IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

FIRST NATIONAL BANK IN SIOUX CITY, IOWA,	)	
Plaintiff-Appellant,	)	Filed February 26, 1985
vs	)	
THOMAS S. GILL, BARBARA E. GILL, G & G INCORPORATED, GARALD GILLIES, and UNION STATE BANK,	)	4-424 84-73
Defendants,	)	
RON HANNA REALTY, INC., GARY F. PAYNE, and PATRICIA L. PAYNE,	)	
Defendants-Appellees.	)	

Appeal from the Iowa District Court for Woodbury County, Phillip S. Dandos, Judge.

Plaintiff bank appeals from judgment for defendants in an action for enforcement of an oral promise, asserting that the evidence was insufficient to support the trial court's finding that plaintiff did not rely on the promise. REVERSED AND REMANDED.

George F. Madsen and William Kevin Stoos of Shull, Marshall & Marks, Sioux City, for plaintiff-appellant.

Michael E. Ellwanger of Kindig, Beebe, Rawlings, Nieland & Killinger, Sioux City, for defendant-appellee Hanna Realty.

Heard by Oxberger, C.J., Donielson, and Hayden.

First National Bank in Sioux City, the plaintiff below, has appealed the trial court judgment for defendants in its action for enforcement of an oral promise. The court found the promise was made, but not relied upon. We reverse and remand.

Defendants Thomas and Barbara Gill deposited in plaintiff bank a check for $15,000 in connection with their purchase of real estate owned by defendants Gary and Patricia Payne. A cashier's check for $9500 was issued by the bank to defendant real estate broker before the bank learned that the $15,000 check would be dishonored due to insufficient funds. The matter of collecting the $15,000 was turned over to the bank's legal department but no attempt was made to collect the $9500 from the broker. Sometime within the next month an officer of the bank, Orville Rysta, met the broker, Ron Hanna, with whom he was acquainted, at a regularly scheduled real estate luncheon. He later testified that the broker at that time promised not to disburse the $9500 from the trust account in which it had been placed until the bank had further investigated the problem with the $15,000 check. The broker disbursed the $9500 approximately a month after the luncheon.

Plaintiff bank's petition at law, inter alia, sought recovery of the $9500 from the broker and the sellers for whom he acted as agent, based on breach of the alleged promise. At trial the broker admitted knowing that the real estate deal was shaky but denied that he had made any promise, while the bank officer testified that if the promise had not been made he would have suggested to the bank's lawyers that they attempt to get hold of the $9500. The trial court found that the broker had stated that he would wait until the bank found out why the $15,000 check was stopped before disbursing the $9500 in the trust account, but further found nothing to show that the bank relied on the promise.

Appellant's brief separately states as an issue whether the evidence was sufficient to support the trial court's finding that the disbursement was in March 1983. By nunc pro tunc order on limited remand from the supreme court, the trial court corrected its entry of judgment for defendants to show that the disbursement was in March 1981.

The trial court findings of fact cannot be upheld if not supported by substantial evidence or when they do not justify the conclusions of law drawn from them. Alsco Iowa, Inc. v. Jackson, 254 Iowa 837, 839, 118 N.W.2d 565, 567 (Iowa 1962).

The bank in this case has relied on the theory of promissory estoppel. The elements of this claim are outlined at Warder & Lee Elevator Inc. v. Britten, 274 N.W.2d 339, 343 (Iowa 1979). It must be shown that a promise was made, that the promisor should have reasonably expected it would induce action or forbearance, that the promise induced the action or forbearance, and that the promise must be enforced in order to prevent injustice. Id. The proof must be made through clear and convincing evidence. United Properties, Inc. v. Walsmith, 312 N.W.2d 66, 73 (Iowa Ct. App. 1981).

Rysta approached Hanna at the meeting and said, "I need your help." The two discussed the situation and Rysta asked Hanna if he would hold up the loan closing between Gill and Payne until the bank determined why the payment on the orginal $15,000 had been stopped. Rysta testified Hanna replied, "Yes, absolutely," that he would not close the transaction.

Hanna and Rysta had known each other for seven years professionally at the time of the conversation, and Hanna had dealt with Rysta in his capacity as a bank officer. Rysta indicated he believed Hanna would not disburse the funds after the promise was made because he knew Hanna's reputation to be excellent and considered Hanna a man who could be held to the oral promise. He told the individual working on the collection of the monies, David Ranschau, that he should trust Hanna and should hold off collecting the money from him. Ranschau

testified he, too, was aware of Hanna's respect in the community. The professional trust between Hanna and Rysta was evidenced by the fact that Hanna openly discussed his client's financial affairs with Rysta. Ranschau says that because of Hanna's statement to Rysta, no collection attempts were made against Hanna.

The evidence defendant claims supports the court's finding includes the fact that no action was taken by the bank for an 18-day period after finding out about the bad check, that the conversation between Rysta and Hanna was not revealed to other bank personnel until ten days after the meeting, and no attempt was made by the bank to confirm the conversation.

The evidence presented supports the conclusion the bank decided to forego collection of the money from Hanna based on his statement, and evidence to the contrary does not rise to a substantial level. The short periods where action was not taken does not substantially show lack of reliance but shows, rather, there is clear and convincing evidence to the contrary. The defendant claims the bank could not have acted through Rysta because he was not involved directly in collection of the monies. However, the testimony shows he was assistant vice-president of the bank and that all officers are responsible in aiding in the collection of delinquent accounts. Hanna was aware of Rysta's position. Further, Rysta presented the information to the person responsible for the actual work of the collecting the money. A bank can only act through its officers, and the decision was made to rely on Hanna's statement.

The trial court concluded the promise had been made, despite Hanna's protests to the contrary, but found the bank did not rely on the promise. However, forbearing in taking action against another is reliance. Warder, 274 N W.2d at 343; Restatement, (Second) of Contracts §§ 90, 139 (1981).

Defendant claims that even if the promise resulted in justifiable reliance, the promise was not breached. The promise, defendant says, was to hold the funds until the bank found out why the check had been stopped. The bank already knew the check had been stopped for insufficient funds.

We believe this question goes more to the issue of whether equity requires us to uphold enforcement of the promise. The factors to consider in making such a determination include the following:

> (a) the availability and adequacy of other remedies particularly cancellation and restitution;
> (b) the definite and substantial character of the action or forbearance in relation to the remedy sought;
> (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;
> (d) the reasonableness of the action or forbearance;
> (e) the extent to which the action or forbearance was foreseeable by the promisor.

Id. It would have been reasonable for the bank to presume, based on the statement of Hanna, that it would be contacted before action was taken regarding the funds. No time limit was set in the terms of the promise, and we find it was foreseeable that the bank would believe the realtor would wait or contact the bank before action.

These factors aside, the evidence shows Hanna knew the words were not to be so strictly construed. During the conversation, Rysta told Hanna that while Hanna held the funds, attempts would be made to start action against the bank of North Dakota and against the Gills to collect the money. Hanna indicated to Rysta he understood that he should not close the loan until it was known if the money could be collected elsewhere. To limit the agreement not to disburse the funds until the bank had actual knowledge of the reason behind the return of the check would render the statement meaningless. Both parties knew the check was returned for insufficient funds. The statement had to mean more than what the bank would have it include.

The defendant argues in the alternative that even if there had been reliance, the bank was in error in believing it could have attached the funds in Hanna's hands in the first place. The money did not belong to Hanna, and instead he was only acting as an agent for the Paynes.

Our Code indicates that when one person is holding funds for another, and action could be taken against the principle, the funds in the hands of the agent may be garnished. Iowa Code § 639.25 (Iowa 1983). The bank could have proceeded to court against the principal, obtained judgment, and garnished the money in the hands of Hanna. Instead, the bank forebore from the action because of the statements made.

Another argument advanced by defendant is that the statute of frauds applies, and no proof may be presented of the oral contract because it was a guarantee by Hanna to pay the money to the bank if the Paynes would not return the funds. Iowa Code § 622.32(2)(1983).

We believe this characterization stretches the definition of a guarantee too far; in any case, our courts have held that promissory estoppel was intended to defeat a statute of frauds defense. Warder, 274 N.W.2d at 343.

We find that, in light of the trial court's finding that the promise was made, there was insufficient evidence to support the finding there was not reliance. We reverse and remand for entry of a judgment consistent with this opinion.

REVERSED AND REMANDED.