

IN THE COURT OF APPEALS OF IOWA/

No. 9-1009 / 09-0549
Filed February 24, 2010

LESLIE COOPER,
Plaintiff-Appellant,

vs.

**IOWA REALTY CO., INC., an
Iowa Corporation; and JOY HOLMQUIST,
A Single Person, Individually,
Jointly and Severally,**
Defendants-Appellees.

Appeal from the Iowa District Court for Madison County, Dale Hagen,
Judge.

The plaintiff appeals from the district court's grant of the defendants'
motion for a directed verdict. **AFFIRMED.**

James R. Cook and Matthew C. Moore, West Des Moines, for appellant.

Jeffrey A. Boehlert and Jason W. Miller of Patterson Law Firm, L.L.P., Des
Moines, for appellees.

Heard by Potterfield, P.J., and Doyle and Mansfield, JJ.

MANSFIELD, J.

In this case, a home seller sued the buyers' real estate agent. The seller alleged that the agent owed a duty to disclose to her the buyers' prior financial difficulties, and that the agent breached that duty, causing her to suffer damages. The district court granted a directed verdict in favor of the agent at the close of evidence. For the reasons set forth herein, we agree that the seller did not have a case that could have sustained a jury verdict in her favor, and therefore affirm.

I. Background Facts and Proceedings.

Because this case comes to us on review from the granting of a directed verdict, we construe the facts presented at trial in the light most favorable to the plaintiff. In 2003, Leslie Cooper planned on selling her home located south of Grand in Des Moines and building a new home in Cumming. In approximately August 2003, she listed her Des Moines house with Joy Holmquist, a licensed real estate agent with Iowa Realty. Cooper, with Holmquist as her agent, then purchased a lot in Cumming and began construction on the new house. In September 2004, construction was completed and Cooper moved into the Cumming home the following month. Because Cooper's Des Moines home had not sold (in fact, no offers had been received), Cooper obtained a bridge loan from West Bank in December 2004. Under the terms of this loan, Cooper was to make interest-only payments until she sold one of the properties.

In July 2005, Cooper's Des Moines home remained on the market, yet still no offers to purchase had been received. Cooper "was getting very desperate" and listed the Cumming home for sale with Holmquist as well. In August 2005, Cooper moved with her children back into the Des Moines home. However,

when no offers had been made on either house by October 2005, Cooper terminated Holmquist as her listing agent for both houses. She subsequently listed both homes for sale with Linda and Kate Godwin, who were also licensed real estate agents with Iowa Realty.

On December 12, 2005, Cooper received a phone call from Holmquist. Holmquist informed Cooper that she had an offer to present on the Cumming home, but it was a “different” type of offer. When Cooper inquired, Holmquist said she had not contacted Cooper’s new realtors. Holmquist proposed that just she and Cooper meet at a local restaurant. According to Holmquist’s later explanation, she suggested this to save Cooper from having to pay a commission to her own realtor.

However, after ending her phone call with Holmquist, Cooper called Linda Godwin, who agreed to go to the restaurant as well. According to Cooper’s testimony, when the group met at the restaurant on the evening of December 13,¹ Holmquist told Cooper that she had an offer from Terry and Wanda Ventling. Holmquist stated that the Ventlings were “not in a position to obtain a conventional loan.” However, Holmquist told Cooper that both Ventlings “had really good jobs. He worked for the state and his wife worked for Meredith Corporation.” Holmquist also explained that the Ventlings had “a beautiful home that a few things needed to be done and they were going to be ready to put it on the market in a month or two and they didn’t want to have two mortgages.”

¹ In addition to Cooper, Holmquist, and Linda Godwin, Cooper’s boyfriend also came to the restaurant. The Ventlings were not in attendance but were reached by phone at various times during the meeting.

Holmquist presented a proposed written purchase agreement to Cooper on Iowa Realty forms. She told Cooper that she needed to make a decision that evening because the Ventlings were looking at another option, i.e., having a builder do a home for them.² The Ventlings' written proposal, as conveyed by Holmquist, required Cooper to enter into a real estate installment contract whereby she would finance almost the entire purchase price. The contract called for the Ventlings to make monthly payments of \$3500 until July 1, 2007, at which time a balloon payment would be due. At Cooper's request, Holmquist inserted language, "Buyer to provide financial statement." Cooper explained she wanted this provision so she would have something to present to West Bank to persuade it to continue the bridge loan.

The Ventlings had proposed a purchase price of \$550,000, but there were negotiations with them over the phone during dinner. The parties settled on a final purchase price of \$555,000. Of this amount, \$553,237.50 would be seller-financed by Cooper.³ Cooper signed the offer that evening. Both brokers also signed the contract. A handwritten addendum, prepared by Holmquist, provided that no commission would be due to Iowa Realty until Cooper was paid in full on or before July 1, 2007.

Cooper acknowledges that she understood the respective roles of Holmquist and Godwin:

Q. And you clearly understood at that time that Godwin represented you as the seller? A. Yes.

Q. And Holmquist represented Ventlings as buyers?
A. Yes.

² Cooper was also going on vacation to Las Vegas the following evening.

³ At this time, Cooper owed at least \$524,000 on her bridge loan.

The Ventlings had proposed moving into the Cumming home on December 15, 2005, prior to the anticipated January 2006 closing. Cooper was unwilling to agree to this. Accordingly, before the paperwork was signed on the evening of December 13, the parties pushed the move-in date back to December 19, 2005, after Cooper's expected return from Las Vegas. When Cooper got back from Las Vegas on the 18th, however, she discovered the Ventlings had already moved into the house along with their furniture, dogs, and cats. Holmquist had given them a key. Cooper was upset about the situation. She still had some personal effects in the Cumming house. However, she agreed to sign a further addendum that changed the move-in date, retroactively, to December 14, 2005. Cooper testified she was "desperate to get the house sold." The addendum also revised the payment schedule, requiring every third payment to be in the amount of \$8500 rather than \$3500. This meant that by the time the July 1, 2007 balloon payment was due, the principal would have been reduced to \$507,163.70.

The Ventlings made their monthly payments to Cooper. However, their monthly payments in April, June, July, August, September, and October 2006 were a week or more late. Nonetheless, the Ventlings continued to make, and Cooper continued to accept, their payments.⁴

In January 2006, Cooper was unable to renew her bridge loan. Although the Ventlings provided some documents to Cooper as their real estate agent advised, Cooper testified the documents were insufficient for West Bank to renew

⁴ The Ventlings paid Cooper a total of approximately \$48,000.

the loan. Ultimately, Cooper was able to get refinancing from another lender at a higher interest rate. This resulted in her monthly mortgage payments increasing from \$20,000 to \$44,000 annually.

In late January 2006, Cooper was at another bank with a friend of hers and asked if he could pull up some information on the Ventlings. This led to her discovering that the Ventlings had filed for bankruptcy in 2001, and that tax liens had been filed against them. Cooper also located the Ventlings' prior home. She determined that it had not been sold and was in poor condition, not "beautiful" as she had been told. Additionally, a petition to foreclose a mechanic's lien had been filed in January 2005 on the Ventlings' former home. On December 22, 2005, the petitioner in that case was awarded an interest in the Ventlings' property through a sheriff's sale and levy. Finally, Cooper conducted a public records search and found the Ventlings had several outstanding judgments against them.

On November 6, 2006, Cooper filed a forcible entry and detainer action, taking the position that the Ventlings had a lease rather than a contract to purchase the Cumming property. The parties arranged a meeting in an attempt to resolve the situation. After the meeting, the Ventlings began making their monthly payments to their attorney's trust account, rather than to Cooper. Cooper denied agreeing to this procedure.

On January 18, 2007, Cooper filed suit seeking a judicial declaration that no contract existed between Cooper and the Ventlings. The district court found that a contract did exist and rejected Cooper's claim that the Ventlings' fraud had prevented the formation of a valid contract. On March 24, 2007, Cooper elected

to forfeit the real estate contract by serving the Ventlings with a notice of forfeiture. On May 29, 2007, the district court ruled that by electing forfeiture, Cooper was not entitled to recover the funds the Ventlings had paid into the trust account. The Ventlings vacated the Cumming property in May 2007, and Cooper moved back there, her Des Moines house having been foreclosed upon. Subsequently, Cooper defaulted on the mortgage securing the Cumming property, and that property was also foreclosed upon. Cooper had to move in with relatives.

On May 29, 2007, Cooper filed the present action against the Ventlings, Holmquist, and Iowa Realty. Relying on the prior declaratory judgment ruling, the Ventlings moved for summary judgment based on res judicata. Their motion was granted. Cooper's claims of breach of fiduciary duty and fraudulent nondisclosure against Holmquist and Iowa Realty proceeded to trial. However, before the submission of those claims to the jury, the district court granted the defendants' motion for a directed verdict. The district court found: (1) Holmquist was the Ventlings' agent, not Cooper's, and did not owe a general fiduciary duty to Cooper; (2) although Holmquist had a duty to disclose material adverse facts, that did not encompass facts that could be discovered through reasonable, diligent inspection, such as a search of public records; (3) Holmquist had a duty to the Ventlings to keep their finances confidential; (4) if a duty was breached, the breach was waived by Cooper's continuing acceptance of payments; and (5) Cooper's damages did not flow from the alleged breach of fiduciary duty/fraud and thus were not recoverable. For all these reasons, the court sustained Holmquist and Iowa Realty's directed verdict motion. Cooper now appeals.

II. Standard of Review.

We review the district court's ruling on a motion for directed verdict for correction of errors at law. *Wolbers v. The Finley Hosp.*, 673 N.W.2d 728, 734 (Iowa 2003); *Heinz v. Heinz*, 653 N.W.2d 334, 338 (Iowa 2002).

The evidence is considered in the light most favorable to the nonmoving party. If there is substantial evidence in the record to support each element of a claim, the motion for directed verdict must be overruled. Additionally, if reasonable minds could reach different conclusions based upon the evidence presented, the issue is properly submitted to the jury.

Wolbers, 673 N.W.2d at 734.

III. Analysis.

A. Breach of Fiduciary Duty.

Cooper first argues that the district court erred in directing a verdict on her breach of a fiduciary duty claim. Our threshold inquiry is "whether the defendants owed a legal duty to the plaintiff. A legal duty is defined by the relationship between individuals; it is a legal obligation imposed upon one individual for the benefit of another person." *J.A.H. ex rel. R.M.H. v. Wadle & Assocs., P.C.*, 589 N.W.2d 256, 258 (Iowa 1999). The existence of a legal duty is a question of law for the courts to determine. *Id.*

Cooper's argument has two prongs. At the outset, Cooper maintains that Holmquist breached a fiduciary duty simply by *representing* the Ventlings. Holmquist had previously acted as Cooper's agent, and had acquired confidential information from Cooper in the course of that engagement. Cooper analogizes the real estate broker's duties to those of an attorney, and insists that if Holmquist had been an attorney, she would have been disqualified based on

having learned Cooper's confidences. See Iowa R. of Prof'l Conduct 32:1.9 (Duties to former clients).

The difficulty with this argument is that Holmquist was *not* an attorney. At trial, an expert witness testified for the defense. He was asked whether there was any problem with Holmquist becoming the buyers' agent sixty days after having been the seller's agent, and he responded, "There is no conflict of interest . . . whatsoever in my opinion." No expert was called by Cooper. No one disputed that Holmquist owed a continuing duty of confidentiality to Cooper, but no evidence was presented that Holmquist breached that duty.

Next, Cooper argues that the defendants breached a fiduciary duty by failing to disclose information about the Ventlings' financial condition. Iowa Code chapter 543B governs licensed real estate brokers and salespersons. This chapter and the rules adopted pursuant to it set forth the duties owed by licensees to the parties to a transaction. Iowa Code § 543B.62 (2007).⁵ In the present case, at the time of the transaction Holmquist was the buyers' agent. As the buyers' agent, Holmquist owed a duty to all parties to the transaction to provide services "honestly and in good faith." *Id.* § 543B.56(1)(a). As to disclosure of information, she was obligated to disclose all material adverse facts actually known, except for the following:

⁵ This section provides in relevant part:

1. Except as provided in subsection 2, the duties of a licensee specified in this chapter or in rules adopted pursuant to this chapter supersede any fiduciary duties of a licensee to a party to a transaction based on common law principles of agency to the extent that those common law fiduciary duties are inconsistent with the duties specified in this chapter or rules adopted pursuant to this chapter.
2. This section shall not be construed to modify a licensee's duty under common law as to negligent or fraudulent misrepresentation of material information.

- (1) Material adverse facts known by the party.
- (2) Material adverse facts the party could discover through a reasonably diligent inspection, and which would be discovered by a reasonably prudent person under like or similar circumstances.
- (3) Material adverse facts the disclosure of which is prohibited by law.
- (4) Material adverse facts that are known to a person who conducts an inspection on behalf of the party.

Id. § 543B.56(1)(c); see also Iowa Admin. Code r. 193E-12.4(2).

The defendants argue that any disclosure by them of the Ventlings' finances was prohibited by law and cite to Iowa Administrative Code rule 193E-12.4(1)(c)(5). Under this rule, as the buyers' agent, Holmquist, owed a duty to the buyers to preserve their confidential information, including their "financial qualifications," "unless disclosure is required by law or unless failure to disclose such information would constitute fraud or dishonest dealing." Iowa Admin. Code r. 193E-12.4(1)(c)(5).

Cooper acknowledges that Holmquist normally would have been prohibited from disclosing the Ventlings' financial status. However, Cooper argues that Holmquist "painted a sound picture of the Ventlings' financial status" and, therefore, had a duty to disclose her actual knowledge of the Ventlings' financial condition to avoid misleading her. This argument is essentially a fraudulent nondisclosure theory, i.e., that Holmquist had a duty to disclose matters "necessary to prevent [her] partial or ambiguous statement of the facts from being misleading." See *Nie v. Galena St. Bank & Trust Co.*, 387 N.W.2d 373, 375-76 (Iowa Ct. App. 1986); Restatement (Second) of Torts § 551(2)(b), 119 (1977) (Liability for Nondisclosure). Cooper does not claim Holmquist made an overt statement that the Ventlings were financially qualified, but rather implied

it through statements that in context were misleading. We agree that facts sufficient to establish this kind of fraudulent nondisclosure would take precedence over any duty of confidentiality under Iowa Administrative Code rule 193E-12.4(1)(c)(5) (providing that “unless failure to disclose such information would constitute fraud or dishonest dealing”).

However, we are not persuaded that the statements allegedly made by Holmquist at the December 13, 2005 dinner meeting were sufficient to give rise to a duty to disclose the Ventlings’ overall financial condition. Holmquist did *not* make a statement that the Ventlings were in good financial shape or had a solid financial history. All she said was that they were “not in a position to obtain a conventional loan” but had “really good jobs.” Stating that a couple have “good jobs,”⁶ does not imply that they have a strong credit history. Indeed, to some listeners, the implication might be that the persons in question have a checkered past from a credit standpoint, but will have steady income going forward. Likewise, stating that the Ventlings were not in a position to obtain a conventional loan, even if coupled with the excuse that they already have one mortgage, cannot be taken as a signal that their finances are strong. Furthermore, Cooper requested that the Ventlings provide “a financial statement,” an indicator that she was not satisfied as to their financial condition. Moreover, Cooper acknowledged she was told at the very beginning by Holmquist that she was receiving a “different” proposal, and there is no question that she understood she was

⁶ Cooper does not contend that Holmquist misrepresented either of the Ventlings’ employment status. In fact, the trial evidence showed that in 2005, Mr. Ventling was employed by the State of Iowa and Ms. Ventling was an independent contractor to Meredith Corporation.

essentially taking on the Ventlings' credit risk with respect to the Cumming property. We hold that the district court properly granted a directed verdict on this ground.

Alternatively, we agree with the district court's ruling that Cooper did not have sufficient proof of damages. As the supreme court recently held, discussing the well-established principle of "loss causation," proof of damages in a fraud case requires more than a "but for" connection between the alleged fraud and the claimed damages. Rather, the misrepresentation must have "increased the risk of the specific damages claimed." *Spreitzer v. Hawkeye St. Bank*, 775 N.W.2d 573, 590-91 (Iowa 2009).

Here, Cooper's damages are a classic example of impermissible "but for" recovery. She herself characterizes them as "a domino effect [that] began immediately upon the signing of the Purchase Agreement." The trial proof showed, however, that the Ventlings made their contractual payments, until Cooper decided to evict them from the property.⁷ Thus, Cooper's damages resulted not because the Ventlings were financially incapable of carrying out their bargain, which would have been "within the risk of harm covered by" the fraudulent nondisclosure, *id.* at 590, but because even with their performance, she ended up having both houses foreclosed upon. Otherwise stated, Cooper really needed a different and better deal than the one she negotiated with the

⁷ Cooper testified as follows:

Q. Isn't that true, Miss Cooper? You never gave them a chance to fulfill that 18-month contract? That's the truth. Your answer is yes, isn't it? A. Yes.

Ventlings to save her properties, and it is purely speculative to conclude that such a deal would have materialized.

Because we hold that Cooper's claim for breach of fiduciary duty is barred for the foregoing reasons, we need not reach the other grounds relied upon by the district court for granting the defendants' directed verdict motion.

B. Fraudulent Nondisclosure.

Cooper next argues that the district court erred in directing a verdict on her fraudulent nondisclosure claim based upon Holmquist's failure to disclose information about the Ventlings' finances. As we have already discussed, Cooper's breach of fiduciary duty claim essentially amounted to a fraudulent nondisclosure claim. To establish her breach of fiduciary duty claim, Cooper had to prove a nondisclosure of financial information that "would constitute fraud or dishonest dealing." Iowa Admin. Code r. 193E-12.4(1)(c)(5). Accordingly, since the two claims are one and the same, we hold that a directed verdict was properly granted for the reasons already stated.

IV. Conclusion.

We conclude that Cooper cannot prove Holmquist breached a fiduciary duty or had a duty to disclose the Ventlings' financial information and thus, the district court properly directed verdict in favor of the defendants. We affirm.

AFFIRMED.