IN THE COURT OF APPEALS OF IOWA

No. 7-962 / 07-0619
Filed January 30, 2008

JASON WATERS and TREVA WATERS,
Plaintiffs-Appellees,

vs.

MURRAY WOLFE and CARLENE WOLFE,
Defendants-Appellants.

Appeal from the Iowa District Court for Linn County, Nancy A. Baumgartner, Judge.

Defendants appeal the district court's damage award for breach of a real estate contract. **AFFIRMED**.

Larry J. Thorson of Ackley, Kopecky & Kingery, L.L.P., Cedar Rapids, for appellants.

Guy P. Booth, Cedar Rapids, for appellees.

Considered by Huitink, P.J., and Miller and Eisenhauer, JJ.

EISENHAUER, J.

Murray and Charlene Wolfe appeal the district court judgment determining their breach of a real estate contract caused damage to Jason and Treva Waters.

I. BACKGROUND FACTS AND PROCEEDINGS.

While living in California, the Wolfes worked with an Iowa realtor to purchase a home in Iowa. On May 25, 2005, the Wolfes signed a contract to purchase the Waters's home in Mount Vernon for $239,000 with a closing in June 2005. The contract was for cash and was not contingent on the sale of their California home or on financing. The contract did provide the Wolfes's obligation to close was contingent on a ten-day buyer's inspection period which ended June 4, 2005. During those ten days the contract allowed the Wolfes to have the home inspected and, also within the ten days, the Wolfes could notify the Waters in writing if they had repair requests. In bold print, the contract provided the Wolfes waived this contingency if they did not provide notice of requested repairs during the inspection period. The Wolfes requested repairs, but not until June 6, 2005, two days after the inspection period had expired.

On June 9, 2005, Murray Wolfe sent an e-mail entitled "sad news" to his Iowa realtor stating the sale of their California home had fallen through and this had adversely affected Charlene's health. Murray stated:

> So this is what I have to do to take the pressure off her. Unpack everything and get the place presentable to be shown again and Escrow here must close completely before we purchase anything anywhere. Please inform [the Waters] that we still want to go ahead with the purchase but it will have to be contingent upon the sale and closing of our place here.

This e-mail was forwarded to the Waters's realtor and was followed the next day, June 10, by a faxed document in which the Wolfes sought both a

release from their purchase contract and a refund of their earnest money. Among the reasons the fax listed for seeking the release were "buyers poor health" and "buyers sale of home fell through." The Wolfes felt the contract was voided as of their June 10 fax, however, the e-mail's contingencies were not acceptable to the Waters and the Waters never agreed to the faxed release.

At trial the testimony of the two realtors conflicted. The trial court determined the Waters's realtor was more credible than the Wolfes's realtor. Additionally, the trial court found Murray Wolfe's trial testimony was not credible and was directly contradicted by his June 9 e-mail. The trial court's determinations of credibility are given weight because it has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). We find no reason to disagree with this credibility determination; therefore, substantial evidence supports the court, as a trier of fact, in its finding: "The Wolfes apparently thought they could unilaterally amend the contract after it was signed. The court found that odd, especially in light of the fact that both are retired mortgage brokers."

While the Waters were under no obligation to accept new contingencies, they were interested in working with the Wolfes to have the sale go through. The Waters made arrangements to complete the Wolfes's requested repairs; however, they were not willing to modify the contract to make it contingent on the sale of the Wolfes's California home. Although the parties continued negotiations, the Wolfes always insisted on adding the California-home-sale contingency. No closing occurred and the last communication from the Wolfes to the Waters was on June 17, 2005.

On September 28, 2005, the Wolfes contracted for a different house in Iowa. The trial court found: "There was no evidence presented at trial that the Wolfes at any time ever made an effort to close on the sale of the Waters home or even inquire as to whether it was still on the market."

When the Wolfes's contract failed to close in June, the Waters relisted their house and, according to Mrs. Waters, made every attempt to sell at the best possible price. In September 2005, the Waters accepted an offer for $219,500, but the buyer had repair concerns and the subsequent negotiations did not lead to a closing of the sale.

After negotiations with the second buyer fell through, the Waters eventually sold their home to a third buyer in October 2005, and closed in November. In January 2006, the Waters sued the Wolfes for breach of contract. On March 1, 2007, the court ruled the Wolfes had breached their contract and awarded damages to the Waters.

On appeal the Wolfes argue: (1) the contract was voided because the Waters failed to follow the contract's repair clause; (2) the trial court incorrectly determined the property's fair market value; and (3) the Waters failed to mitigate their damages.

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 have the force of a special verdict and are binding if supported by substantial evidence. Iowa R. App. P. 6.4, 6.14(6)(*a*).

III. REPAIR CLAUSE.

The Wolfes claim the contract was properly voided by them because the Waters did not follow the requirements of the repair clause.[1] This argument is without merit. It is undisputed the Wolfes's list of repairs was not timely submitted and the contract provides the repair clause contingency is waived if the Wolfes do not provide timely notice. "The issue of waiver is generally one of fact . . . in particular where acts and conduct are relied upon as the basis for the waiver." *Scheetz v. IMT Ins. Co.*, 324 N.W.2d 302, 304 (Iowa 1982). The trial court was correct to find: "[the Wolfes] waived this contingency by not providing timely notice of defects." We find no error because once the Wolfes waived the contingency it ceased to provide an avenue for voiding the contract.

IV. FAIR MARKET VALUE.

The Wolfes next claim the trial court's damage award was erroneous because it incorrectly determined $200,000 was the fair market value of the Waters's home. The Wolfes argue the court should have relied more on the testimony of their realtor while discounting the evidence from the Waters's realtor. We have already discussed and accepted the trial court's determination the Waters's realtor was the more credible witness.

The Wolfes also argue the court should have relied more on their exhibit Z concerning housing sales in Mount Vernon. However, in discussing exhibit Z, their realtor testified she was not involved in any of the listed transactions, she

[1] The Wolfes also argue they could void the contract because the radon mitigation work was not completed by the original closing date of June 14, 2005. However, the trial court found, and the Wolfes's answer to the Waters's petition admits, the closing date had been moved to June 22, 2005. Additionally, on June 10, 2005, well before either closing date, the Wolfes had already breached the contract when they told the Waters they would not close until after their California house was sold.

did not know who prepared the exhibit and she did not know the criteria used to select the houses included on the exhibit. Further, she did not testify as to how the houses on the list compared to the Waters house and she would not conclude the exhibit was a complete listing of houses sold in Mr. Vernon. Therefore, the trial court was correct in not relying on exhibit Z on the question of fair market value.

Finally, the WoIfes argue the court erred in concluding the resale price was the measure of damages rather than evidence of market value. In calculating the damages, the court stated:

> In actions for breach of a real estate contract, general damages are measured by the difference between the contract price and the fair market value of the real estate on the date of the breach. . . . In cases in which the property is resold, the measure of damages is the difference between the contract price and the price at which the property was sold. . . . Accordingly, the court determines the fair market value of the real estate to be $200,000, the price at which it eventually sold at closing on November 1, 2005. Plaintiffs are entitled to recover $39,000, the difference between the contract price of $239,000 and the fair market value of $200,000.

To date, the Iowa Supreme Court has not addressed the effect of a property's resale on the calculation of the property's fair market value at the time of the breach. Other jurisdictions utilize varying standards. *See* Gerald Korngold, *Seller's Damages from a Defaulting Buyer of Realty: The Influence of the Uniform Land Transactions Act on the Courts*, 20 Nova L. Rev. 1069 (1996). However, we note 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). This type of damage is known as the non-breaching party's "expectation interest" or

"benefit of the bargain." *Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.*, 579 N.W.2d 823, 831 (Iowa 1998).

By determining the fair market value to be the eventual sales price of the home, the trial court placed the Waters in the position they would have been in had the Wolfes performed on the contract. *See Yost v. City of Council Bluffs*, 471 N.W.2d 836, 840 (Iowa 1991). The resale four months after the breach was a measure of the fair market value at the time of the breach because the Waters were actively trying to sell the property the entire time. If there had been a market for the property at any better price than the eventual resale price the Waters would have sold it at that price. *See Rokowsky v. Gordon*, 531 F. Supp. 435, 439 (D. Mass. 1982), *aff'd without opinion*, 705 F.2d 439 (1st Cir. 1983); 25 Samuel Williston, *A Treatise on the Law of Contracts* § 66:80, at 12 (Lord 4th ed. 2002) (stating resale price can be competent evidence of fair market value on date of breach). *See also* 34 Causes of Action 2d § 25 at 421 (2007) (stating resale price may be proof of market value).

Iowa courts "take a broad view in determining the sufficiency of evidence of damages." *Westway Trading Corp. v. River Terminal Corp*., 314 N.W.2d 398, 403 (Iowa 1982). Although the trial court initially said it considered the resale price as "the measure" of damages, its further analysis indicates it utilized the subsequent sale as a factor in determining the fair market value. Under the circumstances of this case, the resale price is the fair market value. Because the trial court placed the Waters in the position they would have occupied if the contract had been performed, we find no error in the trial court's determination of the damages the Waters sustained.

V. MITIGATION.

Finally, the Wolfes argue the Waters failed to mitigate[2] their damages. They object to the Wolfes (1) re-listing the house for the price the Wolfes had agreed to pay when the second sale fell through; and (2) accepting the third buyer's offer to purchase without repair contingencies for $200,000 without the Waters making a counteroffer. The Wolfes bear the burden of proof on their mitigation defense. *R.E.T. Corp. v. Frank Paxton Co*., 329 N.W.2d 416, 422 (Iowa 1983).

The Waters's obligation under the mitigation of damages doctrine is one of reasonable diligence. *Id*. The fact other options are available does not negate a finding the Waters were faithful to their obligation of reasonable diligence. *See Bushman v. Cuckler Bldg. Sys*., 421 N.W.2d 145, 149 (Iowa Ct. App. 1988). The Wolfes cannot use hindsight to argue the methods used by the Waters were not the most effective. *See id*.

The trial court noted the third offer's $200,000 sale price was only $10,000 below the amount the Wolfes first offered the Waters for their home. Additionally, the court found:

> [The Waters] were paying on two mortgages and it was causing them to borrow additional money on their mortgage line of credit. They hadn't heard from the Wolfes since June 17th. [The Waters] certainly would have sold their house for more and cut their losses had the opportunity arisen. They were never given that choice, not by the Wolfes or anyone else.

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[2] In addition to mitigation of damages, the Wolfes argue the doctrine of avoidable consequences limits the damage award. However, this doctrine applies where a non-contract legal wrong, negligence for example, has occurred. *See Olson v. Prosoco, Inc*., 522 N.W.2d 284, 291 (Iowa 1994) (avoidable consequences doctrine is akin to mitigation of damages in contract actions). Consequently, we address only the Wolfes's mitigation arguments.

When the Waters accepted the third offer on October 11, 2005, their house had been on the market for eight months with only three offers. The court recognized "the optimal season for selling real estate had come and gone" and ruled: "The court finds no failure to mitigate by accepting [the third offer at] a purchase price of $200,000." We conclude the trial court's findings are supported by substantial evidence and we cannot conclude the court erred as a matter of law in resolving the mitigation issue in favor of the Waters.

AFFIRMED.