FILED
SEP 23 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA 621

LAVERN J. MANNING,

Plaintiff-Appellee,

vs.

JOE McGONEGLE, SR.,

Defendant-Appellant.

Filed September 23, 1980

0-274
64413

Appeal from Clinton District Court - Nathan Grant, Judge.

Defendant seller appeals from judgment for plaintiff buyer resulting from an alleged breach of warranty in a sale of cattle. AFFIRMED.

William B. Norton & Donald B. Clark of Norton, Freese, Zearley & Bates, Lowden, Iowa, for defendant-appellant.

Simon Rasche, Jr., Camanche, Iowa, for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant seller appeals from judgment for plaintiff buyer resulting from an alleged breach of warranty in a sale of cattle. Defendant makes three claims: 1) the evidence is insufficient to establish that an express warranty under section 554.2313, The Code, was created by his conduct, 2) plaintiff cannot recover damages because he did not give notice of the breach within a reasonable time of its alleged occurrence as required by section 554.2607(3)(a), The Code, and 3) plaintiff cannot recover damages because he did not plead notice of breach of warranty.

Plaintiff bought sixty-nine heifers from defendant on October 8, 1977 for feeding purposes. Defendant represented to plaintiff that the heifers were "open"; that is, were not pregnant. Plaintiff said he would not have bought them had they been represented as being other than "open." About three months later, plaintiff observed that a number of the heifers were, in fact, pregnant. Because the heifers had been fed as fat cattle prior to discovery of the pregnancies, they could not deliver properly; thus, all the newborn calves died as did five heifers. Plaintiff brought an action under express warranty, seeking $7,125 in compensatory damages. Following a nonjury trial, the trial court made findings of fact and conclusions of law that defendant expressly warranted the heifers to be open, that some were in fact pregnant, and that plaintiff was damaged in the amount of $2,360. This appeal followed.

I. Defendant raises the following issues: 1) whether defendant's representations as to the heifers not being pregnant were an express warranty, breach of which could result in a money judgment for plaintiff, 2) whether plaintiff gave defendant sufficient notice of the breach within a reasonable time as required by section 554.2607(3)(a), The Code, and 3) whether plaintiff's failure to plead notice of breach of warranty bars recovery.

Section 554.2313, The Code, provides in relevant part as follows:

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description. * * *

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

623

In addition, we believe various pre-UCC cases provide principles of continuing validity--for example, express warranties may be either written or oral. Hoopes & Sons v. Simpson Fruit Co., 180 Iowa 833, 839-40, 161 N.W. 629, 631 (1917). Seller's good faith in making express warranties is no defense to breach of such warranties. Cavanaugh v. Spring Valley Stock Farm Co., 206 Iowa 893, 896, 221 N.W. 512, 513 (1928). Finally, "[a] vendor is bound by his representations as to the quality and condition of his property, when it is understood between him and the purchaser that the purchaser does not rely upon his own knowledge or examination, but relies upon the statements made to him by the vendor." Evans v. Palmer, 137 Iowa 425, 427, 114 N.W. 912, 913 (1908).

Whether seller's assertions regarding quality or condition of goods are an express warranty or merely opinion is a question of fact. Cavanaugh, 206 Iowa at 896, 221 N.W. at 513. Trial court here made findings of fact that an express warranty was created and that plaintiff notified defendant of the breach within a reasonable time. Those findings are binding on this court if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

The record contains substantial evidence to support trial court's findings that an express warranty was created and that plaintiff relied on that warranty in buying the heifers; i.e., the warranty became part of the basis of the bargain. Between October 4 and 8, 1977, defendant told plaintiff in a phone conversation that he had some additional heifers to sell to plaintiff and that they were "open." In addition, plaintiff's Exhibit #2 shows a piece of paper on which defendant calculated the price to be paid for the heifers delivered October 8. He wrote the word "open" on the paper and underlined it. Plaintiff testified he took defendant's word that the heifers were not pregnant and began feeding them as fat cattle in reliance on that representation. He further stated he would not have bought those heifers if they had been represented as other than "open."

Thus, the record indicates defendant gave plaintiff more than a simple opinion as to the condition of the heifers; he instead made more than one affirmation of fact that the heifers were not pregnant. Trial court was correct in finding an express warranty was created by defendant's actions.

II. Defendant also claims plaintiff did not give sufficient notice of the breach. According to § 554.2607(3)(a), The Code, "Where a tender has been accepted (a) the buyer must within a reasonable time after he discovers or should have discovered any breach, notify the seller of breach or be barred from any remedy." Trial court found plaintiff gave notice of the breach within a reasonable time when he discovered some of the heifers were pregnant. Again there is substantial evidence to support this finding. Plaintiff testified he made telephone complaints to defendant after the heifers started to deliver their calves. He called defendant several times but it was a month or two before defendant went out to plaintiff's farm to investigate. Defendant complains this testimony was inadmissible since it was elicited during redirect examination of plaintiff where the issue of notice of breach to defendant had not been raised prior to that time. Trial court overruled defendant's timely objection, ruling the testimony was admissible because it concerned the entire transaction. Trial court did not abuse its discretion in so ruling. See Lewis v. Susmilch, 130 Iowa 203, 106 N.W. 624 (1906).

III. Lastly, defendant claims plaintiff may not recover because he did not plead that he gave notice of breach of warranty to defendant within the required reasonable time. The Iowa Supreme Court has made it clear that such notice must be pleaded before recovery may be had. In Winter v. Honeggers' & Co., Inc., 215 N.W.2d 316, 327 (Iowa 1974), is found the following language:

> In construing section 554.2607(3)(a), The Code, which requires a buyer to give notice of a breach of warranty to the seller within a reasonable time after the buyer discovers, or should have discovered, the alleged breach, it is our opinion the giving of the notice must be pleaded as a condition precedent to recovery. (emphasis added)

In his petition in the present case, plaintiff did not plead that notice was given to defendant of the alleged breach of warranty. We are not convinced, however, that this circumstance requires reversal of the judgment.

The issue was raised in a motion for directed verdict which was taken under advisement by the trial court. No ruling was ever made on this motion. We believe that if the trial court had concluded, prior to submission, that the pleadings were fatally defective, plaintiff should have been permitted to amend to conform to proof. The issue of notice had been tried by consent under Iowa R. Civ. P. 249. We can find no prejudice which has resulted to defendant from plaintiff's failure to specifically allege the giving of notice. In such instances, amendment after final verdict has been held to

be permissible. See Weidert v. Monahan Post Legionnaire Club, 243 Iowa 643, 51 N.W.2d 400 (1952). But, to remand at this time to permit such amendment would be a useless and needless gesture. We conclude that the better course of action is simply to affirm the judgment of the trial court.

AFFIRMED.