

IN THE COURT OF APPEALS OF IOWA

FILED

JAN 29 1986

CLERK SUPREME COURT

48

BELVA BROWN and LAVERNE
ESBECK,

Plaintiffs-Appellants,

vs

JOHN THIELEN,

Defendant-Appellee.

Filed January 29, 1986

5-622
84-1958

Appeal from the Iowa District Court from Shelby County - Paul H. Sulhoff,
Judge

Plaintiffs appeal claiming the trial court erred in finding that they had failed to prove an agreement for reimbursement for use of defendant's grain bin and in allowing evidence of partial payment when defendant had not pleaded partial payment as an affirmative defense. **AFFIRMED.**

Robert Kohorst of Louis, Moore, Kohorst, Louis, Murtaugh & Kohorst,
Harlan, Iowa, for plaintiffs-appellants.

Roland K. Landsness of Cambridge, Feilmeyer, Landsness, Chase & Wells,
Atlantic, Iowa, for defendant-appellee.

Heard by Donielson, P.J., Schlegel, and Sackett, JJ.

Plaintiff, Laverne Esbeck, on his own behalf and on behalf of Belva Brown, entered into an agreement with defendant, John Thielen, for the rental of a certain grain bin for the storage of defendant's corn. The amount of rent agreed upon was in dispute; Laverne claimed the rental agreed upon was \$6,000, while John claimed it was \$.10 per bushel per year. Laverne also claimed that John agreed to pay for the use of a dryer and other equipment. Plaintiffs claimed that in addition to the rental, defendant agreed to pay for the use of electricity to operate aeration equipment located in the bin. Plaintiffs' petition claimed the sum of \$7,450 from November 1, 1981, and the sum of \$1,205.31 for electric utility bills.

While John claimed the rental agreement was for \$.10 per bushel per year, and acknowledged that there were nearly 29,000 bushels of corn stored for nearly two years, he offered evidence of payment of the rental and electric charges and denied any agreement for the use of equipment or electricity.

The trial court found that plaintiffs were entitled to the sum of \$6,000 for rent. The court also found that plaintiffs had completely and totally failed to sustain their burden of "proving that there was any contract between the parties relative to the use of the drying equipment or the repayment of electrical power used in aerating the bin." In addition, the court found that defendant had paid \$2,250 upon the rent due and awarded judgment to plaintiffs in the amount of \$3,750.

Plaintiffs have appealed, claiming that the evidence shows that they were entitled to \$12,000 in rent and that the court erred in finding that they had failed to prove an agreement for reimbursement for electricity bills and for the use of the drying equipment. Plaintiffs further claim the court was in error

in allowing evidence of partial payment, when defendant had not pleaded partial payment as an affirmative defense.

I. Our scope of review in this law action is for the correction of errors at law. Iowa R. App. P. 4. The trial court's findings of fact have the force of a special verdict and are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

II. The court found that the rental for the period was \$6,000. There was substantial evidence in the record to support that finding. Accordingly, we are bound by that finding. The court found that plaintiffs had failed to sustain their burden to prove the existence of an agreement to be reimbursed by defendant for electric bills, in addition to the payment of rent. That finding is also supported by substantial evidence.

III. Plaintiffs allege the court should have ordered judgment in the amount of \$12,000, since the court found that the grain was stored for almost two years. Based upon the petition filed by the plaintiffs, and based upon the proof offered by plaintiffs, the trial court found that plaintiffs had sustained their burden of proving by a preponderance of the evidence that defendant was indebted to plaintiffs for the use of this grain bin in the sum of \$6,000. Plaintiffs did not seek to recover \$12,000. They specifically sought rental in the amount of \$7,450 and the additional sum of \$1,205.31 for electrical utility bills. There was ample support for the court's finding. Plaintiffs' recovery cannot exceed the amount prayed for in view of the specific amount demanded. See Stromberg v. Crowl, 257 Iowa 348, 353, 132 N.W.2d 462, 465 (1965).

Plaintiffs claim the court erred in considering payments made by defendant since he did not plead payment as an affirmative defense. Such a pleading is not necessary to support a denial of the amount owed. The court committed no error. See Hart v. Hart, 160 N.W.2d 438, 445 (Iowa 1968).

The decision of the court was amply supported by the record in this case. Accordingly, that decision is affirmed.

AFFIRMED.