxed rather than personally presented, but he then requested that Davey fax the offer to the Kents' home. After he received the offer, Robert was offended by the low offer and Davey later described him as having a "quack attack."

On the morning of December 20, Davey went to Fisher's office and made a counter-offer on behalf of the Kents to the Coxes, with an asking price of $1,345,000 and an earnest money deposit of $130,000. The Coxes rejected the counter-offer, and did not continue negotiations. Fisher explained to Davey that the Coxes believed the Kents would be too difficult to work with and planned

instead on building a new house. Davey phoned Robert to report the news, and Robert was angry and hung up on her. Fisher left that day at noon to go out of town for the Christmas holiday.

Sometime in the next few days on either December 22 or 23, Davey phoned Robert and suggested the Kents make another offer, or a reverse-offer, to the Coxes because she thought the Coxes would pay at least $1,250,000 for the Kents' house. The Kents were leaving town for the Christmas holiday and agreed to get back together with Davey after Christmas to continue negotiations with the Coxes.

On December 27, after Fisher and the Kents were back in town, Davey and Robert spoke over the phone. Davey testified that Robert agreed that he and Kay would make a reverse-offer to the Coxes. Robert disputed this, stating that he did not agree to make another offer to the Coxes and was "never going to counter [his] own offer," although he admitted that he ultimately did do just that. Davey and Robert spoke several more times over the next couple of days. On December 29 at 1:45 p.m., Davey and Robert again spoke over the phone. According to Davey, Robert reported that he and Kay were still working on a price for the reverse-offer, but Davey knew Robert wasn't entirely comfortable with the idea of a reverse-offer and planned on speaking with the Kents later. According to Robert, he and Davey got into a disagreement and Davey said, "I guess we just can't work together," to which Robert agreed. Although Davey and the Kents disagree both as to whether the Kents were going to make a reverse-offer and as to the content of the phone conservation at 1:45 p.m. on December 29, it is undisputed that Davey continued communicating with the Kents and

Fisher from December 27 to December 29 in an effort to continue working towards a sale of the property to the Coxes.

On December 29 at approximately 3:00 or 3:30 p.m., Robert called Cunningham at her home and told her that he was not happy with the advertising, marketing, and negotiations Davey had done, and requested that Ruhl & Ruhl withdraw the listing of the Kents' home. Robert did not tell her of any ongoing negotiations nor did Cunningham know of any. Cunningham stated that she took Robert at his word. It was Friday afternoon of the New Year's holiday weekend, and Cunningham offered to withdraw the listing the following Tuesday. However, Robert insisted that it be done that same day, even offering to go to Cunningham's house. Cunningham phoned the office and had the receptionist withdraw the listing from the computer system, which included the multiple listing service (MLS). Robert picked up the paperwork at 4:30 p.m. from the Ruhl & Ruhl office.

Later that evening, Davey phoned Fisher, who told her that the Coxes would have paid $1,200,000 for the Kents' house. Davey then called the Kents and left a message with that information. When checking the activity on the MLS, Davey saw that the Kents' listing had been withdrawn and phoned Cunningham, who directed her to call Fisher to inform her of the withdrawal.

Also on December 29, just after Robert had the listing withdrawn, Kay was talking to Steve Stephens about an unrelated matter. Stephens was a former manager and realtor for Ruhl & Ruhl, having retired in 2003, although he maintained his realtor's license. Kay suggested that Stephens list the Kents' home for sale, but Stephens was not interested in marketing the home nor did he

maintain his membership in the Board of Realtors, which prevented him from putting the home on the MLS. Kay then proposed a "menu of services," basically that Stephens would show the property to prospective buyers and negotiate an offer, but that the Kents would do all the marketing.

At approximately 6:00 p.m., Stephens arrived at the Kents' home. Robert also arrived at the home with the forms from Ruhl & Ruhl—the listing agreement, indicating that there was no protection period to reserve a commission for a sale of a previous contact, and the form showing the listing agreement was terminated. Kay had several documents she had prepared, including a seller's disclosure form, that was signed by the Kents and dated December 28, as well as a listing agreement, that was then signed by the Kents and Stephens and dated December 29. Under the listing agreement, the Kents home was to be listed for $1,370,000 and Stephens was to receive a commission of one percent of the sales price or a minimum of $12,200. According to Stephens, he inquired whether there were any persons who had shown an interest in the home. The Kents told him about the Coxes, but dismissed the notion of contacting them, as the Kents conveyed to Stephens that they were simply too far apart in their negotiations. However, after an hour of discussion, Stephens prepared an offer to the Coxes, with a purchase price of $1,270,000. The next day Fisher presented the offer to the Coxes, who had considered negotiations with the Kents to be "dead" and were surprised to receive another offer. Ultimately, on January 2, 2007, the Kents and Coxes agreed for the Coxes to purchase the house for $1,220,000.

On September 5, 2007, Ruhl & Ruhl filed a petition alleging the Kents fraudulently induced Ruhl & Ruhl into terminating the listing contract. A trial to the court was held on July 1, 2009. On July 22, 2009, the district court found,

> Robert Kent's testimony is not credible in regard to the reasons he terminated the contract with Ruhl & Ruhl. The Court finds that he and Kay Kent . . . terminated the contract with the sole purpose of reducing the real estate commission that would have been payable to Ruhl & Ruhl. Therefore, the Court finds that the Plaintiffs have proven fraud in the inducement in that Robert Kent induced Ruhl & Ruhl under false pretenses to terminate the listing agreement without informing them of his true intent to sell to the buyer introduced to them by the efforts of Ivy Davey, Ruhl & Ruhl's agent. . . .
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> Based on the close sequence of events between the termination of the multiple listing agreement with Ruhl & Ruhl and the final transactions between Steve Stephens, Mel Foster, and the Coxes, the undersigned is clearly convinced by this evidence that fraud in the inducement has been shown and proven by the Plaintiff.

The district court entered judgment in favor of Ruhl & Ruhl and against the Kents in the amount of $43,920. The Kents appeal.

II. Standard of Review.

> We review the judgment of a district court following a bench trial in a law action for correction of errors at law. The district court's findings of fact have the force of a special verdict and are binding on us if supported by substantial evidence. Evidence is substantial if a reasonable person would accept it as adequate to reach a conclusion. Evidence is not insubstantial merely because we may draw different conclusions from it; the ultimate question is whether it supports the finding actually made, not whether the evidence would support a different finding. In determining whether substantial evidence exists, we view the evidence in the light most favorable to the district court's judgment. If the district court's findings are ambiguous, they will be construed to uphold, not defeat, the judgment.

Chrysler Fin. Co. v. Bergstrom, 703 N.W.2d 415, 418-19 (Iowa 2005) (internal citations and quotations omitted).

III. Analysis.

On appeal, the Kents assert that Ruhl & Ruhl did not prove that the Kent's made any misrepresentations that would support the district court's findings. The elements of fraudulent misrepresentation are: "(1) representation; (2) falsity; (3) materiality; (4) scienter; (5) intent to deceive; (6) reliance; and (7) resulting injury and damage." *Whalen v. Connelly*, 545 N.W.2d 284, 294 (Iowa 1996). "[T]he elements of common-law fraud must be established by a preponderance of evidence that is clear, satisfactory, and convincing." *Holliday v. Rain & Hail L.L.C.*, 690 N.W.2d 59, 64 (Iowa 2004). The "preponderance of the evidence" refers to the quantity of the evidence, whereas "clear and satisfactory" refers to the character and nature of the evidence. *Id.*

The Kents acknowledge that Robert phoned Cunningham on December 29, and represented that he wanted to terminate the listing agreement because he was not satisfied with Davey's advertising, marketing, and negotiating. The Kents argue that this representation was "a mere expression of an opinion", and therefore cannot support a fraud action. Additionally, the Kents assert that there is no evidence that (1) this representation was false, (2) Kay participated in making this representation, and (3) Ruhl & Ruhl relied on Robert's statement. Ruhl & Ruhl replies that when the facts are examined, the fraudulent scheme is apparent, including Kay's participation, and proved circumstantially by the timing of the events.

We first examine the Kents' argument that the representation was that of an opinion and cannot support a fraud action. A "mere statement of honest opinion" generally does not give rise to a fraud action. *International Mill. Co. v.*

Gisch, 258 Iowa 63, 73, 137 N.W.2d 625, 631 (1965). "When the statements become representations of fact, or the expression of opinion is insincere and made to deceive or mislead they may be treated as fraudulent." *Hoefer v. Wisconsin Educ. Ass'n Ins. Trust*, 470 N.W.2d 336, 340 (Iowa 1991). In the present case, there was sufficient evidence that Robert's statements to Ann Cunningham on Friday, December 29, were insincere and were intended to deceive her into terminating the listing early. "One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation." Restatement (Second) of Torts § 525, at 55 (1977). In order to terminate the listing agreement, the Kents had to provide a reason, and they provided a false one. We find that Robert's statement can support a fraud action.

Next, we examine whether substantial evidence supported the district court's findings (1) the Kents did not want to terminate the listing agreement because they were unhappy with Davey's work, but did so in an attempt to avoid paying commission to Ruhl & Ruhl; (2) that Kay participated in making the false representation and the fraudulent scheme; (3) that Ruhl & Ruhl relied upon the false representation in withdrawing the listing. The evidence demonstrated that the Kents were generally happy with Davey's work. Kay approved all of Davey's advertising and marketing, which included print and television advertisements. Davey acknowledged that Robert was difficult to work with, but she complied with all of the Kents' demands and as a result, the Kents were happy with her work

and "never had a negative comment." Even though Robert was unhappy about the Coxes' initial offer and rejection of the Kents' counteroffer, Robert did not convey to Davey that he was unhappy with her work and the Kents continued working with Davey. On December 22, the Kents agreed to make a reverse-offer to the Coxes and Davey communicated with the Kents about this several times over the next week. During one of those conversations, Robert spoke to her about getting the managers of the agencies involved in negotiations, to which Davey suggested, and Robert agreed, that they do so after the Kents had a reverse-offer in writing. During a phone conversation between her and Robert at 1:45 p.m. on December 29, Robert informed Davey that he and Kay were still working on a price for the reverse-offer. Shortly after that phone call, Robert phoned Cunningham and requested the listing be terminated because he was unhappy with the advertising, marketing, and negotiating that Davey had done. At trial, Robert claimed that he and Davey actually got into an argument during that 1:45 p.m. phone call, yet he did not claim he told Davey that he was unhappy with her advertising, marketing, and negotiating. Also, Robert did not mention the alleged argument to Cunningham when terminating the listing shortly thereafter. Substantial evidence supports the district court's finding that the Kents were pleased with Davey's work and did not terminate the listing for the reasons they asserted.

We next look to "the close sequence of events" that the district court found to bolster the Kents' true intent in terminating the listing agreement. There was no dispute that when Robert phoned Cunningham to terminate the agreement, it was on Friday afternoon of the New Year's weekend. Cunningham told Robert

she would have the listing withdrawn the following Tuesday. Robert, however, insisted that the listing be withdrawn that day and even offered to go to Cunningham's home to facilitate the paperwork associated with the withdrawal. Ultimately, he picked up the paperwork at 4:30 p.m. from the Ruhl & Ruhl office. Around the same time, Kay was on the phone with Stephens suggesting that he list their home. Upon arriving at the Kents' home, Stephens reviewed the documents Kay had already prepared—a listing agreement and seller's disclosure. When asked about the seller's disclosure form, Robert stated that it was prepared for the purpose of making an offer to the Coxes, yet he could not explain how or why it was dated December 28, before the listing with Ruhl & Ruhl was terminated. Although Stephens testified that the idea to make a reverse-offer to the Coxes was his, he also testified that these events happened about two and one-half years prior to trial and he admitted having trouble remembering such details. The evidence supports the district court's finding that both Kay and Robert planned to hire Stephens prior to terminating the listing agreement in order to pursue the Cox negotiations. In addition, the district court made credibility findings adverse to the Kents, which it tied to specific fact findings. We agree with the district court that the timing of events does demonstrate evidence of fraudulent intent in terminating the listing agreement.

Finally, there is substantial evidence in the record that Ruhl & Ruhl relied on the representations Robert made to induce the termination of the agreement. Davey testified that on December 20, she told Cunningham that the Kents and Coxes could not work out a deal and the negotiations were terminated. However, shortly thereafter, Davey spoke to the Kents about making a reverse-

offer, but did not tell Cunningham of the renewed negotiations. Cunningham testified that when Robert called her on December 29, she did not know of any pending deals and that she took Robert at his word that he wanted the listing agreement terminated because of Davey's poor performance. Cunningham then phoned her office and had the receptionist fill out the listing withdrawal form, including time and date, and directed her to remove the listing from the MLS system. Later that evening, after Davey discovered the listing was withdrawn, Davey called Cunningham and told her about her continued negotiations between the Kents and Coxes, including the reverse-offer she was preparing. We conclude substantial evidence supports the district court's finding that Ruhl & Ruhl relied on the Kents' fraudulent representation in terminating the listing agreement.[1]

IV. Conclusion.

The district court's factual findings are binding on us if supported by substantial evidence, and we determine substantial evidence support the district court's findings that Robert made a false representation, that Kay participated in making the false representation and the fraudulent scheme, and that Ruhl & Ruhl relied on the representation in terminating the listing agreement. Therefore, we affirm.

AFFIRMED.

[1] The Kents argue only that evidence of "reliance" was lacking; they do not argue the separate question of whether any reliance was "justifiable." *See* Restatement (Second) of Torts § 542, at 90 (1977) (discussing the special rule for when reliance on a statement of the maker's opinion is justified). However, even if the Kents had raised such an argument, we would find sufficient evidence that Ruhl & Ruhl's reliance was justified. Among other things, there was substantial evidence that Robert purported to have "special knowledge of the matter that the recipient [Cunningham] does not have." *See id*. § 542(a), at 90.