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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JIM EVANS, d/b/a JAS PRODUCTIONS, Plaintiff-Appellant,	)	Filed December 30, 1981
vs.	)	
IOWA STATE FAIR BOARD, Defendant-Appellee.	)	1-281 2-65451

Appeal from Polk District Court - Harry Perkins, Judge.

Plaintiff appeals asserting that: (1) the trial court improperly admitted parol evidence; (2) the trial court's finding of a subsequent oral agreement permitting refunds was not supported by substantial evidence. REVERSED AND REMANDED.

Joseph E. Owens, Des Moines, for plaintiff-appellant.

Thomas J. Miller, Attorney General of Iowa, John Werner, Special Assistant Attorney General, and Jon K. Swanson, Assistant Attorney General, for defendant-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Plaintiff, the promoter of a motorcycle race which had to be rescheduled because of rain, sued the defendant, Iowa State Fair Board, alleging that the defendant had breached the parties' written contract by giving refunds for unused tickets. The defendant contends that the written contract was modified to permit refunds by oral conversations between the parties. The trial court found in favor of the defendant fair board and the plaintiff appeals asserting that: (1) the trial court improperly admitted parol evidence; (2) the trial court's finding of a subsequent oral agreement permitting refunds was not supported by substantial evidence. Our scope of review is limited to correction of errors at law. Iowa R. App. P. 4. We affirm in part, reverse in part, and remand with instructions.

I.

In the spring of 1979, plaintiff entered a written contract with defendant which provided for a motorcycle race to be staged at the Iowa State Fairground on August 19, 1979. This contract specified that if the race could not be held on August 19, it would be rescheduled for August 20. The tickets, which were printed and sold for admission to the race, clearly displayed the words, "NO REFUND, RAIN DATE, Mon., Aug. 20, 1979." The written contract contained no express provision concerning refunds for tickets purchased but not used.

Since the race could not be held on August 19, due to a muddy track, it was held on August 20, the "rain date." A substantial number of ticket-holders could not attend the race on August 20. The defendant decided to offer refunds to ticket-holders who did not attend the rescheduled race. Some three thousand ticket-holders returned their tickets for a total refund of $25,286.

The defendant contends the refunds were made pursuant to oral discussions held between plaintiff and employees of the defendant on August 19, 20, and 21. The trial court found that defendant had proved its affirmative defense of a subsequent oral agreement allowing refunds to ticket-holders who did not attend the race on the rain date by a preponderance of the evidence. Plaintiff then instituted this appeal.

II.

Plaintiff argues that testimony in support of the alleged oral modification of the parties' written contract should have been excluded by the parole evidence rule. We disagree. "The parole evidence rule generally has no application to a subsequent oral

agreement between parties to a written instrument even though it may alter or abrogate the writing." Baie v. Nordstrom, 238 Iowa 866, 869, 29 N.W.2d 211, 213 (1947). We find the evidence was properly admitted by the trial court. Plaintiff's appeal thus turns upon the issue of whether or not the parties did in fact enter an enforcible subsequent oral contract which allowed defendant to refund money to ticket-holders.

III.

Plaintiff argues that the trial court's finding that the conversations between plaintiff and defendant constituted a subsequent oral agreement was both contrary to the weight of the evidence and contrary to the law of contracts. We agree and reverse.

A written contract may be modified by a subsequent oral agreement. DeWaay v. Muhr, 160 N.W.2d 454, 456 (Iowa 1968). However, modification of a contract must meet the formal requisites for the formation of a new contract, Hueston v. Pointer Brewing Co., 222 Iowa 630, 633, 269 N.W. 754, 756 (1936), one of which is mutual assent. McCarter v. Uban, 166 N.W.2d 910, 913 (Iowa 1969).

Defendant correctly points out that assent may be either express or implied from the acts and conduct of the parties, Davenport Osteopathic Hosp. Ass'n. v. Hospital Service, Inc., 261 Iowa 247, 253, 154 N.W.2d 153, 157 (1967), and that while mere silence is insufficient, Ducommun v. Johnson, 252 Iowa 1192, 1197, 110 N.W.2d 271, 274 (1961), silence of the party coupled with actions consistent with the proposed modification can serve as evidence of assent. Collins v. Gard, 224 Iowa 236, 240, 275 N.W. 392, 395 (1937).

We find that the trial court erred in finding there was an enforcible subsequent agreement. Defendant's agent Taylor said that he "did not think the plaintiff ever agreed to refund the ticket purchase price." When it appeared that the race could not be held on August 19, plaintiff first continued his efforts to hold the race by suggesting "maintaining" of the track. When it was clear the race would not be held, plaintiff assisted in writing an announcement that stated that the race would be held on the rain date and made some type of statement regarding refunds.[1]

While it is true plaintiff was silent as to the alleged modification, we find the evidence is lacking as to actions consistent with the proposed modification. The only act consistent with the modification was the announcement, which was strongly

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[1] Plaintiff asserts that the announcement only offered refunds if the rain date was also cancelled. Defendant claims the refunds were offered to anyone who could not attend on the rain date.

contested by the parties as to its content. We, therefore, reverse the trial court and remand the case to the trial court for a hearing to determine the amount of plaintiff's damages. The costs of this action are charged to the appellee.

REVERSED AND REMANDED.