IN THE COURT OF APPEALS OF IOWA

No. 9-556 / 89-535

FILED
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CLERK SUPREME COURT

L. TRAVIS SMILEY and **JEAN SMILEY,**

Appellees,

234

vs.

ALAN NICKS,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

The defendant appeals a ruling of the trial court holding that the amount of $7000 paid to defendant by the plaintiffs was a loan and not a gift, and that the loan was not made on condition of defendant marrying the plaintiffs' daughter. The defendant asserts that the trial court erred in: (1) allowing entry of parol evidence to establish the contract; (2) finding the transaction to be neither a gift or loan in contemplation of marriage; (3) finding the plaintiffs had met all elements of a contract to sustain their burden of proof; and (4) failing to grant a new trial. **AFFIRMED.**

Terry Diane Parsons of Olsen, Parsons & Ament, Cedar Falls, for appellant.

Steven K. Daniels of Mosier, Thomas, Beatty, Dutton, Braun & Staack, Waterloo, for appellees.

Considered by Oxberger, C.J., and Donielson and Habhab, JJ.

HABHAB, J. 236

Appellant, Alan Nicks, appeals the decision of district court holding that a transfer of $7,000 to Alan by the appellees was a loan and not a gift. We affirm.

Alan Nicks and Dian Smiley lived together in an apartment in 1982. At that time Alan was still married to Mary Nicks, who resided in their family home. Jean Smiley, Dian's mother, disapproved of this relationship and was anxious to see Alan obtain a divorce.

In April 1983 Alan and Dian talked about marriage. Alan stated that in order to secure a divorce he needed $7000 to pay his wife Mary for her one-half equity in the marital home. Dian spoke to her parents about providing the $7000. On April 21, 1983, Dian's parents provided a cashier's check for $7000 in the name of Kevin McCrindle, Alan's attorney. Five days later Alan's marriage was dissolved and one month later Alan and Dian were married.

During the next five years Alan was involved in a lawn care and landscaping joint business venture with Dian's parents. During this period the Smileys loaned Alan an additional $6000, which Alan repaid. The Smileys and Nicks also executed several financial statements, none of which listed the $7000 either as an asset or debt. The Smileys did not ask Alan for repayment of the $7000 during this period.

When Alan and Dian's marriage began to crumble, Jean Smiley pressed Alan for repayment of the $7000, stating

that the money was not a gift but was a no-interest "family" loan. Alan refused to sign a written note, and Jean Smiley ultimately had her attorney make a demand for payment. Following the Nicks' divorce, the Smileys filed the present lawsuit.

Our review is on assigned errors. Iowa R. App. P. 4. The evidentiary issues in this case in large part revolve around whether the alleged oral loan contract falls within the parameters of Iowa's Statute of Frauds. Iowa Code section 622.32 provides:

> Except when otherwise specially provided, no evidence of the following enumerated contracts is competent, unless it be in writing and signed by the party charged or by his authorized agent:
>
> 1. Those made in consideration of marriage.
>
> 2. Those wherein one person promises to answer for the debt, default, or miscarriage of another, including promises by executors to pay the debt of the decedent from their own estate.
>
> 3. Those for the creation or transfer of any interest in lands, except leases for a term not exceeding one year.
>
> 4. Those that are not to be performed within one year from the making thereof.

Alan claims that if the $7,000 was a loan, then it must fall within either section 622.32(1) or 622.32(4). Taking the latter first, the Iowa Supreme Court noted in Johnson v. Ward, 265 N.W.2d 746, 747 (Iowa 1978):

> In considering statute of fraud defenses, we do not demand that an oral contract must actually be performed within a year. We hold, rather, such a contract must be impossible of performance within that time if it is to come within the proscription of the statute.

Since it was entirely possible to perform the contract within one year, the contract falls outside the limitation of section 622.32(4).

Similarly, we find no error in the district court's determination that the loan was not given in consideration of marriage. As such, the loan does not fall within section 622.32(1). The 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). Both Dian Smiley and Jean Smiley testified that the money was loaned to Alan so he could terminate his marriage to Mary Nicks. The contract did not require Alan to marry Dian in order to obtain the loan. We find the loan agreement did not fall within the Statute of Frauds.

Alan also argues that if the loan was not given in consideration of marriage, then it fails for want of consideration. Alan, however, has received consideration in the form of the interest-free loan from appellees. Since he received consideration from appellees, he cannot use a lack of consideration as a defense to appellees' claims. Cf. Union Story Trust & Sav. Bank v. Soyer, 332 N.W.2d 316, 322 (Iowa 1983) ("[F]ailure of consideration must ordinarily be total in order to be a complete defense to the return performance of the contracting party."). Additionally, we find Alan provided consideration for the loan in the form of his promise to use the money to facilitate the finalization of his divorce from Mary Nicks, and pay back the loan as soon as he was able. In this respect, "consideration" is either a benefit given or to be given to the person who makes the promise or a detriment

experienced or to be experienced by the person to whom the promise is made. Powell v. McBlaine, 222 Iowa 799, 803, 269 N.W. 883, 885 (1936). Additionally, we further find that appellees proved the remaining elements of their contract claim.

Finally, Alan argues the district court erred in failing to grant a new trial. As this court noted in Nouvenagle v. Wright, 340 N.W.2d 787, 785 (Iowa App. 1983): "[A] trial court has broad discretion in passing on motions for new trials and only when there is clear abuse of that discretion will we interfere with a ruling upon the motion." The entire basis for appellant's motion concerned the application of the statute of frauds to this case. Having already determined the inapplicability of the statute of frauds here, we find no abuse of discretion in the trial court's ruling.

AFFIRMED.