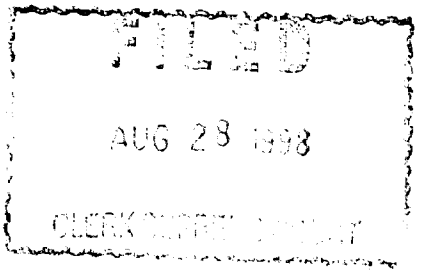
IN THE COURT OF APPEALS OF IOWA



No. 7-538 / 96-1230
Filed August 28, 1998

IOWA STATE BANK & TRUST COMPANY OF FAIRFIELD, IOWA,
Appellee,

vs.

KENNETH CAHILL,
Appellant,

HAWKEYE HOLDINGS INTERNATIONAL, INC., TIM MORRISSEY, and MATTHEW McGAFFICK,
Defendants.

Appeal from the Iowa District Court for Jefferson County, Robert Bates, Judge.

Kenneth Cahill appeals from a money judgment in favor of Iowa State Bank and Trust of Fairfield, Iowa. **AFFIRMED.**

Ann M. Cisco, Timothy S. White, and Allison M. Heffern, of White & Johnson, P.C., Cedar Rapids, for appellant.

Myron L. Gookin of Foss, Kuiken & Gookin, P.C., Fairfield, for appellee.

Heard by Huitink, P.J., and Vogel and Mahan, JJ.

HUITINK, P.J.

Kenneth Cahill appeals from the district court ruling finding him personally liable on a $200,000 promissory note. We affirm.

I. Background Facts and Proceedings.

Matthew McGaffick, Tim Morrissey, and Kenneth Cahill are shareholders of Hawkeye Holdings International, Inc. (HHI). In December 1993, McGaffick secured a $200,000 line of credit from Iowa State Bank (ISB) to finance HHI's business ventures. After loan approval, a bank officer prepared a promissory note that required multiple signatures of each shareholder in their corporate and personal capacities. McGaffick was given the original note and copies so the signatures of the other shareholders could be obtained. Upon obtaining the required signatures, McGaffick returned the documents to ISB.

Beginning in January 1994, ISB advanced $200,000 to HHI on its credit line. ISB received three interest payments on HHI's note from an unrelated company. No other payments were received. ISB filed this action in October 1994 against HHI, Cahill, Morrissey, and McGaffick alleging all were jointly and severally liable for the unpaid balance of HHI's obligations to ISB. Cahill denied signing the promissory note. He affirmatively alleged no contract existed because there was no "meeting of the minds" on the terms of his obligations to ISB. Cahill also alleged the bank's claims against him were barred by principles of estoppel and waiver.

Cahill's answer included counterclaims against ISB for negligence, conspiracy to fraudulently obtain his personal guaranty, and breach of fiduciary duty. Cahill also cross-claimed against McGaffick for fraudulent nondisclosure of the terms of Cahill's personal obligation to the bank.

Prior to trial, ISB designated a handwriting expert who was called to testify regarding the authenticity of the signatures on the promissory note. Cahill moved to strike the expert's testimony citing discrepancies in the expert's original report and intended trial testimony disclosed on the day before trial. Cahill's motion to strike was denied and the witness testified Cahill's signature on the note was authentic.

The district court, following a bench trial, found Cahill was personally liable for HHI's obligations to the bank. Cahill's affirmative defenses were rejected and his counterclaims dismissed on their respective merit. The district court, however, found in Cahill's favor on his fraudulent nondisclosure claims against McGaffick and entered judgment accordingly. In addition, ISB was awarded $15,000 of the $27,724.32 of attorney fees and costs incurred in the course of these proceedings.

On appeal, Cahill contends the district court erred in denying his motion to strike testimony from ISB's handwriting expert. Cahill also argues the district court erred in rejecting his affirmative defenses and finding him personally liable for the unpaid balance of the remaining note.

Cahill additionally argues the district court erroneously rejected the tort theories he advanced in his counterclaims. Lastly, Cahill claims ISB is liable for

McGaffick's fraudulent nondisclosure as ISB's agent and it was error for the district court to conclude otherwise.

ISB contends the district court should have awarded the entire amount of attorney fees and costs incurred in these proceedings. ISB also demands an award of appellate attorney fees.

II. Standard of Review.

We review this law action for correction of errors. Iowa R. App. P. 4. Findings of facts are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). We construe the district court's findings broadly and liberally. *Grinnell Mut. Reins. Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988). We are prohibited from weighing the evidence or the credibility of the witnesses. *Id.*

> A finding of fact is supported by substantial evidence if the finding may be reasonably inferred from the evidence. In evaluating sufficiency of the evidence, we view it in its light most favorable to sustaining the court's judgment. We need only consider evidence favorable to the judgment, whether or not it was contradicted.

Briggs Transp. Co. v. Starr Sales Co., 262 N.W.2d 805, 808 (Iowa 1978).

"Evidence is substantial or sufficient when a reasonable mind could accept it as adequate to reach the same findings." *Waukon Auto Supply v. Farmers & Merchants Sav. Bank*, 440 N.W.2d 844, 846 (Iowa 1989)(citation omitted).

III. Motion to Strike ISB's Expert Witness.

We review the district court's ruling for an abuse of discretion. *Shawnan v. Polk County*, 420 N.W.2d 808, 809 (Iowa 1988). In order to show an abuse of

discretion one must generally show the court abused its discretion "on grounds or for reasons clearly untenable to an extent clearly unreasonable." *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976)(citations omitted).

The result of the district court's ruling was to allow ISB's handwriting expert to testify that Cahill's signature on the relevant loan documents was authentic. This testimony was different from the content of the expert's original report containing an inadvertent omission. The record indicates Cahill's counsel was alerted to this discrepancy and offered an opportunity redepose the expert. Under these circumstances, we cannot say the district's courts refusal to strike the expert's testimony was an abuse of discretion. We affirm on this issue.

IV. Cahill's Liability on the Promissory Note.

ISB's theory of recovery was based on Cahill's liability as co-maker *and* guarantor of a promissory note. *See* Iowa Code § 554.3116 (providing for joint and several liability for co-makers of a promissory note). The record includes the original note which expressly provides for the obligation of each maker to repay ISB amounts advanced on HHI's line of credit. The note and expert testimony authenticating Cahill's signatures on the note, in the absence of a successful affirmative defense, provide substantial evidentiary support for the district court's determination Cahill was personally liable for the unpaid balance of the note.

V. Cahill's Affirmative Defenses.

Cahill's affirmative defenses were premised on the invalidity or unenforceability of the contract underlying the bank's theory of personal liability. He alleged no contract was formed because there was no "meeting of the minds" on personal liability as a condition to HHI's line of credit. Cahill also alleged any contract was void or voidable because he was mistaken as to its terms and McGaffick's fraudulent nondisclosure of its terms. In addition to these defenses, Cahill invoked principles of waiver and estoppel as a bar to ISB's claims against him.

A written agreement speaks for itself. *Morgan v. American Family Mutual Ins. Co.*, 534 N.W.2d 92, 99 (Iowa 1995). Absent fraud or mistake, ignorance of its contents will not serve to avoid or negate its consequences. *Id.* A party is charged with notice of its terms if the party is able to read it or has the opportunity to do so. *Id.*

The district court found:

> The documents in question were presented for signature to Morrissey and Cahill . . . . None of the . . . parties were prevented from reading or understanding both documents. The documents were clearly marked as to their contents. The place for affixing signature was marked in two places indicating one was for corporate responsibility and the other was for personal responsibility. Clear terms and wording of guarantee confirmed this situation. . . . [the] fact remains that financing was to be put in place. All three parties were aware of this fact. As businessmen, all three could expect that lenders do not provide credit to a newly formed corporation where two parties are unknown without some form of personal guarantee.

As noted earlier, we are bound by these factual determinations. There can be no serious dispute that each factual determination recited above is abundantly supported by the record.

Appeals are routinely controlled by our scope of review. *Ezzone v. Riccardi*, 525 N.W.2d 388, 391 (Iowa 1994). This case provides no exception. We note within the confines of the above findings of fact, sufficient grounds to affirm the district court's disposition of each affirmative defense raised.

Cahill's "meeting of the minds" defense is irreconcilable with his actual and imputed knowledge. The fact that Cahill was unaware of his obligations or the content of the loan documents cannot be credibly supported on this record. Any notion that the underlying contract was void or voidable also fails by virtue of evidence of Cahill's knowledge and conduct. The district court correctly noted Cahill's failure to void the contract even if it were voidable.

The doctrine of equitable estoppel rests on fair dealing, good faith, and justice. *In re Marriage of Gallagher*, 539 N.W.2d 479, 482 (Iowa 1995). A party asserting equitable estoppel must prove: (1) a false representation or concealment of a material fact by the actor; (2) lack of knowledge of the true facts by the other party; (3) the actor's intent the other party act upon the representation or concealment; and (4) detrimental reliance upon the representation or concealment by the other party. *Id.*

Cahill has failed to prove the first and third elements of estoppel. There is no evidence ISB misled Cahill or concealed material facts when Cahill signed the

promissory note. Because ISB did not make any false representation or conceal any material facts, the district court correctly held Cahill acted to his detriment. Additionally, substantial evidence indicates Cahill was aware he was signing the note personally and on behalf of HHI. We affirm the district court on this issue.

Cahill finally asserts the affirmative defense of waiver. He argues ISB waived its rights under the note when it failed to: (1) verify Cahill's unnotarized signature on the note; (2) investigate McGaffick's loan documentation; and (3) notify Cahill of McGaffick's $85,000 withdrawal from HHI's account.

Waiver is "[t]he intentional or voluntary relinquishment of a known right . . . ." Black's Law Dictionary 1580 (6th ed. 1990). Waiver can be express or implied. *In re Guardianship of Collins*, 327 N.W.2d 230, 233-34 (Iowa 1982). The elements of waiver are: (1) the existence of a right; (2) actual or constructive knowledge of it; and (3) an intention to give it up. *Id.* (citation omitted).

Because the record discloses no evidence ISB intended to relinquish any rights under the note, the district court correctly rejected Cahill's waiver defense. We affirm on this issue.

V. Cahill's Counterclaims.

A. Negligence. Cahill claims the bank owed him a duty of care in the extension and management of HHI's line of credit. This duty of care, Cahill argues, is separate from any of ISB's contractual duties imposed by the terms of the

promissory note and personal guarantee he signed. The district court determined, as a matter of law, ISB owed no such duty independent of its contract with Cahill.

Before actionable negligence exists, a defendant must owe the plaintiff a duty of care. *Peters v. Burlington Northern R.R. Co.*, 492 N.W.2d 399, 401 (Iowa 1992). Whether a person owes the plaintiff a duty of care is an issue of law for the courts to determine. *See Tuenisser v. Orkin Exterminating Co.*, 484 N.W.2d 589, 591 (Iowa 1992). Persons who deal in commercial transactions at arm's length do not have a duty to the other to use reasonable care. *Greatbach v. Metropolitan Federal Bank*, 534 N.W.2d 115, 117 (Iowa App. 1995).

Under some circumstances, breach of a contractual duty may give rise to an independent action in tort. *Preferred Marketing v. Hawkeye National Life*, 452 N.W.2d 389, 397 (Iowa 1990). This distinction has been explained in these terms: "[I]f a relation exists which would give rise to a legal duty without enforcing the contract promise itself, the tort action will lie, otherwise not." *Id.* We, like the district court, find no duty independent of Cahill's contract relationship with ISB. We affirm on this issue.

B. Negligent Misrepresentation, Fraudulent Misrepresentation, and Breach of Fiduciary Duty. All of these theories of liability are premised on McGaffick's role as ISB's agent. An agency relationship is created upon a manifestation of consent by both parties, the principal, and the agent. *Farmers Grain Co., Inc. v. Irving,* 401 N.W.2d 596, 601 (Iowa App. 1986)(citation omitted). The

principal agrees the agent shall act on the principal's behalf and subject to the principal's control. *Id.* The agent consents to so act. *Id.* Cahill bears the burden of proving an agency relationship existed between McGaffick and ISB. *Id.*

ISB provided Cahill and Morrissey written instructions, including a cover letter and post-it notes, for signing the promissory note. There is no direct evidence ISB consented to McGaffick acting as its agent or sought to control McGaffick's actions. Likewise, there is no evidence McGaffick consented to act on ISB's behalf or subject to its control. McGaffick merely delivered the note to Cahill and Morrissey.

Cahill has also failed to prove an agency by estoppel. There is no evidence McGaffick represented himself as acting on ISB's behalf at the time Cahill and Morrissey signed the note. There is also no evidence Cahill or Morrissey relied upon the appearance McGaffick was ISB's agent. *See* 3 Am.Jur.2d Agency, § 19, p. 523. The district court's contrary conclusions find abundant support in the record.

The district court correctly found there was no agency relationship between McGaffick and ISB. Accordingly, all of Cahill's claims premised on this relationship fail. We affirm on this issue.

*C. **Civil Conspiracy.*** Cahill alleges ISB and McGaffick conspired to fraudulently obtain his personal guarantee on HHI's obligation. The district court found Cahill failed to establish a conspiracy.

A civil conspiracy is a "combination of two or more persons who accomplish through concerted actions, an unlawful end or a lawful end by unlawful means."

Tubbs v. United Central Bank, N.A. Des Moines, 451 N.W.2d 177, 183-84 (Iowa 1990). To establish a conspiracy, a party must prove the existence of an agreement between two or more persons to commit a wrong against another. *Ezzone v. Riccardi*, 525 N.W.2d 388, 398 (Iowa 1994). The agreement must involve "some mutual mental action, coupled with an intent to commit the act that causes injury." *Id.*

Although Cahill offered circumstantial evidence from which any of the foregoing may have been inferred, the district court declined to make the required inferences. The district court, as the finder of fact, was free to accept or reject Cahill's contrary assertions. We are bound by the district court's findings and accordingly affirm on this issue.

IV. Attorney Fees and Costs.

The promissory note Cahill signed expressly provides for an award of attorney fees. Under these circumstances, ISB can recover attorney fees, including appellate attorney fees in an action on this promissory note. *Farmers Bank Unionville v. Erpelding*, 555 N.W.2d 222, 226 (Iowa 1996)(citing *Federal Land Bank v. Woods*, 480 N.W.2d 61, 66 (Iowa 1992). We decline to review the trial court's award of attorney fees. Although ISB was the prevailing party on issues of liability, it did not prevail on this issue. Because ISB was obliged to appeal to obtain the relief demanded, any errors on this issue have been waived by its failure to cross-appeal. *See Johnston Equipment v. Industrial Indemnity*, 489 N.W.2d 13, 16 (Iowa 1992).

Based on the content of the affidavit included in ISB's brief, we award ISB $7165.00 for attorney fees and costs incurred in this appeal.

V. Summary.

We have considered all of Cahill's appellate contentions and find them to be without merit. The judgment of the district court is affirmed.

AFFIRMED.