IN THE COURT OF APPEALS OF IOWA

No. 0-309 / 99-625
Filed August 16, 2000

PURINA MILLS, INC.,
Plaintiff-Appellee,

vs.

DUANE BUSHMAN AND SHIRLEY BUSHMAN,
Defendants-Appellants.

FILED
AUG 16 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Winneshiek County, Margaret L. Lingreen, Judge.

Duane and Shirley Bushman appeal the district court's order denying their motion for directed verdict and entering judgment in favor of Purina Mills, Inc.

AFFIRMED.

Dennis G. Larson of Larson Law Office, Decorah, for appellant.

Lynn J. Wiese of Barker, McNeal, Wiese & Holt, Iowa Falls, for appellee.

Heard by Sackett, C.J., Vaitheswaran, J., and Habhab, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

000263

HABHAB, S.J.

This appeal stems from an action brought by Purina to recover the reasonable prices and values of merchandise furnished to the Bushmans and for cash advances made to the Bushmans for the purchase of pigs, all as set forth and listed in a consecutively numbered "Bill of Particulars" attached to the petition. Purina claims the Bushmans' debt is owed on an open account. The Bushmans in their answer separately denied all but two of the allegations in Purina's petition but offered no specific defense nor did they specifically deny any of the items set forth in the "Bill of Particulars." *See* Iowa R. Civ. P. 87.

In their "Statement of Case" on appeal the Bushmans assert this case is "based upon a written contract for credit and an oral agreement to custom feed hogs." The case was tried to the court, and the trial court held otherwise and rendered judgment for Purina in the amount of $95,987.33 plus interest from the date of the commencement of this action. The Bushmans appeal. We affirm.

I. Background Facts and Proceedings.

Purina Mills, Inc., is a corporation doing business in the State of Iowa. Duane and Shirley Bushman operate a farm with a pig facility. They entered into a feeder finance arrangement with Purina Mills through their son-in-law, Douglas Schweinefus, a Purina and Wilson Feed and Supply employee. Under this arrangement, Purina would finance a certain amount of the purchase price of a pig and would finance 100% of the cost of the feed used to bring the pig to market weight. The Bushmans would own the pigs and would utilize their facilities and labor to care for the pigs. When the pigs were sold, proceeds would

first be used to reimburse Purina for its financing. The Bushmans submitted a credit application to this proposal dated December 15, 1993. Purina approved the application.

On January 4, 1994, the parties executed a line of credit agreement. The agreement provided Purina would extend a line of credit to the Bushmans not to exceed $33,600 for advances on feeder pigs and Purina products incidental to the finishing of such feeder pigs, not to exceed eighty dollars per head up to 420 head of feeder pigs. The agreement also provided advances made by Purina would be secured by a security agreement and a financing statement. Consistent with the line of credit agreement the Bushmans purchased 420 head of pigs.

On January 10, 1994, the Bushmans purchased an additional 200 head of pigs. Again, the Bushmans executed a security agreement, financing statement and promissory note to Purina. Feed was charged to the Bushmans' account. Contrary to the Bushmans' argument on appeal, we believe the trial court's finding is supported by substantial evidence that the Bushmans continued to purchase approximately 1000 head of hogs and feed using the same proceedings as before, but without benefit of any new line of credit agreement.

On June 7, 1994, the parties executed another line of credit agreement setting a maximum grant of credit of $190,000. The agreement provided amounts advanced for feeder pigs would bear interest at two percent over prime rate. Prime rate was not identified in the agreement. The agreement further provided the Bushmans would execute a security agreement, financing

statement, and promissory note when credit was extended. The Bushmans continued to purchase pigs and to incur feed bills as before. However, no further promissory notes, financing statements or security agreements were at any point required by Purina. Paragraph eight of the June 7, 1994, line of credit agreement provided, "No failure to delay by Purina to exercise any right, power or privilege hereunder shall operate as a waiver of any such right, power or privilege . . . ."

The parties' relationship continued until the spring of 1995 when Purina informed the Bushmans it would no longer make advances for the purchase price of pigs but would continue to finance feed. No feed advances were made after January of 1996. The Bushmans failed to make payments on the account. Purina brought suit, and it sought judgment against the Bushmans in the amount of $154,018.78 plus interest. The trial judge awarded Purina $95,987.73 plus costs and interest.

On appeal, the Bushmans argue:[1] (1) the June 7, 1994, agreement contains ambiguous terms; (2) a party may controvert a petition on account's bill of particulars through pleadings which may include discovery responses; (3) a party's burden of proof upon an open account is defined by its pleadings; (4) the court erred in admitting a written contract into evidence until evidence had been presented upon all prerequisites for admission; (5) a party cannot plead one contract and recover on another; (6) dismissal is required when a plaintiff fails to present adequate proof that parties ever reached an agreement; (7) an ambiguous contract is construed against the drafter; (8) the plaintiff has the

[1] We have, in certain instances, abbreviated the issues presented by the Bushmans but have considered each issue in the manner argued and presented by them.

burden to present evidence that a written contract was signed and accepted by the parties; (9) the court erred by not granting motion for directed verdict at the close of Purina's evidence; (10) the court erred in finding a credit application existed; and (11) the court erred in making a factual finding contrary to stipulations of the parties.

II. Law Action Tried to the Court.

Our scope of review of a law action tried to the court is governed by a number of well-established principles. These principles are set out in *Whewell v. Dobson*, 227 N.W.2d 115, 117 (Iowa 1975):

> On appeal from a law action tried to the court, as here, review in this court is only on errors assigned and the matter is not triable de novo. Under this limited extent of review the findings of fact by the trial court have the effect of a special verdict. If supported by substantial evidence and justified as a matter of law, they are binding on us and the judgment will not be disturbed on appeal.
>
> Further, we must construe the evidence in the light most favorable to the trial court's judgment, and this court will not weigh the evidence or pass on the credibility of the witnesses.
>
> However, the rule does not preclude inquiry into the question whether, conceding the truth of a finding of fact, a conclusion of law drawn therefrom is correct, nor does it apply if in arriving at a finding the trial court erred in its ruling on evidence or in other respects upon questions of law which materially affect that decision.

(Citations omitted.)

III. Motion for Directed Verdict.

Following Purina's presentation of evidence, the Bushmans moved for a directed verdict. The trial court granted a portion of the Bushmans' motion as it related to Purina's request for attorney's fees. The Bushmans rested without

calling witnesses and again renewed their motion for directed verdict. The trial court, in its ruling, overruled the remainder of the Bushmans' motion.

Denial by the trial court of a motion for directed verdict is reviewed for correction of errors at law. *Spaur v. Owens-Corning Fiberglass Corp.*, 510 N.W.2d 854, 858 (Iowa 1994). The evidence is viewed in the light most favorable to the nonmovant, and it is determined whether sufficient evidence existed to warrant submission of the issues to a jury. *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 684 (Iowa 1990). To grant a directed verdict, a trial court must find the evidence, when considered in the light most favorable to the opposing party, is insufficient as a matter of law to sustain the allegations brought. *Nash v. Schultz*, 417 N.W.2d 241, 243 (Iowa App. 1987).

We also consider whether reasonable minds could differ on the issues in controversy. *Spaur*, 510 N.W.2d at 858. If they could, the issue should be submitted to the jury. *Schiltz v. Cullen-Schiltz & Assoc., Inc.*, 228 N.W.2d 10, 17 (Iowa 1975). To successfully resist a motion for directed verdict, the plaintiffs must merely show there is evidence sufficient to submit the question to the jury; they do not need to prove their claims. *Miller v. Young*, 168 N.W.2d 45, 51 (Iowa 1969).

The Bushmans claim Purina failed to meet its burden of proof and, therefore, the court should have dismissed its claims as a matter of law. Specifically, the Bushmans argue Purina failed to establish the June 7, 1994, agreement governed those pigs purchased after the first batch of pigs (the 420 and 200 head) but before the June 7, 1994, agreement. This group of pigs was

referred to as the thousand head, which was also the total capacity of the Bushmans' facility. The Bushmans purchased these additional pigs between January 1994 and June 1994.

Purina plead its petition as an action upon an open account that existed through the purchase of two lots of pigs in January 1994 and continued to exist up to and after the execution of the June 7, 1994, line of credit agreement. Purina argues the trial court properly overruled the motion for directed verdict and properly entered judgment for Purina. We agree.

At trial, Douglas Schweinefus testified he explained Purina's feeder finance arrangement to Duane Bushman. He further testified the relationship did not change in its content from the first group of 420 head up to and including all subsequent groups of animals. Sheri Sprouse, Purina's financial services administrator, testified she prepared the bill of particulars attached to Purina's petition. She testified the bill of particulars, after crediting four payments made by the Bushmans after its preparation, reflected a true and accurate balance of the amount owing Purina and the Bushmans.

The Bushmans failed to call any witnesses. Based upon Purina's evidence, the trial court properly found:

> From the credible evidence, the Court finds Plaintiff and Defendants had a feeder finance arrangement that existed not only through the purchase of two lots of hogs in January of 1994, but continued to exist to and after the execution of the June 7, 1994, Line of Credit Agreement. The Court finds the transactions undertaken as part of the feeder finance arrangement form the basis for Plaintiff's action on account.
>
> . . .
>
> In the instant case, this Court finds from the parties' conduct they elected to continue the informal practices that were in place

> prior to the execution of the June 7, 1994, Line of Credit Agreement. Neither party demanded of the other the implementation of the full provisions of the June 7th agreement. Paragraph eight of the June 7, 1994, Line of Credit Agreement allowed Plaintiff to not exercise its rights under the agreement, without giving up any such rights.

Considering Purina's evidence with the foregoing principles in mind, the Bushmans' motion was properly overruled. Purina's evidence and all favorable inferences reasonably drawn therefrom was sufficient to present a fact question. The Bushmans' evidence was not so strong as to let it be said reasonable minds could not differ on the evidentiary questions present in this litigation.[2] The Bushmans' contention is without merit.

IV. Bill of Particulars.

We do not believe that we have to explore extensively this part of the Bushmans' appeal. We are unable to find from the record presented to us that the trial court relied on Rule of Civil Procedure 87 in reaching its decision to award judgment for Purina.

In order to explain and resolve this issue as presented by the Bushmans, we look to the trial court's ruling. Under its conclusions of law the trial court stated:

---

[2] In *Prestype, Inc. v. Car*, 248 N.W.2d 111, 119 (Iowa 1976), the supreme court considered a motion for directed verdict in an action on open account. The supreme court held that

> plaintiff's actual ledger cards showing each entry of debit and credit, the testimony of plaintiff's manager showing the simultaneous business machine posting and invoice billing of the customer, his testimony concerning the correctness of the entries, and his testimony that all materials represented by the entries had been delivered to defendant constitute sufficient evidence to make a prima facie case.

2. Iowa Rule of Civil Procedure 87 provides:

> A pleading founded on an account shall contain a bill of particulars thereof, by consecutively numbered items, which shall define and limit the proof, and may be amended as other pleadings. A pleading controverting such account, must specify the items denied, and any items not thus specified shall be deemed admitted.

Plaintiff asserts defendants failed to specify the items being denied in its answer. Defendants assert their discovery responses provided the necessary specificity for their denial of the bill of particulars.

Rule of Civil Procedure 68 identifies allowable "pleadings" as: Petition, answer, reply to counterclaim, answer to counterclaim, cross-petition and answer to cross-petition. Discovery responses are not pleadings. *Arguably*. Defendants failed to controvert Plaintiff's statement of the account by not specifying the items denied.

(Emphasis added.) The trial court merely made the observation by way of argument that since discovery responses are not pleadings the Bushmans failed to controvert Purina's bill of particulars by not specifying which items are denied. The trial court then proceeded to consider the entire account and correctly concluded "in an action on open account, the burden was upon the plaintiff to prove all material elements of account by a preponderance of evidence."

By this ruling we do not want to say that we disagree with the "arguably" statement of the trial court. On the contrary, we agree under our present rules, and under the facts here, that discovery responses are not pleadings.[3] Thus, like

---

[3] We have searched the record and are unable to find that a rule 222 motion for judgment on the pleadings was made by Purina; nor has our attention been directed by the Bushmans where the discovery responses were made a part of the evidentiary portion of this trial specifying the items denied.

000271

the trial court, we agree it could be argued that the Bushmans indeed failed to controvert Purina's bill of particulars by not specifying the items denied.

V. Promissory Notes / Security Agreements.

The scope of review is for correction of errors at law. Iowa R. App. P. 4.

The Bushmans argue Purina's election not to require them to further evidence advances for the purchase of pigs by a promissory note as indicated in the line of credit agreement is fatal to its recovery on the open account. Purina argues it had pleaded and proved an action upon an open account which existed both before and after the execution of the June 7, 1994, line of credit agreement.

An oral contract may exist even though the parties intended to reduce it to writing at a later date. *Employee Benefits Plus, Inc. v. Des Moines Gen. Hosp.*, 535 N.W.2d 149, 153-54 (Iowa App. 1995). Even if a contract is valid when made, it is competent for the parties thereto to abandon it, or to substitute another in its place, or, by conduct inconsistent with the continued existence of the original contract, to estop themselves from asserting any right thereunder. *Severson v. Elberon Elevator, Inc.*, 250 N.W.2d 417, 421 (Iowa 1977).

The trial court found that from the parties' conduct, they elected to continue the informal practices that were in place prior to the execution of the June 7, 1994, agreement. The trial court further found neither party demanded of the other the implementation of the full provisions of the June 7 agreement. Paragraph eight of the agreement allowed Purina to not exercise its rights under the agreement without giving up any such rights.

We find substantial evidence in the record to support the trial court's findings and accordingly affirm on this issue.

VI. Admissibility of the Line of Credit Agreement.

We review the district court's ruling concerning admission of evidence for correction of errors at law. *Bangs v. Maple Hill, Ltd.*, 585 N.W.2d 262, 265 (Iowa 1998). "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." *Tucker v. Caterpillar, Inc.*, 564 N.W.2d 410, 414 (Iowa 1997). Whether a substantial right is affected can only be determined when the record as a whole is considered. Iowa R. Evid. 102. A trial court is granted a broad range of discretion concerning the admissibility of evidence. *Bangs*, 585 N.W.2d at 265. We should reverse only when justice would not be served by allowing the trial court judgment to stand. *Stumpf v. Reiss*, 502 N.W.2d 620, 623 (Iowa App. 1993).

The Bushmans argue the district court erred in admitting Exhibit F, the June 7, 1994, line of credit agreement. The Bushmans in their objection merely contend the exhibit was not a fully integrated agreement.

The effective date of the agreement was, by its terms, June 7, 1994. One of Bushmans' objections is that the signatures were not dated and that Sheri Sprouse failed to verify the specific date she signed the agreement. We find the trial court properly recognized that the failure of the parties to fill in the blanks that indicate the date they placed their signatures on the agreement was not fatal for the agreement itself provided for the agreement to become effective on June 7, 1994. We find the district court properly overruled that objection.

In addition, the Bushmans seem to say that since Exhibit F makes reference to several documents, i.e., promissory note, financing agreement, and security agreement, that are to be executed on some future date and were not, that it should not have been received into evidence. As to this assignment of error, we find the court properly overruled the objection. The judgment of the district court is affirmed on this issue.

VII. Conclusion.

The Bushmans assign as error at least eleven separate issues. Our decision to affirm on those issues set forth in the divisions of this opinion eliminates the need to rule separately on the remaining issues. However, we must emphasize we have examined in detail all of the other issues and arguments advanced by the Bushmans and find them to be without merit.

We note on appeal that the Bushmans have taken the position that Purina is not entitled to judgment in any amount. Therefore the Bushmans have not challenged the amount of the final judgment entered by the trial court nor has Purina. In addition, the Bushmans have not challenged on appeal the allowance of interest as fixed by the trial court. The Bushmans did take the position that because prime rate was not defined in the agreement of the parties that this constituted an ambiguity to defeat the agreement. We have held that it did not.

AFFIRMED.