FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

F. S. CREDIT CORPORATION,

Plaintiff-Appellee/Cross-Appellant,

vs.

SHEAR ELEVATOR, INC., and DeWAYNE SHEAR,

Defendants-Appellants/Cross-Appellees.

Filed June 25, 1985

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84-28

Appeal from the Iowa District Court for Butler County - John F. Stone, Judge.

Defendants appeal from an adverse judgment in an action for an alleged conversion of secured grain sold by debtors of the plaintiff to the defendants. AFFIRMED IN PART AND MODIFIED IN PART.

Stephen P. Carroll, of Hobson, Cady & Drew, Hampton, for defendant-appellant.

John T. McCoy, of Lindeman & Yagla, Waterloo, for plaintiff-appellee.

Heard by Snell, P.J., and Hayden and Sackett, JJ.

Facts

Kenneth and Karen Kettwig were engaged in farming. They purchased farm supplies from Butler-Grundy Farm Service (Butler). Butler sold supplies to the Kettwigs on open account. They were billed for the purchases and then had an option to pay the account or participate in an extended credit arrangement through Plaintiff F.S. Credit Corporation (F.S.).

The Kettwigs had established a $20,000 line of credit with F.S. Each time a bill was sent, a promissory note was sent. They could either pay the bill or sign the note. If the note was signed, the bill would then be paid to Butler by F.S.

In 1976 and 1977, under this arrangement, the Kettwigs became indebted to F.S. by signing security agreements and promissory notes giving a security interest in their crops. Their line of credit was set at $20,000, according to the security agreement. The security agreement and financing statement were properly executed and filed. In 1976 the Kettwigs paid their debt to F.S. in full.

In July of 1977, the Kettwigs' line of credit was increased $5,000. During 1977, seven promissory notes were purportedly signed by either one or both of the Kettwigs and delivered to F.S., which in turn made payments of $25,000 on the Kettwigs' Butler bill.

In the fall of 1977 and early 1978, the Kettwigs sold the crop collateral to Defendant Shear Elevator. Payment for the grain was made one-half to the Kettwigs and one-half to the landlords. Shear Elevator did not check the filing with the secretary of state and was unaware of F.S.'s security interest in the crop.

When the Kettwigs failed to pay the debt and interest when it became due, F.S. brought an action for conversion of the 1977 secured crop against Shear Elevator and owner DeWayne Shear.

Following a trial to the court, judgment was entered for F.S. and against defendants for $25,000 plus interest. Defendants received a credit of $902.16,

which they had paid to plaintiff for the 1978 crop and a credit of $750, paid to plaintiff by another elevator.

Defendants contend the trial court erred: (I) in ruling there was sufficient evidence the debtors had signed the promissory notes, (II) in ruling that plaintiff did not impliedly authorize the sale of grain by a course of dealing or usage of trade, (III) in ruling that plaintiff was secured to the extent of $25,000 and (IV) by not reducing the judgment by the amount received by plaintiff in the settlement of another action.

Plaintiff contends in their cross-appeal that the trial court erred in limiting the amount of plaintiff's judgment to the principal amount of the secured debt and by failing to include appropriate interest.

We affirm in part and modify in part.

I.

Defendants initially contend there was insufficient evidence that at least one of the Kettwigs had signed each of the 1977 promissory notes, and the trial court erred in so holding. The trial court determined that "the plaintiff has established by a preponderance of the evidence that either Kenneth Kettwig or Karen Kettwig signed the promissory notes." We are bound by the trial court's findings of fact if they are supported by substantial evidence. Larsen v. Warrington, 348 N.W.2d 637, 640 (Iowa Ct. App. 1984).

There was no dispute on five of the notes - either Kenneth or Karen admitted signing them. The other two notes bore the signature "Kenneth Kettwig." Although Karen admittedly signed Kenneth's name on several of the other notes, on these two, both denied signing his name. Evidence indicated the two notes were sent by mail to the Kettwigs and subsequently returned signed to the Butler office. The Kettwigs knew if the notes were not signed the accompanying Butler bills must be paid. They did not pay the bills and allowed

F.S. to extend credit on those two notes. There was also evidence that Kenneth was drinking heavily during 1977 and suffered from memory lapses.

According to Iowa Code section 554.3307(1), "When the effectiveness of a signature is put in issue . . . b. the signature is presumed to be genuine or authorized. . . ." Presumption or presumed is defined in Iowa Code section 554.1201(31) as meaning "the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence."

In Uniform Commercial Code Comment 1 to Iowa Code section 554.3307, further explanation of the burden of proof is made:

> [U]ntil some evidence is introduced which would support a finding that the signature is forged or unauthorized the plaintiff is not required to prove that it is authentic. The presumption rests upon the fact that in ordinary experience forged or unauthorized signatures are very uncommon, and normally any evidence is within the control of the defendant or more accessible to him. He is therefore required to make some sufficient showing of the grounds for his denial before the plaintiff is put to his proof. His evidence need not be sufficient to require a directed verdict in his favor, but it must be enough to support his denial by permitting a finding in his favor.

Plaintiff's evidence showed the notes were mailed to the Kettwigs' residence, Karen admitted receiving them and Butler received the signed promissory notes back in the mail. Additional credit was then extended by plaintiff and accepted by the Kettwigs in reliance on the proper execution of the notes. These facts add additional support to the presumed validity of the signatures. Defendant failed to assert or present evidence the signatures were made by another or how another might have obtained access to the notes. In view of the weight of plaintiff's evidence, more than a mere denial by the Kettwigs is required to rebut the signatures.

The trial court ruling the signatures were valid is supported by substantial evidence and binding on this court.

II.

Defendants also contend the trial court erred in not finding that plaintiff had impliedly authorized the crop sale by a course of dealing or usage of trade.

A provision of the security agreement expressly prohibited sale of the crop collateral without the prior written consent of F.S.

> Debtor shall not sell, assign, encumber or transfer the collateral or any part thereof without the prior written consent of the Secured Party. No waiver of this provision shall be effective unless in writing and signed by the Secured Party.

Both parties agree that no written approval was ever requested by or given to the Kettwigs.

Absence of written consent is not determinative in this instance. In Ottumwa Prod. Credit Ass'n v. Keoco Auction, 347 N.W.2d 393, 395 (Iowa 1984), the security agreement in question contained a similar clause requiring written consent by the secured party prior to sale. The court held, even absent a writing, an express waiver would be found because the P.C.A. instructed the farmer to liquidate his inventory. Id. at 396.

Iowa Code section 554.9306(2) provides in part:

> Except where this article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange, or other disposition thereof, unless the disposition was authorized by the secured party in the security agreement or otherwise . . . (emphasis added).

Defendant relies on the "otherwise" language arguing that plaintiff impliedly authorized the grain sale by their course of dealing or usage of trade.

a. Course of Dealing

Course of dealing may be described as the previous conduct between parties which may be regarded as the basis for interpreting subsequent conduct. See Iowa Code §554.1205(1). Initially the Iowa court determined that a lender could impliedly authorize a sale by its prior course of dealing, at least where the

security agreement contained no express prohibition without written consent. Lisbon Bank & Trust Co. v. Murray, 206 N.W.2d 96, 99 (Iowa 1973). Eventually this course of dealing waiver was extended also to situations where the agreement prohibited sale absent the lender's written consent. See Hedrick v. Myers, 229 N.W.2d 252 (Iowa 1975).

We look at the parties' prior conduct to determine if F.S. had by their actions impliedly authorized the Kettwigs to sell the crop. F.S. and the Kettwigs had prior dealings in 1976 with the same type of loan and security interest in the 1976 crop. Defendants argue that loan was repaid with money obtained from a bank loan and the Kettwigs told a Butler employee they had borrowed the money to make the payment. Defendants also contend plaintiff knew the Kettwigs had no on-farm storage facilities and yet at no time did anyone from F.S. or Butler warn the Kettwigs against selling the grain. There is no evidence that F.S. had knowledge of the storage facilities. We refuse to determine whether the knowledge of Butler can be imputed to F.S., because even if F.S. had access to those facts, they do not support any implied authorization to sell. Payment of the previous loan by another loan is likewise unsupportive. As long as the debt was paid, F.S. had no need to inquire about the collateral securing the loan. Absent some agreement to the contrary, there is no requirement that F.S. supervise the grain to retain their security interest. That interest is protected by filing it with the secretary of state. See Iowa Code §§ 554.9302 and 554.9401(1)(c).

"[I]n order for a buyer to take collateral free of a properly perfected security interest under the 'course of dealing' doctrine . . ., that buyer must present proof of a course of dealing and show that the purchase involved was within that course of dealing." Larsen, 348 N.W.2d at 641. Defendants have failed in their proof, and their course of dealing argument must fail also.

b. Usage of Trade

A usage of trade is defined as:

> [A]ny practice or method of dealing, having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question.

Iowa Code §554.1205(2).

Defendants called two bankers to testify that it was the practice of banks in Butler and Grundy counties to never require written consent, but to trust the farmers to sell the collateral and account for the proceeds. Defendants argue this was such a common and regular practice in the community that the elevator was justified in the expectation F.S. would conduct its sales the same way.

The usage of trade argument is, however, inapplicable in this instance. Its usefulness is in interpreting the intent of the parties when their contract is ambiguous. Parties are free to contract in any way they desire, even though performance might be different than the usual practice of the community. As long as the contract terms are clear, they are controlling. See Iowa Code §§554.1205 (3-5). While the prior course of dealing between the two contracting parties may be important, in the absence of an ambiguity, the dealings of the rest of the community are irrelevant.

III.

Defendant additionally challenges the trial court ruling that plaintiff was secured to the extent of $25,000. The 1977 security agreement given by the Kettwigs to F.S. provided in part:

> This security interest is given to secure the performance of the covenants and agreements herein set forth and for payment of an indebtedness in the face amount of $20,000.00, as evidenced by a promissory note (s) or other instruments executed by the debtor, payable to the order of said secured party, as therein provided, and with interest as therein set forth.

After the security agreement was signed, F.S. sent a letter to the Kettwigs extending to them additional credit of $5,000.[1] F.S. then make payments totaling $25,000 for which the Kettwigs signed promissory notes.

A valid, enforceable security interest, with respect to the collateral, requires either possession of the collateral by the secured party or a signed security agreement. Iowa Code section 554.9203(1)(a). The Kettwigs signed a security agreement limiting the indebtedness to $20,000. Plaintiff admits that no formal written amendment to the security agreement was made, but argues the parties orally agreed to modify the amount of the debt. Since F.S. extended the additional $5,000, plaintiff contends the modification was valid.

We agree with plaintiff that the agreement modification was valid with respect to the debt owed by the Kettwigs. However, the oral agreement, absent a signed modification to the security agreement, was not adequate to create an additional $5,000 secured interest in the crop collateral. If we were to allow the secured interest to include the $5,000, we would introduce an element of uncertainty to commercial law that the Uniform Commercial Code was designed to eliminate.

> If security agreements which on their face served as collateral for specific loans could be converted into open-ended security arrangements for future liabilities by recitals in subsequent notes, much needless uncertainty would be introduced into modern commercial law. In effect, notes would take on the character of security agreements.

Safe Deposit Bank & Trust Co. v. Berman, 393 F.2d 401, 404 (1st Cir. 1968). The basis of the problem here, as in Safe Deposit Bank, is that plaintiff used an inappropriate form - the letter - to do what it apparently wished. Id.

Plaintiff also claims because section 554.9203(1) does not require the amount secured to be stated in the security agreement that it should not be limited to

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[1] Testimony indicated additional credit was extended pursuant to an oral request by the Kettwigs.

security of only $20,000. Iowa Code section 554.9203(1) requires a security agreement signed by the debtor which contains a description of the collateral, but no mention is made of the underlying obligation.

While recognizing that the statute does not require an amount to be stated, the fact is F.S. and the debtors contracted the security interest was not to exceed $20,000. No provision of section 554.9203(1) bars the parties from limiting by a dollar amount the creditor's interest. However, allowing the parties to limit the amount is consistent with the principles of general contract law. See First Northwestern Nat'l Bank v. Crouch, 287 N.W.2d 151, 153 (Iowa 1980).

We decline to determine on the facts before us whether the result might be different if defendant had left the amount open-ended. We hold the security interest of F.S. was limited to $20,000.

IV.

Finally, defendant contends that F.S.'s judgment amount should have been reduced by more than the actual amount received in another related case. In Iowa State Bank of Clarksville v. Kettwig, et. al., No. 16082, Butler County District Court, several parties, including the Clarksville Bank, F.S., and Butler, claimed the proceeds from Kettwig's 1978 crop. The bank claimed a prior, perfected security interest and F.S. claimed an interest based on the 1977 security agreement and promissory notes at issue here.[2] Defendant here, Shear Elevator, cross-petitioned for interpleader and paid the 1978 grain proceeds to the clerk of court. The Clarksville Bank case was settled by the parties without litigation or adjudication. As a result of that settlement, F.S. and Butler together received $7,432. The Butler account was paid in full, and F.S. received the remaining $902.16.

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[2] The financing statement filed in 1977 stated it covered "[A]ll crops growing or to become growing," and the security agreement contained similar language. Plaintiff apparently asserted its right to the 1978 crop pursuant to these clauses.

Both parties agree F.S.'s recovery in the Clarksville Bank case was predicated on the 1977 security agreement. Their dispute arises because defendant claims F.S. should have kept the $7,432 rather than letting Butler receive the larger share on an unsecured open account. The total amount of $7,432 should then be used to offset plaintiff's judgment in this action.

Plaintiff, on the other hand, argues the only opportunity Butler had to collect their account was in the Clarksville Bank case, while plaintiff could collect from Shear Elevator for the conversion of the 1977 crop. F.S. contends it should not be required to satisfy its claim from other sources before suing Shear Elevator, and the $902.16 is the full amount which should be deducted from the judgment in this action.

We are limited in our consideration of this issue because only portions of the record from the Clarksville Bank case were admitted here. We do note, however, the final court order in that action, made pursuant to the parties' stipulation, paid certain proceeds for court costs and attorney fees, and:

> . . . the balance in equal shares to Iowa State Bank [of Clarksville], and one-half to the defendants Butler-Grundy County Farm Service Corporation and Farm Service Corporation.

Copy of a cashier's check for $7,432 payable to F.S. and Butler was also admitted.

It is obvious to this court that F.S. has already collected $7,432 based on the 1977 security agreement. What it chose to do with those proceeds after collection is of no concern to us here[3] other than to say F.S.'s judgment in this case must be reduced by the $7,432 already received.

V.

The trial court awarded 5% interest from the due date of the Kettwig debt to F.S., until the date of filing of the petition and then 10% from the petition

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[3] Mervin Farkas, a retail credit specialist for F.S. Credit, testified the division of the recovery was negotiated between Butler and F.S. as a matter of the internal workings of the two companies and resulted in the Butler account being paid in full and F.S. receiving what was left.

filing date. In its cross-appeal, plaintiff basically contends it was error for the trial court to compute interest only from the date the debt was due F.S. According to plaintiff's rationale, interest should have been paid from the dates defendant made each grain purchase.[4]

In their brief, defendants state they do not take issue with the trial court's computation of interest.

Interest on judgments and decrees is regulated by statute.

> Interest shall be allowed on all money due on judgments and decrees of courts at the rate of ten percent per year, unless a different rate is fixed by the contract on which the judgment or decree is rendered, in which case the judgment or decree shall draw interest at the rate expressed in the contract, not exceeding the maximum applicable rate permitted by the provisions of section 535.2, which rate must be expressed in the judgment or decree. The interest shall accrue from the date of the commencement of the action.

Iowa Code §535.3

Although plaintiff may have had a contract claim against the Kettwigs, its action against Shear Elevator was a tort claim for conversion. In an action for conversion of a secured asset, the general measure of damages is the fair and reasonable market value of the property at the time of the taking. Larsen v. Warrington, 348 N.W.2d 637, 643 (Iowa Ct. App. 1984). Older Iowa decisions have allowed the value of the property plus interest from the time of the conversion. See Leonard v. Sehman, 206 Iowa 277, 220 N.W. 77 (1928); Crawford v. Nolan, 72 Iowa 673, 34 N.W. 754 (1887); Cutter v. Fanning, 2 Iowa 580 (1856).

More recently Iowa courts have come to rely on the distinction between liquidated and unliquidated claims in determining when interest should begin to accrue. See Vorthman v. Keith E. Myers Enterprises, 296 N.W.2d 772, 778 (Iowa 1980); Mrowka v. Crouse Cartage Co., 296 N.W.2d 782, 783-84 (Iowa 1980); Kuper v. Chicago & North Western Transportation Co., 290 N.W.2d 903, 910 (Iowa 1980);

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[4] Defendant acquired the Kettwigs' 1977 crop in several separate purchases during late 1977 and early 1978.

Thomas Truck & Caster Co. v. Buffalo Caster & Wheel Corp., 210 N.W.2d 532, 536 (Iowa 1973); Farrington v. Freeman, 99 N.W.2d 388, 391-92 (Iowa 1959). A liquidated claim is one the "amount of which has been agreed on by parties to [the] action or is fixed by operation of law," and "[a] debt is liquidated when it is certain what is due and how much is due." Black's Law Dictionary 1079 (5th ed. 1979). Interest, therefore, can only be allowed from the date of filing, Iowa Code section 535.2; or from the date a claim is liquidated or the entire damage is complete, Vorthman, 296 N.W.2d at 778-79, whichever is first. This has the added advantage of avoiding piecemeal computations on separated items of recovery. See Id.

There is no evidence before us that plaintiff's claim was liquidated prior to the date the debt became due, December 31, 1977. Plaintiff is not eneitled to additional interest.

Conclusion

As a result of our foregoing analysis, we determine plaintiff was secured to the extent of $20,000 and is entitled to recover that amount on the security interest. Plaintiff has already recovered $7,432 and $750[5] in other actions and settlements on this same security interest; these sums must be deducted. The judgment is modified to award plaintiff $11,818 plus 5% interest on that amount from January 1, 1978, until the date of filing of the petition and thereafter at 10% per annum.

AFFIRMED IN PART, MODIFIED IN PART.

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[5] The amount of $750 was recovered from another grain elevator in settlement of a separate action. Plaintiff agrees this amount has been received on the security interest and should be deducted from its recovery in this action.