

IN THE COURT OF APPEALS OF IOWA

No. 6-427 / 05-1260
Filed January 18, 2007

WILLIAM WELLS,
Plaintiff-Appellee/Cross-Appellant,

vs.

KELLY ANN LYNCH and JOSEPH BITTER,
Defendants-Appellants/Cross-Appellees,

MARK S. BLUME,
Defendant.

Appeal from the Iowa District Court for Dubuque County, Jon Fister,
Judge.

Defendants Kelly Lynch and Joseph Bitter appeal, and plaintiff William
Wells cross-appeals, from a district court judgment. **REVERSED AND
REMANDED ON APPEAL; CROSS-APPEAL DISMISSED.**

Thomas A. Bitter of Bitter Law Offices, Dubuque, for appellants.

Russel A. Neuwoehner of Lange & Neuwoehner, Dubuque, for appellee.

Mark Blume, Dubuque, pro se.

Heard by Miller, P.J., and Eisenhauer, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

PER CURIAM

Plaintiff William Wells sued defendants Kelly Ann Lynch, Mark S. Blume, and Joseph Bitter in a two-count petition. Count I is, as asserted by Wells and recognized by the trial court in its judgment and decree, a breach of contract claim. Wells alleged the parties entered an agreement for Wells to purchase certain real estate, Wells made a \$10,000 “deposit” toward the purchase price, and defendants have failed to complete the sale and have failed to return his \$10,000 despite his written request. Wells sought \$10,000 of money damages, plus interest and costs.

Count II sounds in tort, alleging negligent misrepresentation. Wells alleged the defendants represented that Lynch was the owner of the real estate in question and had the authority to sell it to Wells, the representations were false, and Wells justifiably relied on the representations, to his damage. He sought \$10,000 of money damages, plus interest and costs.

The defendants Bitter and Lynch filed answers denying material allegations of Wells’s petition. The case was tried to the district court without a jury. In its decision the court stated that although Wells had filed the case as a law action for breach of contract, he should have filed it as an equity action for rescission and restitution. The court opined that the defendants themselves had introduced issues of rescission and restitution through the evidence they presented, and thus, although not formally pled by any party, such issues were tried by consent. It held that Wells was entitled to rescission and restitution,

rather than damages for breach of contract, and entered judgment for Wells and against Lynch and Bitter. The court did not address or rule on Wells's claim for negligent misrepresentation.¹ Lynch and Bitter appeal, and Wells cross-appeals.

This case was filed as a law action. The trial court ruled on evidentiary objections. This is "normally the hallmark of a law trial, not an equitable proceeding." *Sille v. Shaffer*, 297 N.W.2d 379, 381 (Iowa 1980). Our review is thus for correcting errors of law. Iowa R. App. P. 6.4; *In re Mt. Pleasant Bank & Trust Co.*, 426 N.W.2d 126, 129 (Iowa 1988).

Lynch and Bitter claim the district court erred in granting rescission of a contract, as no contract existed, and in overruling their motion to dismiss Wells's petition, made at the close of the plaintiff's case. They also point out that Wells did not move to amend his petition to assert a claim for rescission and restitution, and claim there was no basis for the court converting a breach of contract case to an action for rescission of a contract and restitution. For the reasons that follow we agree with this latter contention.

As noted above, this case was filed and tried as an action at law based on claims of breach of contract and negligent misrepresentation. The trial court held that by presenting certain testimony and documents concerning communications and transactions between the various parties the defendants Lynch and Wells had introduced the issues of rescission and restitution into the case and the issue was thus tried by consent. For two reasons we disagree. First, the evidence in

¹ The court dismissed Wells's claims as against Blume, and no issue concerning this dismissal is raised on appeal or cross-appeal.

question was relevant to one or both of the legal theories specifically pled and relied on by Wells. Consent to try an issue will not be found where the evidence was also admissible on a different issue that was raised by the pleadings. *Gibson Elevator, Inc. v. Molyneaux*, 668 N.W.2d 565, 567 (Iowa 2003); *Dutcher v. Randall Foods*, 546 N.W.2d 889, 893 (Iowa 1996). Second, it defies logic to believe and hold that by introducing evidence in defense of the plaintiff's claims the defendants consented to submission of a third, additional theory by which the plaintiff might recover against them.

We conclude the trial court erred in treating Wells's law action for breach of contract and negligent misrepresentation as an equity action for rescission of a contract and restitution. We conclude the judgment of the district court must be reversed and the case remanded to the district court for a retrial of Wells's claims against Lynch and Bitter based on the legal theories pled and presented and the existing evidentiary record.

On cross-appeal Wells claims he was entitled to a judgment based on the theory of negligent misrepresentation. As noted above, this case was filed and tried as an action at law, not an equity action. Our review is not de novo, but for correction of error. Our appellate courts are courts of review, not nisi prius courts. *State v. Anderson*, 517 N.W.2d 208, 215 (Iowa 1994); *Waterbury v. State*, 387 N.W.2d 309, 311 (Iowa 1986); *State v. Holbrook*, 261 N.W.2d 480, 482 (Iowa 1978). The trial court has not addressed Wells's claim of negligent misrepresentation. We have reversed and remanded for retrial based on the legal theories in fact presented by the parties and the existing record. We

therefore decline to reach the issue raised by Wells's cross-appeal and dismiss it.

**REVERSED AND REMANDED ON APPEAL; CROSS-APPEAL
DISMISSED.**