

**IN THE COURT OF APPEALS OF IOWA**

No. 7-698 / 06-2090  
Filed November 29, 2007

**JANE STRONG,**  
Plaintiff-Appellee,

**vs.**

**MORTGAGE LOANS OF AMERICA, LLC,**  
Defendant-Appellant,

**GARY WRIGHT,**  
Defendant.

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Appeal from the Iowa District Court for Pottawattamie County, James M. Richardson, Judge.

Mortgage Loans of America, LLC, appeals the district court judgment awarding \$30,000 in damages to Jane Strong. **AFFIRMED.**

Kirk S. Blecha, Gerald P. Laughlin, and Gretchen L. Twohig, Baird Holm LLC, Omaha, Nebraska, for appellant.

Robert J. Laubenthal and Nathan R. Watson, Smith Peterson Law Firm, LLP, Council Bluffs, Iowa, for appellee.

Heard by Miller, P.J., and Eisenhauer and Baker, JJ.

**EISENHAUER, J.**

Mortgage Loans of America, LLC, (Mortgage Loans) appeals the district court judgment determining its breach of a real estate contract caused \$30,000 in damages to Jane Strong (Strong). Mortgage Loans argues Strong waived her right to contest the lot's boundary and Strong's damage award is not supported by substantial evidence.

**I. BACKGROUND FACTS AND PROCEEDINGS.**

In 2000, Gary Wright (Wright) and his company, Mortgage Loans, purchased 120 acres of land to develop and resell as residential lots. On November 5, 2003, Strong purchased a multi-acre lot for \$35,000 from Mortgage Loans. Based on the representations of Mortgage Loans, Strong reasonably believed the south boundary line was located along a terrace. Subsequently, it was determined the lot did not extend to the terrace. The land Strong was conveyed was approximately one acre less than the land she believed she had purchased. Because having less land would cause Strong to change her septic system laterals and relocate her house on the lot, Strong eventually offered to purchase the disputed land for an additional \$2,500 in May 2004. Mortgage Loans countered it would sell her the additional land for \$30,000. Strong did not purchase the disputed land; instead, she redesigned her house and relocated both the septic and her house.

On November 29, 2004, Strong sued Mortgage Loans for breach of contract and misrepresentation. On November 20, 2006, the court ruled Mortgage Loans had breached its contract with Strong and awarded \$30,000 in damages. Mortgage Loans appeals.

## II. SCOPE AND STANDARDS OF REVIEW.

Our review is for correction of errors at law. Iowa R. App. P. 6.4. The trial court's findings of fact are binding "if supported by substantial evidence." Iowa R. App. P. 6.4.

## III. WAIVER.

Mortgage Loans argues Strong legally waived her right to contest the lot's boundaries when she signed a survey accurately depicting the correct boundaries at closing. "The essential elements of a waiver are the existence of a right, knowledge, actual or constructive, and an intention to relinquish such a right." *Scheetz v. IMT Ins. Co.*, 324 N.W.2d 302, 304 (Iowa 1982). "The issue of waiver is generally one of fact . . . in particular where acts and conduct are relied upon as the basis for the waiver." *Id.*

Mortgage Loans cites no Iowa precedent for its proposition Strong's signing of the survey constitutes waiver and we do not believe the facts in this case support a finding of waiver. The copy of the survey Mortgage Loans provided to Strong was reduced to fit onto one page making the print unreadable. On the survey's diagram, the boundaries of lots A, B, and C (Strong) all appeared to follow the curving terraces. Additionally, the restrictive covenants provided to Strong made the purchaser of Lot C responsible for maintaining the terraces on and surrounding Lot C.

Strong's counter-offer was conditioned on flags being placed to mark the boundaries and the corn being disked. Wright e-mailed a reply and (1) refused to put out flags because a survey had been performed and the marking followed the terraces; and (2) declined to remove the corn because it would cause erosion.

Substantial evidence supports the trial court's conclusion these responses show Wright and Mortgage Loans also believed the south boundary was the terrace; otherwise, the e-mail would not have stated the survey's marking followed the terraces and it would have stated the corn could not be disked because it was not a part of Lot C.

Even though standing corn prevented the south terrace from being seen, Mortgage Loans' real estate agent, Philip Storey (Storey) repeatedly told Strong the south terrace was her south boundary. Storey became agitated when Strong originally did not accept his assurances and Wright's e-mail assurances and would not close the sale.

Strong then decided to accept the assurances the south boundary was the terrace and determine her fence location at the bottom or at the top of the terrace following the sale. Strong concluded either location of the boundary would not limit her use and fencing of the property.

Strong reasonably relied on the oral and written communications of Mortgage Loans repeatedly telling her the south boundary was the south terrace. We conclude the action of signing an unreadable survey, when viewed in the context of the facts detailed above, does not show Strong's intentional relinquishment of a known right and Strong's actions did not constitute waiver.

#### **IV. DAMAGES.**

The "ultimate purpose" of a contract damage award "is to place the injured party in the position he or she would have occupied if the contract had been performed." *McBride v Hammers*, 418 N.W.2d 60, 64 (Iowa 1988). The plaintiff bears the burden of establishing a claim for damages with some reasonable

certainty and for demonstrating a rational basis for determining their amount. *Conley v. Warne*, 236 N.W.2d 682, 687 (Iowa 1975). As the Iowa Supreme Court noted in *Northrup v. Miles Homes, Inc.*, 204 N.W.2d 850, 857 (Iowa 1973):

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

See *Westway Trading Corp. v. River Terminal Corp.*, 314 N.W.2d 398, 403 (Iowa 1982) (upholding damages where “record discloses a reasonable basis from which the amount can be inferred or approximated”). Iowa courts “take a broad view in determining the sufficiency of evidence of damages.” *Id.*

In determining the damage amount, the district court concluded, “[Mortgage Loans] also established the value of the real estate located between the south terrace and [Strong’s lot.] . . . Mortgage Loans offered to sell this parcel to Strong in exchange for \$30,000.”

Due to Mortgage Loans’ breach of contract, Strong received one acre less land than she was entitled to receive. The testimony of Wright concerning this one acre provided the reasonable basis in the record from which the amount of Strong’s damages were inferred or approximated by the trial court. Wright stated:

I e-mailed her back that . . . you know, we’d be interested in selling the land to you. I don’t want to have [sewer] laterals put on our property, but we’ll sell you some land, and she made an offer. She offered us \$2500 for an acre of land. I was selling lots out there at that time to up to \$45,000 an acre. I counter her \$2500 offer, I believe, at \$30,000.

Wright, the property developer, provided substantial evidence one acre lots in the development where Strong purchased her lot were selling for \$45,000. Therefore, the record discloses a reasonable basis from which Strong's damage amount can be inferred or approximated and substantial evidence supports the trial court's factual finding Strong suffered damages of \$30,000.

**AFFIRMED.**