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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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CLINTON FEDERAL SAVINGS & LOAN ASSOCIATION, PIONEER FEDERAL SAVINGS & LOAN ASSOCIATION, MISSISSIPPI VALLEY SAVINGS & LOAN ASSOCIATION, PEOPLES SAVINGS & LOAN ASSOCIATION, INDEPENDENCE FEDERAL SAVINGS & LOAN ASSOCIATION, FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF CARROLL, and NORTHWEST FEDERAL SAVINGS & LOAN ASSOCIATION OF SPENCER,	)	
Plaintiffs-Appellants,	)	
vs.	)	
IOWA-DES MOINES NATIONAL BANK, n/k/a NORWEST BANK OF DES MOINES NATIONAL ASSOCIATION,	)	9-175 88-1194
Defendant-Appellee.	)	

Appeal from the Iowa District Court for Polk County (No. CL 028-16413), Luther T. Glanton, Jr., Senior Judge.

Plaintiffs appeal from a judgment for defendant bank on plaintiffs' claim arising out of a loan participation agreement. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.**

Craig D. Warner of Aspelmeier, Fisch, Power, Warner & Engberg, Burlington, for plaintiffs-appellants.

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Patrick J. McNulty, Ross H. Sidney, and Mark J. Wiedenfeld of Grefe & Sidney, Des Moines, for defendant-appellee.

Considered by Oxberger, C.J., and Donielson, and Hayden, JJ. Sackett, J., takes no part.

DONIELSON, J.

This is the second time these parties have come before this court. Their dispute arises out of a loan participation agreement entered into by the parties in which they agreed to loan $2.7 million to a developer. Plaintiffs claimed defendant Norwest failed to promptly notify them of the borrower's default.

Eleven savings and loan institutions located throughout Iowa and the defendant bank agreed to finance construction of a Hilton Hotel in West Des Moines, Iowa, which became known as the Country Club Hotel Project. The parties entered into a loan participation agreement on June 7, 1974. Under the terms of the agreement, defendant bank was to be the "lead lender" and the parties agreed to lend a total of $2.7 million to the developer for construction of the hotel. The bank, as representative of all the participants, entered into a loan agreement with the borrower, Country Club Hotel, Inc., on June 19, 1974. The borrower was a shell corporation incorporated by the developer. A promissory note was executed, and the borrower gave a mortgage on the land upon which the hotel was to be erected.

The promissory note provided that during the construction phase of the project, the borrower was to pay only interest on the portion of the principal sum as may have been advanced on the first day of each month until

December 1, 1975. Thereafter, both principal and interest were to be paid monthly. The parties anticipated that the developer would secure additional funding to complete the project so that the hotel would open in January 1976, thus generating income to pay the loan installments.

The mechanics of the participation agreement provided that the bank would make periodic disbursements of the loan proceeds to the borrower for construction. The bank would then contact the plaintiff savings and loan institutions requesting reimbursement for their proportionate share of the funds advanced by the defendant bank.

The first disbursement was made by Norwest on June 24, 1974, in the amount of $293,550. The developer was unable to secure additional funding and consequently became unable to make the interest payments in November 1974. Norwest advanced moneys to the developer, enabling him to make the interest payments in December 1974 through March 1975. These payments were distributed to the defendant participants.

On May 9, 1975, the parties attended a meeting to discuss the project. Norwest then informed the plaintiffs that Norwest had been making the interest payments for the borrower, that the borrower was insolvent, that the developer was unable to secure additional financing, and that the building was approximately 90% completed. The participants decided to refinance in order to raise the

additional funds needed to complete the building and get it open and in operation.

The refinancing proposal fell through. The parties accelerated the note, and Norwest, on behalf of the savings and loan institutions, brought a mortgage foreclosure action. The property was sold in April 1979 for $1,500,000. Following the sale, nine of the savings and loan institutions brought this action on June 6, 1979, to recover damages for Norwest's alleged mismanagement of the loan. Those nine plaintiffs now number seven after two mergers.

The suit was originally brought under the theories of negligence, breach of contract, breach of warranty, and breach of trust. The trial court dismissed all claims other than for negligence on the ground the participation agreement "clearly and unambiguously" reflected the intention of the parties to limit their liability to negligence. The case went to trial May 7, 1984, on plaintiffs' claim for negligent breach of contract, resulting in a judgment for defendant Norwest. The plaintiffs appealed, and on June 4, 1986, this court affirmed in part as to the dismissal of the breach of warranty claim, reversed in part, holding the agreement was ambiguous, and remanded the case to the district court to apply the rules of interpretation and construction to the agreement's liability clause and determine whether

plaintiffs had a claim for breach of contract and fiduciary duty. Clinton Federal Sav. & Loan Ass'n v. Iowa-Des Moines Nat. Bank, 391 N.W.2d 712, 717 (Iowa App. 1986). A new trial commenced April 18, 1988, in front of the same judge, resulting in a judgment for defendant Norwest. The trial court once again determined the agreement limited plaintiffs' claims to negligence and that plaintiffs failed to prove negligence.

Plaintiffs appeal, contending the trial court erred in construing the participation agreement as relieving defendant from claims based on breach of contract and fiduciary duty; excluding testimony by each of the plaintiffs' chief executive officers as to the course they would have taken had they received timely notice of default; and in its findings of facts and conclusions of law.

Our review of this action at law is on assigned error. Iowa R. App. P. 4. The findings of fact of the trial court have the effect of a special verdict. Id. These findings are binding upon this court if they are supported by substantial evidence. Iowa R. App. P. 14(f)(1).

I. Construction of Liability Limitation Clause. The central issue on remand is whether the trial court erred in its conclusion that paragraph 12 of the participation agreement limited the plaintiffs' theories of recovery to negligence and precluded them from asserting breach of

contract and fiduciary duty claims. Paragraph 12 of the participation agreement states in part:

> LIABILITY AND REPRESENTATIONS: . . . no party shall be liable to any other for any loss not due to its own negligence; but all loss or losses shall be borne proportionately by PRINCIPAL and PARTICIPANTS according to their respective interest in the Loan; and no party shall be responsible beyond that degree of ordinary care it would have exercised in the conduct and management of its own business.

The trial court concluded this clause limits the liability of each party to any other to negligent acts.

The rules of contractual interpretation and construction are well settled. "Interpretation involves ascertaining the meaning of contractual words; construction refers to deciding their legal effect." Mt. Pleasant Bank & Trust Company v. Mount Pleasant Professional Building, 426 N.W.2d 126, 133 (Iowa 1988). "Interpretation is reviewed as a legal issue unless it depended at the trial on extrinsic evidence. Construction is always reviewed as a law issue." Id.

Extrinsic evidence is evidence which is not contained in the body of the agreement, see Black's Law Dictionary, 529 (5th ed. 1979), but which sheds light on the situation of the parties, antecedent negotiations, the attendant circumstances, and the object the parties were striving to obtain. Phillips v. National Trappers Association, 407 N.W.2d 609, 612 (Iowa App. 1987). The trial court concluded neither party offered any extrinsic evidence to

aid the court in ascertaining the parties' intent. We find the plaintiffs did offer extrinsic evidence on this point. Because the trial court refused to consider this evidence and looked solely to the language of the agreement, we review both its interpretation and construction as matters of law. Mt. Pleasant Bank & Trust, 426 N.W.2d at 133.

"Principles of contract interpretation and construction require that we give effect to all [the] language of an agreement." Mount Pleasant Bank & Trust, 426 N.W.2d at 135. "Because an agreement is to be interpreted as a whole, it is assumed in the first instance that no part of it is superfluous; an interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation that leaves a part unreasonable, unlawful, or of no effect." Id., citing Fashion Fabrics of Iowa, Inc. v. Retail Investors Corp., 266 N.W.2d 22, 26 (Iowa 1978). The cardinal principle in the construction of written contracts is that the intent of the parties must control; and, except in cases of ambiguity, this is determined by what the contract itself says. Iowa R. App. P. 14(f)(14). We have already determined the terms of this agreement are ambiguous as to the liability clause. Clinton Federal, 391 N.W.2d at 717.

The trial court concluded, in applying the rules of interpretation, that paragraph 12 limits the liability of each party to any other to negligent acts. The only

argument made by the trial court on behalf of this result is that the last clause of paragraph 12 requires the parties' conduct be measured by a standard of "ordinary care." Since ordinary care is a concept of negligence, the court concluded, the parties understood that if any liability would attach to a party, it would be for negligence.

We find the trial court erred in its application of the rules of interpretation and construction. This agreement designated defendant as the party who shall deal and negotiate with the borrower on behalf of the other parties; required defendant to issue participation certificates under appropriate circumstances; prohibited defendant from accepting or applying any prepayment upon the loan without the participants' prior agreement; required defendant to hold the mortgage instruments for the benefit of the parties; prohibited defendant from altering the terms of any instruments, consenting to the sale, assignment, etc. of such documents, accelerating the loan, waiving any claim, accepting a hazard insurance policy, sue upon the note or make any election of remedies without prior written consent of the parties; and required defendant to give prompt notice of default to participants. The agreement also included plaintiffs' obligations to each other and to defendant.

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The plaintiffs introduced extrinsic evidence that the lead lender acts as an agent on behalf of the participants. The participants are passive lenders who rely on the lead lender to manage the loan and carry out the terms of the loan agreement on their behalf. This evidence reveals the circumstances were such that the lead lender was in a superior position to monitor the safety of the loan investment.

When read as a whole, we find the intent of the parties cannot possibly have been to take away a party's legal right to sue for breach of the other's contractual obligations. Without the right to sue for breach of contract, these obligations are of no effect because neither party could enforce them. The defendant intentionally concealed the borrower's default in violation of the agreement. Defendant avoided liability for negligent breach by claiming that is how it ordinarily conducts business. We find, based on extrinsic evidence and reading the agreement as a whole, that the parties did not intend to render the agreement unenforceable against a party who intentionally breaches. We cannot construe this agreement to contain a limitation inconsistent with the apparent object of the parties.

The law gives contracting parties a remedy for breach of an agreement. We require a clear expression of intent to forego such a remedy before a party will be deprived of

the remedy. Maytag Co. v. Alward, 253 Iowa 455, 462, 112 N.W.2d 654, 658 (1962). There has been no clear expression of intent to waive the right to sue for breach of contract. Thus, we find paragraph 12 cannot be construed to limit recovery for negligence only. This being the case, paragraph 12 also does not preclude plaintiffs from suing for breach of fiduciary duty. A fair reading of paragraph 12 is that no party shall be liable for another's negligence, only their own. It does not preclude claims based on breach of contract and breach of fiduciary duty.

II. **Evidentiary Rulings.** We specifically held in the first appeal that testimony regarding whether the plaintiffs would have approved of disbursing the remaining funds had they been informed of the borrower's default was relevant and material. Clinton Federal, 391 N.W.2d at 719. Each plaintiff offered evidence as to what it would have done had it been timely notified of default. Five plaintiffs were represented at trial by a witness who was a senior executive with their savings and loan in 1974 and who testified he had the authority to make that decision on behalf of its savings and loan. Three of the plaintiffs were represented by the present chief executive officer (the 1974 executives were not available) who testified what the best course of action for his savings and loan would have been under an identical hypothetical set of facts.

Each of plaintiffs' witnesses testified he had the authority to make the decision to quit funding a loan in default because it was an operational decision. Each witness was asked either what he would have done or what would have been the best course of action for his savings and loan had they been notified of the borrower's default in November 1974. Despite uncontroverted evidence these witnesses would have had the authority to quit funding, the trial court sustained defendant's foundational objections to this question on the basis the witness could not testify as to what the board of directors would have done. We set forth the following portion of the record as illustrative. Ivan Stienstra testified he was vice-president of Northwest Federal Savings & Loan Association of Spencer in 1974.

> MR. WARNER: In your capacity as vice-president did you have the authority to authorize Northwest Federal to quit funding a loan that was in default in 1974? A. Yes.

Plaintiffs' attorney then asked a hypothetical question as to what Northwest Federal would have done in regard to continued funding in November 1974 given the facts of this case. Defendant objected on the grounds there was "insufficient foundation that this gentleman at that time had the authority to make that kind of decision." The court sustained the objection.

> THE COURT: It is not the proper foundation.
> Q. Mr. Stienstra, I thought I heard you testify that you did have the authority to make those decisions. Did you testify to that?
> THE COURT: He can state what he would have done, but not what the board would have done. That is not proper.

MR. WARNER: Well, Your Honor, the question is what Northwest would have done.

THE COURT: That is the board. He can state what he would have done, but he isn't qualified to state what the board would have done.

Q. Let's go back, Mr. Stienstra. Did you testify that possibly the board would have been consulted? A. Yes.

Q. Was it necessary to consult the board? A. No.

Q. Could you have made that decision on behalf of Northwest? A. Yes.

Each of the witnesses testified they had the authority to make the decision on behalf of their savings and loan institution. The trial court, despite uncontroverted evidence, continued to harbor the notion that only the board of directors could make that decision. The trial court cannot hold as a matter of law that which is not a matter of fact. The trial court erred as a matter of law in sustaining defendant's motions on foundational grounds.

III. Substantial Evidence. The trial court, in its conclusions of law, determined that plaintiffs did not prove by a preponderance of the evidence that the defendant negligently breached the participation agreement. In reaching this conclusion, the trial court looked to paragraph 13 of the agreement, which states in part:

> PROCEDURE UPON DEFAULT - If any event of the default comes to the knowledge of any party hereto, such party shall give prompt notice of the existence and nature of such default to the others; and PRINCIPAL shall, with due diligence to the extent PRINCIPAL would act in dealing with defaults in connection with PRINCIPAL's other similar investments, cause such default to be cured . . . .

The trial court concluded defendant acted with due

diligence to cure the default to the extent defendant would have acted in connection with other similar investments, thus no negligence.

Findings of fact in a law action are binding upon the appellate court if supported by substantial evidence. Iowa R. App. P. 14(f)(1). Defendant put on evidence that in managing construction loans the bank normally works with a borrower in default, giving the borrower an opportunity to cure the default. This evidence was uncontroverted. Thus, we find substantial evidence defendant was not negligent in causing the default to be cured and affirm this finding.

On remand we directed the trial court to determine whether defendant acted negligently in failing to disclose the borrower's breach until [May] 1975. Clinton Federal, 391 N.W.2d at 719. Defendant's negligence in this regard is measured by the standard of care set out in paragraph 12. The question is whether defendant exercised that degree of ordinary care it would have in the conduct and management of its own business with respect to its concealing the borrower's default. The trial court made no findings in this respect. We remand on this issue.

IV. Proximate Cause. The trial court determined that even if defendant acted negligently, plaintiffs failed to prove defendant's negligence was a proximate cause of plaintiffs' damages. In reaching its conclusion, the trial court determined that plaintiffs' offers of proof lacked

credibility and authenticity and that the agreement required unanimous action to cease funding.

Plaintiffs' witnesses, in an offer of proof, each testified that they would have stopped funding if promptly notified of borrower's breach. Defendant did not attempt to impinge the credibility of plaintiffs' witnesses. Nevertheless, the trial court made alternate findings of what the plaintiffs would have done in November of 1974. The trial court's findings of fact in this regard may not reasonably be inferred from the evidence and therefore are not supported by substantial evidence. Hubby v. State, 331 N.W.2d 690, 694 (Iowa 1983). The trial court substituted its judgment for that of the plaintiffs' witnesses, despite the fact their testimony was uncontroverted. These conclusions were unsupported by the record and are not binding on appeal. We find as a matter of law the trial court erred in concluding plaintiffs would not have ceased funding the project in November 1974.

The trial court's conclusion that plaintiffs did not show proximate cause is also premised on the conclusion that the agreement required unanimous action to cease funding the project and plaintiffs did not demonstrate they all would have stopped funding upon default. The agreement nowhere requires unanimous consent to do anything. The trial court's conclusion in this respect is completely unsupported by the record and cannot stand on appeal.

V. Disposition. Ordinarily, a finding of insufficient evidence to support a judgment entitles the successful appellant to a reversal for entry of judgment in appellant's favor. Novak Equipment, Inc. v. Hartl, 168 N.W.2d 924, 927 (Iowa 1969). However, where there remain issues presented to but not decided by the trial court, we remand for findings or for a new trial. Id. Where the case is tried to the court and the court errs as to the rule of law to be applied in formulating conclusions and arriving at its judgment, the appellate court need not remand for a new trial. Houlahan v. Brockmeier, 258 Iowa 1197, 1205, 141 N.W.2d 545, 550 (1966). Thus, when it appears the parties have fully explored the factual situation, we remand for fact findings based on the record. Id.

A trial court's exclusion of evidence that should have been admitted normally requires us to remand the case for retrial on the issue for which evidence was offered. Mihalovich v. Appanoose County, 217 N.W.2d 564, 569 (Iowa 1974). However, where all the facts are clearly established, it is appropriate for us to enter final judgment. Id. See also Thorp Credit, Inc. v. Barr, 200 N.W.2d 535, 537 (Iowa 1972), U.S. cert. dis. 410 U.S. 919, 93 S. Ct. 978, 35 L. Ed. 2d 581.

A. Breach of Fiduciary Duty. We find the record inadequate to determine whether defendant owed a fiduciary

duty to plaintiffs or whether defendant breached such a duty. Accordingly, we remand for a new trial on this claim.

B. **Breach of Contract.** The record is clear in this regard that defendant was required to notify plaintiffs of borrower's default and did not do so. We hold the evidence establishes as a matter of law defendant breached the agreement. We held on remand that evidence of what the lenders would have done if promptly notified of borrower's default relates to the speculativeness of damages on this issue. Clinton Federal, 391 N.W.2d at 719. The evidence was uncontroverted that plaintiffs would have stopped funding and declared a default. We hold the evidence establishes as a matter of law defendant breached the agreement and is liable for damages. We remand for findings of fact, based on the record, as to plaintiffs' damages. We remind the trial court we set out the extent of defendant's liability for damages in Clinton Federal, 391 N.W.2d at 719.

C. **Negligence.** The trial court failed to consider whether defendant was negligent in failing to notify plaintiffs of the borrower's default in November 1974. Accordingly, we remand for findings of fact and conclusions of law, on the record, in this regard. We hold as a matter of law that the record establishes proximate cause (see discussion on proximate cause, infra). If the

trial court finds negligence, it must then determine plaintiffs' damages for defendant's negligence.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.