

BROKERS' DUTIES

Crutchley v. First Trust and Savings Bank 450 N.W.2d 877 (Iowa 1990)

CARTER, Justice. The estate of Don Fishel, a deceased real estate salesperson, appeals from a judgment awarding damages to plaintiffs, Harold E. Crutchley and Anita S. Crutchley.

Plaintiffs' action sought to recover for the alleged negligence and breach of contract of Fishel and Jim Short, two licensed real estate agents who represented them in the sale of 600 acres of land in Linn County. Short, who is also a defendant against whom judgment was entered, has not appealed.

In 1980, the plaintiffs listed 600 acres of land for sale through the Mundel, Long & Luce real estate office in Cedar Rapids. Fishel and Short were salespersons

associated with that firm. Plaintiffs were well acquainted with Fishel, who had previously represented them in selling other property. Short assisted Fishel on some of the prior sales as well as the transaction giving rise to the present controversy. After advertisement of the 600-acre tract in publications of general circulation in the Midwest, Carl Esker and two medical doctors participating with him agreed to pay a total consideration of \$1,650,000 for the property pursuant to an installment contract.

The contract called for a \$300,000 down payment with the remaining balance to be paid over a twenty-year period.

The contract of sale came into being as a result of the plaintiffs' acceptance of an offer to purchase which contained the following language:

In the event of default on this contract, the sellers shall only be entitled to possession of the real estate as of the date of said default. Buyers will only lose their interest in said property and any payments made to date of default.

The parties to this litigation have referred to this provision as a nonrecourse clause. Although the price and payment terms of the installment contract evolved from a series of offers and counteroffers, the nonrecourse clause had been included in the original offer and was not altered or amended in any way in the subsequent negotiations between buyers and sellers.

In 1985 the buyers defaulted on the contract. As a result, plaintiffs regained possession of the farmland by forfeiture proceedings. Plaintiffs retained the down payment and annual interest payments received on March 1 of 1982, 1983, and 1984. The parties to this action are in agreement that, as a result of the nonrecourse clause, plaintiffs were entitled to no further relief against the buyers.

Due to a plummeting decline in the value of farm real estate between 1980 and 1985, the value of the 600-acre tract plus the payments which plaintiffs received prior to default did not equal the contract price to be paid by the defaulting parties. Prior to bringing the present action, the plaintiffs sought federal bankruptcy protection. As a part of those proceedings, the 600-acre tract was liquidated in 1986 for \$576,465.

On June 9, 1986, plaintiffs commenced the present action against Jim Short and the estate of Fishel, who by that time was deceased, seeking recovery of money damages on theories of negligence and breach of contract. They contended that Short and Fishel misadvised them concerning the legal significance of the nonrecourse clause and failed to observe the provisions of article 17 of the National Association of Realtors' Code of Ethics by not recommending that plaintiffs consult legal counsel on a matter in which their interests required it.

At the trial, plaintiff Harold Crutchley testified that, when the property was sold to Carl Esker and his associates, the sellers did not understand that the nonrecourse clause in the contract left them without any recourse other than to regain the property. Crutchley testified that Short had advised the sellers that this clause only protected certain of the buyers' assets from execution sale and protected the buyers' spouses from personal liability. Crutchley testified that he would not have accepted the offer to buy the land

had he realized the legal import of the nonrecourse clause. He stated that neither Fishel nor Short recommended that plaintiffs seek legal counsel in consummating this transaction and that Short had affirmatively dissuaded them from so doing.

Fishel was deceased at the time of trial, but Short was called as a witness. Short conceded the applicability of article 17 of the National Association of Realtors' Code of Ethics for purposes of determining his and Fishel's responsibilities to their clients. He denied that either he or Fishel had dissuaded plaintiffs from seeking the advice of legal counsel on this transaction. He testified that plaintiffs were sophisticated in real estate transactions and that on other land sales in which Short had assisted them they had freely consulted attorneys concerning questions over legal matters.

He testified that both he and Fishel had fully explained the legal significance of the nonrecourse clause to the plaintiffs and that he was satisfied they understood it and accepted it as a means of obtaining a favorable sale.

The case was submitted to the jury under the comparative fault provisions of Iowa Code chapter 668 (1987). The jury found that defendants were at fault under plaintiffs' breach-of-contract and negligence claims and that plaintiffs themselves were also at fault. Fault was apportioned 25 percent to plaintiffs and 75 percent to Short and the Fishel estate collectively. In response to a special interrogatory, the jury determined that the total amount of damages sustained by plaintiffs was \$715,000. After a reduction of damages for plaintiffs' percentage of fault, judgment was entered against the two defendants jointly and severally for the sum of \$536,250.

* * *

The district court permitted the jury to find that the defendants were negligent or had breached their duties under the listing agreement in the following particulars: (1) by giving an inadequate and incorrect explanation of the nonrecourse provision, (2) by not affirmatively recommending that plaintiffs obtain legal counsel in a matter in which their interests required it, and (3) in discouraging plaintiffs from seeking legal counsel. Although the Fishel estate strenuously argues that the evidence fails to support any of these theories of negligence or breach of contract, we believe that based on the evidence presented a jury might have found adversely to defendants as to any or all of the three specifications we have listed.

Plaintiffs offered evidence, including the testimony of Short himself, that both Short and Fishel were required to maintain the standards articulated in article

17 of the National Association of Realtors' Code of Ethics in representing their clients. That standard reads as follows:

The Realtor shall not engage in activities that constitute the unauthorized practice of law and shall recommend that legal counsel be obtained when the interest of any party to the transaction requires it.

We recognized in *Menzel v. Morse*, 362 N.W.2d 465, 473 (Iowa 1985), that proof of a violation of this standard is evidence upon which a trier of fact may find negligence.

The evidence concerning that which was said or not said by the parties to the litigation concerning the legal effect of the nonrecourse clause or the desirability of

plaintiffs seeking legal counsel was in sharp dispute. If, however, the evidence presented is viewed in the light most favorable to the plaintiffs, it will support a finding by the jury that defendants failed to exercise the standard of care required of persons engaged in their business or profession.

Because of the interrelationship between the negligence and breach-of-contract issues in the present case, we conclude that proof of a breach of this standard of professional conduct would also establish a violation of the agent's duties under the listing agreement with the broker. The district court did not err in accepting the jury's findings on the negligence and breach-of-contract issues. * * * [The trial court judgment is affirmed.]