

FILED

MAR 26 1985

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA 538

WESTERN OUTDOOR ADVERTISING CO.,)
A Corporation,

Plaintiff,

vs.

KEITH COPE, f/d/b/a
STARLITE MOTEL,

Defendant.

Filed March 26, 1985

KEITH COPE,

Cross-Petitioner/
Appellant,

vs.

GERALD L. NIELSON and
BONNIE J. NIELSON,

Defendants to Cross-
Petition/Appellees.

5-44
84-773

Appeal from the Iowa District Court for Pottawattamie County - Glenn M. McGee, Judge.

Cross-petitioner appeals from adverse judgment in indemnity action, in which cross-petitioner alleges that defendant is liable for lease payments under a contract he assumed when he purchased a motel from cross-petitioner.
REVERSED.

Daniel B. Stageman of Pogge, Root & Steege, Council Bluffs, for cross-petitioner/appellant.

James A. Pratt of Heithoff, Pratt & Heithoff, Council Bluffs, for appellees.

Considered by Donielson, P.J., and Snell and Schlegel, JJ.

PER CURIAM

Western Outdoor Advertising Company brought an action against Keith Cope for breach of contract. Western had agreed to provide a sign advertising Cope's motel for \$395.00 a month for 36 months. The lease was entered into on October 7, 1980, and the monthly payments ceased on December 1, 1981.

Subsequently, Cope filed a cross-petition against Gerald and Bonnie Nielson for indemnity. The Nielsons had purchased Cope's motel on July 20, 1981. Cope alleged that the Nielsons had agreed to assume all the costs associated with the motel, including the Western lease.

On October 10, 1983, Western received judgment against Cope. Thereafter, Cope filed a motion for summary judgment against the Nielsons. That motion was sustained on October 24, 1983.

The Nielsons moved to set aside the summary judgment on the ground that no proof of service had been stamped on the motion for summary judgment. However, the evidence is undisputed that Nielson's attorney had been served with the motion. The motion to set aside was sustained solely on the grounds that no proof of service had been stamped on the motion.

Trial was held on the cross-petition. Cope testified that Gerald Nielson was provided with a file containing all of the motel lease arrangements and given an opportunity to examine the file. The Western lease was included in the file. One of the realtors involved in the sale recalled providing the lease to Gerald Nielson. Another realtor stated that Gerald Nielson leafed through the lease file provided by Cope. There was also evidence that Gerald Nielson was given a data sheet concerning the general circumstances of the motel which included a notation, "road signs 2 owned leased \$835.00 month."

Nielson testified that he never read the Western lease until he came across it several months after the sale. Nielson did, however, make the monthly payments from July through December of 1981. In December, Nielson wrote to

Western and stated that he had "decided not to try and assume the former owner's contract." After Nielson ceased making the payments, Western sued Cope.

The record indicates that Cope sent a request for admissions to the Nielsons on May 12, 1983. This included a request that the Nielsons admit that they would be obligated to indemnify Cope if he was found liable to Western. The Nielsons did not respond to this request until December 6, 1983.

On March 30, 1984, the trial court ruled that there was no evidence that the Nielsons had agreed to assume the lease. The cross-petition was dismissed. Cope has appealed.

On appeal, Cope asserts: (1) that the trial court erred in setting aside the summary judgment because no proof of service had been stamped; (2) that Nielson is bound by his admission of liability because of a failure to deny the request within the requisite time; (3) that the evidence indicates that Nielson impliedly and expressly agreed to assume the lease when he purchased the motel.

This case was heard in equity. Our review is de novo. Iowa R. App. P. 4.

We find that the trial court erred in ruling that Nielson was not liable to Cope. On May 12, 1983, Cope filed a request for admissions which included the following:

Pursuant to Rule 127, plaintiff requests defendants to cross-petition to admit the following for the purpose of this action only:

* * *

3. That in the event defendant is found liable to plaintiff, defendants to cross-petition are legally obliged to indemnify defendant.

No response was received until December 6, 1983, at which time the defendant Nielson denied the above statement.

Iowa Rule of Civil Procedure 127 states that a statement is admitted unless the party to whom it is addressed serves a written answer or objection within thirty days. The answer or objection must specifically deny the matter or set

forth in detail the reason why the answering party cannot truthfully admit or deny the matter. Rule 128 states that the court may permit withdrawal or amendment of an admission when the "presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits."

In this case, no response was received within thirty days and thus the statement of liability is deemed admitted. See, Shirk Oil Co. v. Peterman, 329 N.W.2d 13, 16 (Iowa 1983). There was never any motion to withdraw or amend this admission. We find therefore that the defendant Nielson is bound by his admission of liability.

In addition, we find that Nielson is estopped from asserting a non-acceptance of the contract at this time. The trial court ruled that Cope failed to prove that Nielson had read the lease or that he had expressly agreed to assume the lease.

The offer to purchase included the following clause: "Sellers agree . . . to provide Buyers with copies of all Lease Agreements, Option Agreements, Contracts, Mortgages These obligations are all subject to approval by the Buyers" We find that there is sufficient evidence in the record that Cope notified Nielson of the existence of the lease and that Nielson was provided with copies of the lease. The data sheet prepared at the time of the sale contained the information that the transaction included: "Road Signs 2 owned leased at \$835/month." Cope testified that he went through the motel's business files, which included the lease agreements, with Nielson and allowed Nielson the opportunity to examine the files. Robert Shellady, a real estate broker who handled the transaction, testified that Cope went through the files with Nielson. Fred Clark, who had owned the motel before Cope, also testified that he was present when Nielson was shown the files containing the lease agreements. He

testified that he and Cope explained the leases to Nielson. Clark also stated that Nielson had contacted him shortly before terminating the leases to ask his opinion of the signs effectiveness. We find that Cope did provide Nielson with the leases as required by the contract.

We also find that Nielson waived his right to reject the lease by failing to raise an objection to the lease at the time of the sale under the theory of estoppel by acquiescence. Estoppel by acquiescence arises when a person knows or ought to know that [he] is entitled to enforce [his] right or to impeach a transaction and neglects to do so for such a time as would imply that [he] intended to waive or abandon [his] right. Davidson v. Van Lengen, 266 N.W.2d 436, 438 (Iowa 1978). See also, Corsiglia v. Summit Center Corp., 348 N.W.2d 647, 650-51 (Iowa App. 1984). To determine whether a right has been waived we must look at the individual's actions. Id. at 439.

In this case we find that Nielson did waive his right to object to the lease by failing to do so before the contract was closed. The offer to purchase, which set forth Nielson's right to object, was entered into July 20, 1981, and the transaction was completed on August 31. At no time during this period did Nielson voice any objection to the lease.

Further evidence of Nielson's acceptance of the lease is the fact that Nielson made the lease payments from August until December, 1984. In December, he notified Western Outdoor Advertising of his intention to no longer honor the lease. We find that his failure to object before the transaction was completed combined with his continuing payments indicate a waiver of his right to object.

The findings of the trial court are reversed and we order that judgment be entered against Nielson and in favor of Cope.

REVERSED.