IN THE COURT OF APPEALS OF IOWA

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No. 7-562 / 96-1596

KENNETH F. MAGINA,

Plaintiff-Appellant,

vs.

MAX L. BARTLETT,

Defendant-Appellee.

FILED
JAN 28 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Linn County, William L. Thomas, Judge.

Plaintiff in a breach of contract action appeals from the district court's grant of a judgment notwithstanding the verdict. **REVERSED; JURY VERDICT REINSTATED.**

William F. Olinger, Cedar Rapids, for appellant.

Richard A. Pundt, Cedar Rapids, and David J. Smith, Cedar Rapids, until withdrawal, for appellee.

Heard by Cady, C.J., and Sackett and Streit, JJ.

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SACKETT, J.

In 1979, plaintiff-appellant Kenneth F. Magina and defendant-appellee Max L. Bartlett orally formed a partnership and purchased the lease for air rights over a proposed Ground Transportation Center in Cedar Rapids, Iowa. They each paid $1000 of the $2000 purchase price. The lease was in defendant's name alone. On March 1, 1981, defendant transferred the air rights and obtained a lease for the fourth floor of the Ground Transportation Center, the fourth floor being valued at $725,000.

Plaintiff sued claiming defendant had breached their contract by transferring the air rights and obtaining the lease without compensating him. The case was tried to a jury that found defendant liable to plaintiff for one-half of $725,000 less certain miscellaneous expenses. Defendant filed motions for new trial and remittitur and for a judgment notwithstanding the verdict. The trial court granted the motion for judgment notwithstanding the verdict. This appeal by plaintiff follows. We reverse and reinstate the verdict.

The trial court granted the motion for judgment notwithstanding the verdict finding the settlement agreement entered into between the parties and dated September 22, 1980, had certain contingencies. The court found what happened was governed by contingency number three, that is, if defendant sells the air rights for property other than cash, then plaintiff gets ten percent of the proceeds on sale. The court found there was no cash payment, rather there was an exchange. Finding

defendant did not sell the air rights for cash, the court granted the motion for judgment notwithstanding the verdict.

Plaintiff contends the trial court erred in holding the jury verdict could only be sustained if there were a cash payment and the trial court erred in entering the judgment notwithstanding the verdict.

We review the grant or denial of a motion for judgment notwithstanding the verdict for the correction of errors of law. Iowa R. App. P. 4; *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 538 (Iowa 1996).

When ruling on a motion for directed verdict, a trial court must examine the evidence in the light most favorable to the non-moving party. Iowa R. App. P. 14(f)(2); *Beitz v. Horak*, 271 N.W.2d 755, 757 (Iowa 1978); *Cockerton v. Mercy Hosp. Medical Ctr.*, 490 N.W.2d 856, 858 (Iowa App. 1992). To overrule the motion, the court must find substantial evidence in support of each element of the non-moving party's claim. *Beitz*, 271 N.W.2d at 757. A motion for judgment notwithstanding the verdict must stand or fall based on the grounds set out in the motion for directed verdict. *Konicek v. Loomis Bros., Inc.*, 457 N.W.2d 614, 617 (Iowa 1990).

We view the evidence in the light most favorable to the non-moving party and determine whether sufficient evidence existed to warrant submission of the issues to a jury. *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 684 (Iowa 1990). The review standard requires us to consider whether reasonable minds could differ

on the issues in controversy. *Podraza v. City of Carter Lake*, 524 N.W.2d.2d 198, 202 (Iowa 1994); *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 858 (Iowa 1994).

The parties seem in agreement that resolution of these issues focuses on the settlement agreement. The settlement agreement basically recited the parties had a June 13, 1980, agency agreement for allocation of income, cash flow, and proceeds of sale; since the execution of that agreement events have occurred not contemplated by the parties at the execution; and defendant intended to develop a ten- to fifteen-story office complex with the air rights.

The settlement agreement then specifically provided in part as follows:

> 1. TRANSFER OF LEASE OF AIR RIGHTS. It is Bartlett's intention to transfer his Lease to the Air Rights to certain Third Parties in exchange for certain periodic cash payments. The parties agree that as said payments are received, they shall first be applied against all expenses incurred by Bartlett with regard to the Development (including cash contributions made by each of the parties hereto in the approximate amount of $1000 each), with any excess to be distributed equally to Bartlett and Magina. Bartlett shall provide Magina with a periodic accounting upon the receipt of each payment and shall, upon request, provide Magina with copies of all invoices relative to expenses of the Development.
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> 2. PARTNERSHIP AND DEVELOPMENT. It is anticipated that Bartlett will become a limited partner of said Third Parties with regard to the Development. It is agreed by the parties hereto that, except as modified by paragraph 3 with regard to Magina's right to ten percent of the proceeds on resale, Bartlett shall assign twenty-five percent of his partnership interest to Magina, and, consistent therewith, Magina shall recognize twenty-five percent of Bartlett's partnership income, credits and other tax attributes and burdens and twenty-five percent of cash or other property distributed to Bartlett as a partner; provided that to the extent that Bartlett incurs expenses relative to any

> property distributed to him by the partnership for which he is not otherwise reimbursed, twenty-five percent of said expenses shall be applied against the income to be recognized and the cash to be received by Magina. Magina shall be entitled to draw his twenty-five percent interest in the cash flow generated hereunder as periodically agreed, but not less than annually.
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> 3. SALE OF PROPERTY. If Bartlett in his capacity as a partner receives property other than cash, upon the resale of said property Magina shall be entitled to an amount equal to ten percent of the net sales proceeds (defined as gross sales price reduced by all costs of closing). If said sale is cast in the form of an installment sales contract, the sales contract shall reflect Magina's interest herein. Bartlett agrees not to sell any non-cash property received from the partnership for a period of five years after date of first occupancy of the Development without the prior written agreement of Magina to said sell; provided, however, that if Bartlett is able to demonstrate financial hardship to Magina during said five-year period, Magina shall not unreasonably withhold his agreement to sell. Bartlett shall give Magina reasonable advance notice of any intention to sell such property and the proposed salient terms of said sale.

Plaintiff contends the trial court erred in determining the three paragraphs were contingencies. Plaintiff further contends the court erred in interpreting paragraph three as an alternative contingency to paragraph one.

Principles of contract construction and interpretation dictate whether issues concerning contracts are decided as a matter of law by the court or are factual issues to be determined by the jury. *Taylor Enter., Inc. v. Clarinda Prod. Credit Ass'n*, 447 N.W.2d 113, 115 (Iowa 1989). The construction of a contract, the legal effect of the contract, is always a matter for the court. *Connie's Constr. Co. v. Fireman's Fund Ins. Co.*, 227 N.W.2d 207, 210 (Iowa 1975). Interpretation, the meaning of contractual words, is also an issue for the court unless it is dependent upon extrinsic

evidence or upon a choice among reasonable inferences from the extrinsic evidence. *Id.* Extrinsic evidence is admissible as an aid to interpretation when it throws light on the parties' situation, antecedent negotiations, the attendant circumstances, and the objectives the parties were trying to attain. *Taylor Enter.*, 447 N.W.2d at 115; *Hamilton v. Wosepka*, 261 Iowa 299, 306, 154 N.W.2d 164, 168 (1967). Generally, questions of performance or breach are for the jury. *Iowa-Illinois Gas & Elec. Co. v. Black & Veatch*, 497 N.W.2d 821, 825 (Iowa 1993).

In a breach of contract claim, the complaining party must prove: (1) the existence of a contract; (2) the terms and conditions of the contract; (3) that it has performed all of the terms and conditions required under the contract; (4) the defendant's breach of the contract in some particular way; and (5) that plaintiff has suffered damages as a result of the breach. *Id.*; *Berryhill v. Hatt*, 428 N.W.2d 647, 652 (Iowa 1988).

On September 22, 1980, defendant made an agreement with Wayne Engle and transferred the air rights to Engle. Engle was to transfer the rights to a limited partnership and defendant was to be a limited partner. This never happened. On October 3, 1980, defendant transferred the air rights to Engle personally.

On March 1, 1981, two agreements were executed. One modified the September 22, 1980 agreement and assigned the air rights that were previously transferred to Engle to Engle Center Associates, and Engle agreed to pay defendant $725,000 in lieu of consideration provided in the September 22, 1980 agreement.

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Engle was to pay defendant the $725,000 for the air rights in annual payments of $48,333.33. A second agreement, also signed March 1, 1981, was for defendant's purchase of the fourth floor for $725,000 payable in annual payments of $48,333.33 plus ten percent interest. Defendant paid Engle no money. Engle paid defendant no money. Defendant testified at trial it was a tax-free exchange. There was no further evidence on this fact.

A factual issue was generated whether there was one contract or two. *See Taylor Enter.*, 447 N.W.2d at 115-16. If it were decided there were two contracts, the jury was justified in finding there was a sale for cash. The trial court was not correct when it ruled as a matter of law that defendant sold his air rights for other than cash. There has been no challenge to the trial court's failure to rule on the motion for new trial and remittitur. Consequently, we need not address these issues. We reverse and reinstate the verdict.

REVERSED AND JURY VERDICT REINSTATED.