IN THE COURT OF APPEALS OF IOWA

No. 7-491 / 06-1633
Filed February 27, 2008

STEVEN A. GAEDE and RUTH A. GAEDE,
Plaintiffs-Appellees,

vs.

LESLIE D. STANSBERRY and MARGERY J. STANSBERRY,
Defendants-Appellants.

Appeal from the Iowa District Court for Clayton County, Lawrence H. Fautsch, Judge.

Defendants appeal from an award of damages in a breach of covenant of title suit. **AFFIRMED.**

Terry Parsons of Olsen & Parsons Law Firm, Cedar Falls, and Charles R. Kelly of Charles R. Kelly Law Firm, P.C., Postville, for appellants.

Larry Cohrt of L.J. Cohrt Law Firm, Waterloo, for appellees.

Heard by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

SACKETT, C.J.

Plaintiffs Steven A. and Ruth Gaede purchased riverfront real estate in the city of Marquette in Clayton County from defendants Leslie D. and Margery J. Stansberry. Defendants executed and delivered to plaintiffs a warranty deed to the property. Following court action determining the city of Marquette had title to an approximately thirty-three foot strip across the property conveyed, plaintiffs successfully sued defendants for breach of warranty of title. On appeal defendants challenge both the finding that they are liable to plaintiffs for breach of warranty and the amount awarded plaintiffs as damages. We affirm the finding that defendants are liable to plaintiffs for breach of warranty.

I. Scope of Review.

Our review is for correction of errors at law. Iowa R. App. P. 6.4. The district court's findings are binding on us if supported by substantial evidence. Iowa R. App. P. 6.14(6)(*a*).

II. Background Facts and Proceedings.

Plaintiffs purchased the riverfront property from defendants for $50,000 in July of 1998. Title to the land, including the thirty-three foot strip, was conveyed by defendants as grantors to plaintiffs as grantees by warranty deed containing the following covenant:

> Grantors do Hereby Covenant with grantees, and successors in Interest that grantors hold the real estate by title in fee simple; that they have good and lawful authority to sell and convey the real estate; that the real estate is Free and Clear of all Liens and Encumbrances except as may be above stated; and grantors

> Covenant to Warrant and Defend the real estate against the lawful claims of all persons except as may be above stated . . . .[1]

Following their purchase plaintiffs made certain improvements to the property including filling portions of it and constructing a sea wall. The work was done pursuant to a permit issued by the Department of Natural Resources. The application for this permit required the city's approval.

In 2000 the city filed a quiet title action asserting its ownership of the thirty-three foot strip contending it was an extension of North Street. The plaintiffs unsuccessfully defended the suit and title to the strip was quieted in the city. *City of Marquette v. Gaede*, 672 N.W.2d 829, 836 (Iowa 2003).

Following the Iowa Supreme Court's decision plaintiffs brought this suit against defendants, alleging breach of the covenants of title and failure to warrant and defend the title against the city's claims.

The district court found for plaintiffs and awarded them $32,303.72. The award included legal fees and court costs incurred in defending the quiet title action, $1540.79 for the cost of fill and the removal of the retaining wall, and $12,000 for loss of property value. The judgment was reduced by $5000 paid by the attorney who examined the abstract of title for the plaintiffs.

III. Analysis.

Breach of Warranty. A covenant of warranty, the principal covenant found in most deeds, including in the deed given by plaintiffs to defendants, constitutes an agreement by the grantor that upon the failure of the title which the deed purports to convey, either for the whole estate or part only, the grantor will

---

[1] The Iowa State Bar Association Official Form No. 103 was used.

pay compensation for the resulting loss. *See Kendall v. Lowther*, 356 N.W.2d 181, 189-90 (Iowa 1984). To prevail on a claim for breach of warranty of title, the plaintiffs must show that the title warranted to them has failed and that a paramount title has been positively asserted against them and the asserted title is paramount and that they have suffered an actual or constructive eviction from their land. *See id.* A final judgment or decree adverse to plaintiff's title or right to possession is sufficient eviction or a sufficient substitute for, or equivalent of, eviction, to entitle them to sue for breach of the covenant of warrant. *See St. Paul Title Ins. Corp. v. Owen*, 452 So. 2d 482, 485 (Ala. 1984). We agree with the district court that substantial evidence supports its finding the plaintiffs have met this burden.

Defendants contend, relying on *Moser v. Thorp Sales Corp.*, 312 N.W.2d 881, 885 (Iowa 1981), that in addition to meeting the burden outlined above the plaintiffs also bear the additional burden of showing they were good faith purchasers for value without notice of the express or implied claims of the city to the questioned strip of land. Defendants argue the district court's finding that plaintiffs had no notice either express or implied of the city's claim is not supported by substantial evidence. They argue that the attorney who examined the abstract for the plaintiffs failed to find the defect in title that was clearly evident and that the knowledge of the attorney as plaintiffs' chosen agent was chargeable to the plaintiffs.

We believe defendants' argument that plaintiffs must show they were good faith purchasers for value without notice is misplaced. The facts in *Thorp* are

distinguishable from those here in that *Thorp* is not a breach of warranty case. The doctrine of good faith purchaser without notice usually applies in disputes between a purchaser and the holder of a prior unrecorded conveyance or encumbrance and deals with whose interest has priority. *See, e.g.*, *Kindred v. Crosby*, 251 Iowa 198, 201, 100 N.W.2d 20, 22, (1959); *accord Raub v. Gen'l Income Sponsors of Iowa, Inc.*, 176 N.W.2d 216, 220 (Iowa 1970); *Eames v. St. Paul Title Ins. Co.*, 654 S.W.2d 560, 561 (Tex. App. 1983) ("Grantee's actual or constructive knowledge of title defects does not relieve grantor of warranty obligations."). Furthermore, authority from other jurisdictions support the position it is not a good defense for a party in defendant's position that plaintiffs here could have discovered the defect in title by inspecting the records, nor does the fact a grantee knew of an outstanding superior claim at the time of the conveyance by warranty deed bar the grantee's right to recover for breach of a covenant of warranty. *See Eames*, 654 S.W.2d at 561, *Berubre v. Nagle*, 841 A.2d 724, 729 (Conn. App. Ct. 2004). Furthermore, a grantee's knowledge of an encumbrance at the time of the conveyance was held not to bar enforcement of a convent against encumbrances. *Juhan v. Cozart*, 403 S.E.2d 589, 590 (N.C. Ct. App. 1991).

However several courts have determined a covenant against encumbrances may not be breached by the existence upon the property of an open, notorious, and visible physical encumbrance, since it would be presumed that in fixing the purchase price, the existence of the encumbrance was taken into consideration. *Ford v. White*, 172 P.2d 822, 824 (Or. 1946); *see Murdock*

Acceptance Corp. v. Aaron, 230 S.W.2d 401, 405-06 (Tenn. 1950). While defendants argue that plaintiffs should have visually noticed the strip of property was a street, we disagree.

The challenged property was described in a long and detailed metes and bounds description. North Street was shown to go clear to the river on a 1858 plat of the town of what was then North McGregor.[2] However, to physically locate the property transferred would require a survey, particularly because the street shown on the plat extended to the Mississippi River, which could have changed its banks in the time between the plat's drafting and the transfer of property here. There was no formal acceptance of the street by the city. Furthermore, the street was not paved, and while there was evidence there may have been a portion of blacktop on the street, this was not such an encumbrance that a buyer would recognize it on inspection of the property as an open, notorious physical encumbrance. On our review of the record we also agree. Any encumbrance on the property was not one that would have been taken into consideration in fixing the purchase price. We affirm the district court's determination that plaintiffs have shown that defendants breached a covenant in the warranty deed they gave for the lot in question.

Damages. Defendants' next contention is that plaintiffs should not have been awarded damages. Defendants argue, among other things, that substantial evidence does not support the award. "Substantial evidence is 'evidence that a reasonable mind would accept as adequate to reach a conclusion.'" *Ag Partners, L.L.C. v. Chicago Cent. & Pac. R. Co.*, 726 N.W.2d 711, 715-76 (Iowa 2007)

[2] The name of the town was later changed to Marquette.

(quoting *Bellville v. Farm Bur. Mut. Ins. Co.*, 702 N.W.2d 468, 473 (Iowa 2005)). Defendants also argue the method for calculating any diminution in value of the property was improper.

There is a distinction between proof that damages have been sustained and proof of the amount of damages. *Larsen v. United Fed'l Sav. & Loan Ass'n*, 300 N.W.2d 281, 288 (Iowa 1981). "Actual damages are recoverable unless it is speculative whether damages have been sustained." *Poulsen v. Russell*, 300 N.W.2d 289, 295 (Iowa 1981). "But if the uncertainty is only in the amount of damages, a fact finder may allow recovery provided there is a reasonable basis in the evidence from which the fact finder can infer or approximate the damages." *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 641 (Iowa 1996).

Defendants challenge the district court's determination that plaintiffs lost property value of $12,000.00. Plaintiffs introduced evidence as to the percentage of loss of their property based on then current value, and that percentage was applied to the $50,000 purchase price originally paid. The general rule is that a plaintiff is allowed to recover for the loss of property only in the amount of consideration paid for it and, where the title is invalid, only to a part of the land conveyed, the grantee's loss is that portion. *See* 25 Richard A. Lord, *Williston on Contracts* § 66:85, at 36-37 (4th ed. 2002); *Boice v. Coffeen*, 158 Iowa 705, 712-13, 138 N.W. 857, 860 (1912); *City of Beaumont v. Moore*, 202 S.W.2d 448, 453 (Tex. 1947). The grantee is normally awarded such proportion of the whole consideration as the value of the part of the land as to which the title failed bore to the value of the whole tract at the time that transaction was consummated.

Williston on Contracts § 66.85, at 36-37; *Mischke v Baughn*, 52 Iowa 528, 530, 3 N.W. 543, 545 (1876); *McDunn v. City of Des Moines*, 39 Iowa 286, 287-88 (1874). There is substantial evidence to support this measure of damages and we affirm it.

The defendants also challenge the award of $1,540.79 for removing improvements because, while there was testimony this was the cost of the improvements, there were no receipts to prove the same. We address only the specific challenge made. We conclude the court did not err in considering the summary list of damages as "a reasonable basis in the evidence from which the fact finder can infer or approximate the damages." *Sun Valley*, 551 N.W.2d at 641.

There was substantial evidence to support the district court finding on this issue and we affirm it.

Defendants challenge the award of attorney fees. Defendants argue the plaintiffs should be estopped from seeking attorney fees as damages because they did not notify defendants of the adverse claim and give them the opportunity to defend the title they warranted. Plaintiffs contend notice is not necessary and defendants did not plead the affirmative defense of equitable estoppel.

Equitable estoppel is an affirmative defense. *Moser*, 256 N.W.2d at 908. "Failure to plead an affirmative defense normally results in waiver of the defense, unless the issue is tried with the consent of the parties." *Dutcher v. Randall Foods*, 546 N.W.2d 889, 893 (Iowa 1996). The district court addressed the defense and plaintiffs have not cross-appealed. We conclude the issue is

properly before us. "The party asserting the defense has the burden to establish all essential elements thereof by clear, convincing and satisfactory proof." *Moser*, 256 N.W.2d at 908. The elements of equitable estoppel are:

> (1) a false representation or concealment of material facts;
> (2) a lack of knowledge of the true facts on the part of the actor;
> (3) the intention that it be acted upon; and
> (4) reliance thereon by the party to whom made, to his prejudice and injury.

Johnson v. Johnson, 301 N.W.2d 750, 754 (Iowa 1981).

Defendants argue (1) plaintiffs concealed their intention to hold defendants financially responsible for the cost of defending title, (2) defendants lacked knowledge that plaintiffs expected defendants to hold them harmless for the defense of title, (3) plaintiffs intended defendants not to act because of their lack of knowledge, and (4) defendants relied to their detriment. Defendants contend they were "lulled into inaction" and injured by having no input into the defense or any chance to control costs.

The district court concluded, "equitable estoppel is applicable 'when kept within its proper function for the prevention of fraud, actual or constructive.'" *Smith v. Coutant*, 232 Iowa 887, 891, 6 N.W.2d 421, 424 (1942), and there was no evidence of fraud here. We agree with the district court that there is no evidence to support a finding of fraud, actual or constructive. There is no evidence the plaintiffs sought to conceal the problem with the title to the property or that they would defend the quiet title action.

There still is the question of whether giving notice to defendants and providing them with an opportunity to defend is required before plaintiffs can recover their attorney fees. Plaintiffs argue their position

> is consistent with, and is in essence the spirit behind, the general rule that in order to recover the cost of defense of title from the person giving the warranty deed, that individual must have been given notice of the proceedings so that he or she may personally undertake defending title.

See 20 Am. Jur. 2d *Covenants, Conditions, and Restrictions* § 143, at 663-64 (2005) (noting "before a covenantee may recover [the cost of defending title] . . . the covenantor *must be given notice* of the proceeding . . . and have failed to or chosen not to defend" (emphasis added)). The general rule requires notice of the proceeding, an opportunity to defend, and a failure or refusal to do so. *Id*. § 56, at 605-06 (notice of suit in time for covenantor to defend); § 141, at 662 (attorney fees allowed after notice and failure to defend); § 140, at 661 (expenses of defending title recovered after notice to and demand on covenantor); *accord* 21 C.J.S. *Covenants* § 52, at 372 (2006); *Black v. Patel*, 594 S.E.2d 162, 164-65 (S.C. 2004) ("The covenantor must, of course, have been notified of the action and have failed to defend."); *Bridwell v. Gruner*, 209 S.W.2d 441, 442 (Ark. 1948) (requiring notice and request to defend).

Iowa courts have not directly addressed the issue of the necessity of notice. Several cases have allowed recovery when the covenantor was given notice of (or "vouched into") the suit and did not defend the title. *See, e.g.*, *Kendall v. Lowther*, 356 N.W.2d 181, 190 (Iowa 1984); *Kellar v. Lindley*, 203 Iowa 57, 60, 212 N.W. 360, 361-62 (1927) (vouched into the suit); *Ballou v. Clark*, 187 Iowa 496, 498, 171 N.W. 682, 683 (1919) (notice to appear and defend); *Meservey v. Snell*, 94 Iowa 222, 226-27, 62 N.W. 767, 769 (1895) (notice to defend). In dicta in *Meservey*, the court implicitly left the door open for

allowing recovery of the cost of defense even if, as here, the covenantor was not given notice and an opportunity to defend:

> The practice of allowing such fees is not uniform, but the weight of authority seems to be in favor of allowing them if necessary and reasonable, especially if the warrantor has been notified of the litigation, and given an opportunity to protect his warranty.

Meservey, 94 Iowa at 227, 62 N.W. at 769. But in *Meservey*, the fees were allowed as damages because they "were incurred after notice of the litigation had been given the defendant, and he had failed to take charge of it." *Id*.

Plaintiffs argue defendants had notice of the suit because they were asked about being witnesses for plaintiffs. While there is some evidence defendants knew of the suit and the possibility they would be called as witnesses, we cannot conclude this rises to the level of notice that would indicate to defendants they must defend the title they warranted or risk liability for attorney fees in addition to damages.

Iowa has not adopted the general rule that notice and an opportunity to defend is a prerequisite to recovering the cost of defending title. The district court did not err in awarding attorney fees. However, the attorney fee award must be reasonable. *Kendall*, 356 N.W.2d at 189-91; *see* 20 Am. Jur. 2d *Covenants, Conditions, and Restrictions* § 141, at 662 ("reasonable expense incurred"); 21 C.J.S. *Covenants* § 82, at 393 ("reasonably and necessarily incurred"). The district court found plaintiffs "incurred court costs and legal fees totaling $23,762.93." Defendants contend an award of more than $23,000 in attorney fees to defend against a loss in property value of $12,000 is unreasonable. The district court found the fees and court costs of $23,762.93

were incurred in defending the city's quiet title action in the district court and on appeal. There is substantial evidence to support this conclusion. We affirm.

AFFIRMED.