FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CLEM CAVANAUGH,

Plaintiff - Appellee,

vs.

JOSEPH KAVANAUGH d/b/a Wightman Feed and Grain Company,

Defendant - Appellant.

JOSEPH KAVANAUGH d/b/a Wightman Feed and Grain Company,

Counterclaimant,

vs.

CLEM CAVANAUGH,

Defendant to Counterclaim.

Filed September 9, 1977

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2-58654

Appeal from Calhoun District Court - Paul E. Hellwege, Judge.

Defendant grain elevator appeals trial court finding it breached an oral contract for the purchase of corn by refusing plaintiff farmer's deliveries. - Affirmed.

Dean Erb, of Johnson, Burnquist, Erb, Latham & Gibb, of Gowrie, for Plaintiff - Defendant to Counterclaim and Appellee.

Donald E. O'Brien, of O'Brien & O'Brien, of Sioux City, for Defendant - Counterclaimant and Appellant.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant grain elevator appeals the trial court finding that it breached an oral contract with the seller Clem Cavanaugh by refusing to accept delivery of his corn. We affirm.

The trial court's finding of fact is binding upon this court if supported by substantial evidence. Rule 14(f)(1), Rules of Appellate Procedure. The supreme court recently dealt with a similar allegation of an elevator's refusal of a farmer's grain deliveries. Nora Springs v. Brandau, 247 N.W.2d 744 (Iowa 1976). The elevator's continued receipt of deliveries from other farmers and the deterioration in the corn's quality and value occasioned by the non-acceptance constituted substantial evidence to support a finding the farmer justifiably cancelled his contract without notice to the elevator. 247 N.W.2d at 750.

In this case the oral contract specified no date for delivery. In such an instance Section 554.2309(1), The Code, provides delivery must be within a reasonable time. Section 554.1204(2),The Code, provides "a reasonable time for taking any action depends on the nature, purpose and circumstances of such action." The trier of fact could find that the farmer's corn was heating and spoiling and that he had to dispose of it. The elevator's testimony indicated it was receiving deliveries of corn throughout the period in question and that it had no shortage of storage. A reasonable time for delivery under these circumstances would be when the farmer's corn was harvested, dried, and offered to the elevator. Section 554.1204(2), The Code.

The elevator grounds its alternative argument on an alleged grain trade custom that accords the elevator the perogative to accept or refuse delivery at any time prior to the final delivery date. Under §554.1205(2), The Code, the existence and scope of such a usage of trade is to be "proved as facts" in order to justify an expectation that such a usage will be observed in the transaction in question. The elevator's proof failed to establish the parties agreed to a delivery date, or that January 31, 1973 should be the final delivery date.

The elevator's argument is, therefore, without merit. There was no final

delivery date specified in the contract by which the elevator's acceptance had to occur. Furthermore, the evidence does not establish as a matter of law that the farmer was aware of the alleged custom and practice and agreed to be bound by it in the contract.

Upon the elevator's breach, the farmer had two options under the §554.2610, The Code, provisions for anticipatory repudiation: 1) wait for performance by the elevator for a commercially reasonable time, or 2) resort to any remedy for breach under §554.2703 even if he notified the elevator that he was waiting for performance and urged retraction. In either case he could suspend his own performance. Section 554.2611(1) allowed the elevator to retract its repudiation until its next performance was due unless the farmer had cancelled or materially changed his position. Here the farmer in mid-December and in early February attempted to deliver corn. His tender was refused; on each occasion he sold the grain subsequently to other elevators in the vicinity. Section 554.2703(d) allowed him to resell his grain. The trier of fact could find the elevator did not retract its repudiation by its subsequent conduct. The trial court properly ruled that as the breaching party, the elevator could not seek recovery for the Cargill default penalties or lost commissions.

Affirmed.