

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

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FIRST NATIONAL BANK OF SIBLEY,)
Sibley, Iowa)

Plaintiff/Cross-Appellant,)

vs)

DRENKOW MOTOR CO., INC. A Corporation.)
and RONALD DRENKOW, Individually)

Defendants/Appellants.)

119 - $\frac{5-414}{84-737}$

Appeal from the Iowa District Court for Osceola County - Charles H. Barlow, Judge.

Defendant appeals and plaintiff bank cross-appeals from the judgment entered in an action upon a note and the judgment entered in the counterclaim for breach of contract. **AFFIRMED IN PART AND REVERSED IN PART.**

Harold O. Postma, Orange City, for defendants/appellants.

Richard D. Zito and Daniel E. DeKoter of Corcoran, Skiver, Zito, DeKoter & Thole, Sibley, for plaintiff/cross-appellant.

Heard by Oxberger, C.J., and Snell, and Sackett, JJ.

SACKETT, J.

Plaintiff bank sued defendant on a written promissory note. Defendant counterclaimed contending plaintiff had breached a deposit agreement. Following a jury trial, judgment was entered for plaintiff on the promissory note for \$27,482.35 plus interest of \$14,386.48 and attorney fees of \$2,000. The jury returned a verdict in favor of defendant for \$20,000 plus \$16,386.48 for interest and attorney fees. The trial court partly sustained a motion for judgment notwithstanding the verdict filed by plaintiff and set aside the \$16,386.48 award leaving defendant with a judgment against plaintiff in the amount of \$20,000.

Defendant appealed contending the trial court erred in reducing the verdict and failing to grant a new trial. Plaintiff has cross-appealed contending there was not substantial evidence in the record to sustain a verdict on defendant's counterclaim.

We shall first address the issue of whether there was substantial evidence in the record to sustain the jury verdict for defendant on his counterclaim for breach of contract. The jury's findings of fact are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). Evidence is substantial for purposes of sustaining a finding by the trier of fact when a reasonable mind would accept it as adequate to reach a conclusion. Baty v. Binns, 354 N.W.2d 777, 780 (Iowa 1984).

Viewing the evidence in the light most favorable to the verdicts, the jury could find the facts substantially as follows. Defendant Ronald Drenkow (hereafter Drenkow) opened a car dealership in Sibley, Iowa in 1977. The dealership was owned by Defendant Drenkow Motor Co., Inc. and operated in a temporary location. Drenkow obtained an SBA loan to finance the business and to build a new dealership. He placed \$25,000 of the loan proceeds in a savings account at plaintiff bank in May 1978. Drenkow testified he and the bank president

agreed this savings "reserve account" was to be withdrawn only on Drenkow's authorization since it was to be used as working capital for the car dealership. Drenkow Motor Co., Inc. had a second savings account and a checking account at the bank at the time the \$25,000 loan proceeds were deposited to the reserve account.

In July and August of 1978, plaintiff bank transferred funds of \$21,000 from the reserve account to Drenkow Motor Co., Inc.'s checking account to cover overdrawn checks. Defendant's counterclaim for breach of contract alleges that Drenkow did not authorize this transfer of funds from the reserve account to the checking account and that as a result defendant was damaged. There is no allegation that these funds were misappropriated, lost, or missing.

We agree wholeheartedly with Drenkow that the bank breached its agreement with him involving the reserve account. When the bank enters into an agreement not to transfer funds without a specific person's authorization, then it is bound by that agreement. We next turn to the issue of damages. Defendant claims as damages the operating losses for its car dealership for fiscal year 1978-79 and 1979-80 by loss of franchise and value of a going business and by having to continue fixed payment expenses on a building after the close of the business (consisting of interest paid on the SBA loan, insurance premiums, and real estate taxes). Defendant alleged that the reserve account was for the car dealership's working capital and that without the working capital requirement the business failed.

Plaintiff bank argues that there is no evidence in the record to support Drenkow's assertion that the decline in profitability of the car dealership was caused by the transfers from Drenkow's reserve account to Drenkow's checking account. The bank contends that Drenkow incurred no damages at all since there was no loss or decrease to Drenkow's total funds.

The record indicates that the manager of Drenkow Motor Co., Inc. wrote several checks in July and August of 1978 and that the checking account had insufficient funds to cover these checks. Drenkow does not dispute the fact that these checks were written for business expenses that were due and owing. Drenkow does not dispute that the \$21,000 from the reserve account was used to cover these checks. The evidence shows that Drenkow himself withdrew \$2,500 from the reserve account on June 6, 1978. Drenkow testified that he first discovered that the July and August transfers had been made on September 10, 1978 when he went to the bank to withdraw money from the reserve account to cover the business' overdrawn checking account. Drenkow also testified that for the fiscal year ending July 1, 1978, the car dealership lost approximately \$200 and that between July and September 1978 the business lost approximately \$4,000.

In support of his claim for lost profits, defendant relies on Harsha v. State Savings Bank, 346 N.W.2d 791 (Iowa 1987), in which a business recovered lost profits from its bank for breach of an agreement. In Harsha the court found that the bank had agreed to loan the business \$25,000 and then later would only loan it \$15,000. Id. at 794. We believe Harsha is distinguishable from defendant's case in that the business in Harsha had \$10,000 less in operating funds. In defendant's case, there was no loss or decrease in Drenkow's total funds. The money from the reserve account was used to cover the business' overdrawn checking account.

And even if Drenkow had shown a loss in operating funds, this case is distinguishable because in Harsha a well-qualified expert testified and "carefully explained to the jury the nature and source of the facts he relied on in formulating his opinion" concerning future profits. Id. at 798. In Drenkow's case, no such

expert testified. No factual data was presented by defendant which would furnish a basis for compilation of probable loss of profits for his car dealership. See Harsha at 798. Drenkow failed to introduce sufficient substantial evidence that the 1978 transfers were linked to the lost profits and subsequent failure of the business in 1980. We find no evidence in the record of any loss or decrease in Drenkow's total funds from which he could claim damages.

Damages which are speculative, contingent, conjectural, remote, or uncertain will not be recoverable. Shinrone, Inc. v. Tasco, Inc., 283 N.W.2d 280, 286 (Iowa 1979). Defendant failed to prove its damages with reasonable certainty.

We cannot find substantial evidence in the record to support the jury's finding that the alleged breach of contract resulted in the failure of Drenkow's car dealership. We do not find it necessary to address the other issues on appeal. The judgment entered against the defendant on the promissory note is affirmed, and the judgment entered against the plaintiff in the counterclaim for breach of contract is reversed.

AFFIRMED IN PART AND REVERSED IN PART.¹

¹ We refer appellee's counsel to Iowa Rule of Appellate Procedure 16(a) which provides: "The appendix and brief shall be printed or duplicated on both sides of the sheet." The rule also provides that the cover of the appellee's brief should be red.