

IN THE COURT OF APPEALS OF IOWA

No. 8-090 / 07-1152
Filed May 14, 2008

WILLIAM WELLS,
Plaintiff-Appellee/Cross-Appellant,

vs.

KELLY ANN LYNCH, MARK S. BLUME,
and JOSEPH J. BITTER,
Defendants-Appellants/Cross-Appellees.

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

The defendants appeal and the plaintiff cross-appeals from the district
court's ruling on a breach of contract and negligent misrepresentation claim.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

Russel Neuwoehner of Lange & Neuwoehner Law Offices, Dubuque, for
appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

VAITHESWARAN, J.

William Wells claimed he entered into an agreement to purchase a duplex from Kelly Ann Lynch and her former spouse, Mark Blume. He deposited \$10,000 with Lynch's attorney, ostensibly in furtherance of this agreement. When the real estate transaction did not materialize and the money was not returned, he sued Lynch, Blume, and Lynch's attorney, Joseph Bitter, for breach of contract and negligent misrepresentation.

The district court initially tried the case on what it said were stipulated facts. The court determined the contract violated the statute of frauds and concluded Wells was entitled to the return of his \$10,000 with interest. On appeal, Lynch asserted the parties had not reached a stipulation and he was entitled to present evidence in court. We agreed and reversed and remanded. On remand, the district court heard evidence and entered judgment in favor of Wells based on equitable claims not asserted in the petition. In a second appeal, we again reversed and remanded "for a retrial of Wells's claims against Lynch and Bitter based on the legal theories pled and presented." Following this opinion, the district court did not conduct a retrial but issued a ruling based on the existing record. The court rejected the contract and negligent misrepresentation claims and dismissed the petition.

Wells filed a motion for enlarged findings and conclusions, attaching a real estate offer and acceptance executed after the date pled in the petition. On receiving this motion, the district court reversed course and concluded the language of this contract entitled Wells to have all payments returned to him.

The district court entered judgment in favor of Wells for \$10,000 plus interest and costs. Lynch and Bitter appealed and Wells cross-appealed.

As noted, the district court did not hold a second trial. Therefore, our review is of the record created prior to the issuance of this court's second opinion.

I. Contract Claim

Lynch and Bitter argue "there being no evidence of a contract between Wells and [them], there can be no finding of breach of contract." Our review of this issue is on error. Iowa R. App. P. 6.4. The district court's findings of fact bind us if they are supported by substantial evidence. Iowa R. App. P. 6.14(6)(a).

In a breach-of-contract claim, the complaining party must prove: (1) the existence of a contract; (2) the terms and conditions of the contract; (3) that it has performed all the terms and conditions required under the contract; (4) the defendant's breach of the contract in some particular way; and (5) that plaintiff has suffered damages as a result of the breach.

Molo Oil Co. v. River City Ford Truck Sales, Inc., 578 N.W.2d 222, 224 (Iowa 1998).

With respect to the first element, the existence of a contract, Wells pled the following facts:

That on or about July 10, 2001, Plaintiff entered into an agreement with Defendants Kelly Ann Lynch and Mark S. Blume, and Defendant Joseph Bitter, as Attorney and agent for Kelly Ann Lynch, for the purchase of certain real estate located at 743 University Avenue, Dubuque, Dubuque County, Iowa. It was agreed that the Plaintiff would be able to purchase said real estate for approximately \$42,000, and Plaintiff made a \$10,000 deposit on said real estate by issuing a check to "Joseph Bitter", a copy of which is attached hereto. It was understood and agreed that said deposit would be held by Joseph Bitter, as attorney and agent for Kelly Ann Lynch, pending completion of the transaction.

The record does not contain substantial evidence that, on July 10, 2001, Lynch and Bitter agreed to sell Wells the duplex. The record instead contains a July 10, 2001 agreement between Lynch and Blume to resolve ongoing litigation involving the property distribution provisions of their dissolution decree. Prior to the divorce, the duplex was titled in Lynch's name. In the decree, the court accepted the parties' stipulation to transfer the duplex to Blume. The court clarified, however, that Blume would have to refinance the mortgage on the duplex in his name exclusively and would have to pay Lynch \$6,000. Blume was given sixty days to accomplish this. Refinancing was not timely accomplished and Lynch filed various motions and applications to enforce the provision.

On the morning of July 10, 2001, just prior to a scheduled contempt hearing, the parties engaged in an off-record settlement discussion. Blume's friend, Wells, was present during this discussion and during Bitter's subsequent dictation of the agreement. The discussion culminated in an agreement that Blume would pay Lynch \$10,000. After the agreement was dictated, Wells delivered a \$10,000 check dated July 10, 2001, to Bitter's law office. The dictation was not committed to writing until three months later and was only executed by Lynch and Blume.

The written stipulation, made effective "as of July 10, 2001," contained an acknowledgment that Lynch received \$10,000, but did not specify that the source of the funds was Wells. While the stipulation referenced a possible real estate transaction with Wells, it did not specify key terms of the transaction such as the

sale price. The stipulation stated only that a man named “Tim Lee Wells”¹ was “interested in purchasing the property” and that Lynch and Blume would convey “their interests” to Wells “if all of the terms and conditions as specified herein are met.” Finally, the stipulation provided that, in the event the duplex was not sold, Lynch did not need to refund the \$10,000 to Blume and Blume would be entitled to a credit for a judgment Lynch had against him in a small claims action. Again, the stipulation did not state Wells furnished the \$10,000 payment.

In short, the agreement reached on July 10, 2001, was only between Lynch and Blume; Blume agreed to pay Lynch \$10,000 in exchange for a dismissal of the contempt application. Wells was not a party to the agreement and his monetary interest was not mentioned. While his name was included in the stipulation, it was only in connection with an agreement to agree on a possible real estate contract with him. A contract is generally not found to exist when the parties agree to a contract on a basis to be settled in the future. *Air Host Cedar Rapids v. Airport Comm’n*, 464 N.W.2d 450, 453 (Iowa 1990). Because Wells did not establish that he entered into a contract with Lynch and Bitter, his breach-of-contract action against them necessarily fails.

The district court recognized this in its original ruling. The court subsequently changed its ruling on the basis of a real estate offer and acceptance contract that Wells attached to a post-trial motion. That contract was not offered or admitted at trial and, in any event, was executed well after the July 10, 2001 date pled in Wells’s petition. It was not evidence we could consider.

¹ There appears to be no dispute that the Wells referenced in the stipulation is one and the same as the Wells who is plaintiff in the lawsuit.

See *Tratchel v. Essex Group, Inc.*, 452 N.W.2d 171, 180 (Iowa 1990) (“We must accept the record as made by the parties and cannot consider matters which are not a part of the record.”).

As the record does not contain substantial evidence supporting the existence of a contract between Wells, Lynch, and Bitter, the district court erred in granting judgment in favor of Wells. In light of our conclusion, we find it unnecessary to address the remaining elements of a contract claim.

II. Negligent Misrepresentation

In his cross-appeal, Wells asserts that the district court erred in not ordering damages against Bitter on his negligent misrepresentation claim.² Although the district court did not address this count in its post-trial ruling, the count was mentioned in Wells’s Rule 1.904(2) motion to enlarge or amend findings and conclusions. Therefore, we determine that error was preserved. See *Madden v. City of Eldridge*, 661 N.W.2d 134, 138 (Iowa 2003) (holding city’s Rule 1.904(2) motion, which the district court denied without ruling on the merits, was sufficient to preserve error); *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (“When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal.”).

At a minimum, Wells had to show that Bitter supplied “false information.” *Barske v. Rockwell Intern. Corp.*, 514 N.W.2d 917, 924 (Iowa 1994). He made no such showing. See *Field v. Palmer*, 529 N.W.2d 347, 353 (Iowa 1999) (“Such a representation is the essence of the tort of negligent misrepresentation.”).

² Wells concedes this claim is not directed at Lynch.

Accordingly, we affirm the district court's decision not to grant judgment in favor of Wells on the negligent misrepresentation count.

III. Costs

This appeal was preceded by two other appeals. The district court assessed the \$1864 in costs from both appeals against the defendants. As we have reversed the judgment in favor of Wells, we find it unnecessary to address Lynch and Bitter's argument that the district court lacked authority to tax appellate costs against them.

IV. Disposition

We affirm the district court's decision not to enter judgment in favor of Wells on the negligent misrepresentation count. We reverse the district court's entry of judgment in favor of Wells on the contract count and remand for dismissal of the petition.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.