IN THE COURT OF APPEALS OF IOWA

No. 6-128 / 94-2088

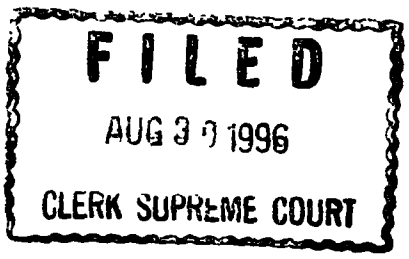
WALT VINING and RANDY VINING d/b/a VINING FARMS,

Plaintiffs-Appellees/Cross-Appellants,

vs.

GARY KUPER,

Defendant-Appellant/Cross-Appellee.



Appeal from the Iowa District Court for Mitchell County, Paul W. Riffel, Judge.

Defendant appeals and plaintiffs cross appeal from judgments entered for monies due on a farm lease and lost profits on a contract to purchase. **AFFIRMED.**

William F. Olinger and John A. Stitely of the William F. Olinger Law Firm, Cedar Rapids, for appellant.

Roger L. Sutton of the Sutton & Troge Law Office, Charles City, for appellees.

Heard by Sackett, C.J., and Huitink and Streit, JJ.

SACKETT, C.J.

This case addresses unresolved issues of rights under a lease for 517 acres of farm land in Mitchell County, Iowa. Plaintiffs-appellees Walter Vining and Randy Vining owned the land and leased it in March 1992 to defendant-appellant Gary Kuper. The lease, called an open or continuous lease, was a cash rent lease. Under the terms of the lease, defendant Kuper was required to pay $31,800 on the first of March and $31,800 on the first of November in each year he leased the farm.

The lease also contained the following language:

> If the farm is sold, Gary and Eloise Kuper have the right to match the highest written bid and will be the owners of the farm.

In October 1993, plaintiffs and defendant signed an agreement whereby defendant was to purchase and plaintiffs were to sell eighty acres of the 517-acre tract for a purchase price of $152,000. Defendant paid $25,000 down and the balance was to be paid at closing set for January 3, 1994. Problems developed concerning closing and the sale did not close for nearly one year.

This action started when plaintiffs sued defendant for unpaid rent under the lease. This suit drew a counterclaim and defendant Kuper sued plaintiff Walter Vining for money Kuper had loaned Walter. Additionally, defendant sued plaintiffs in the counterclaim for breach of the option to purchase and slander. There were also requests for attorney fees.

The trial court decided the question of whether defendant was delinquent on his rent in favor of plaintiffs and entered judgment in favor of plaintiffs and against defendant on this claim for $31,800. The trial court also found plaintiff Walter Vining was delinquent on a loan defendant Kuper had made him in the amount of $2000 and entered judgment in favor of Kuper and against Walter Vining in the amount of $2000.

The trial court then submitted a series of special verdicts to the jury. The jury then made several findings. One finding was defendant had not proved his counterclaim for slander.

The jury did find defendant was entitled to recover on his counterclaim for breach of contract. The jury further found plaintiffs did not prove their affirmative defense of failure to mitigate damages. The jury found defendant had suffered lost profits of $11,500. The jury further found the amount of attorney fees incurred by both plaintiffs and defendant.

After the special verdicts were returned, the trial court found neither plaintiffs nor defendant to be the prevailing party on the lease and, because of that fact, denied the claim of both for attorneys fees. Costs ultimately were taxed three-fourths to defendant and one-fourth to plaintiffs.

Defendant on appeal claims the trial court erred in: (1) not finding he was a prevailing party as defined in the lease and in not awarding him attorney fees; (2)

submitting plaintiffs' claim for attorney fees to the jury; and (3) failing to submit the issue regarding the recovery of monies paid for the option to purchase.

Plaintiffs on cross-appeal claim the trial court erred in submitting defendant's claim for breach of contract and submitting to the jury defendant's claim for lost profits.

Defendant first contends he should have been awarded attorney fees. The lease provided, "If either party files suit to enforce any of the terms of the Lease, the *prevailing party* shall be entitled to recover court costs and reasonable attorney fees." (Emphasis supplied.) Defendant contends he was the prevailing party under the lease and this entitled him to attorney fees.[1]

Determination of attorney fees is a matter entrusted to the discretion of the trial court and is reviewed for an abuse of discretion. *Mississippi Valley Broadcasting v. Mitchell*, 503 N.W.2d 617, 619 (Iowa App. 1993); *Bremecker v. M.C.I. Telecommunications Corp.*, 420 N.W.2d 427, 428 (Iowa 1988).

Defendant was delinquent on rent when the suit was brought. We do not agree with defendant that he was the prevailing party on the suit to recover under the lease. The trial court did not abuse its discretion in not awarding defendant attorney fees. We find it unnecessary to address defendant's contention the trial court should not have submitted the issue of the amount of plaintiffs' attorney fees to the jury.

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[1] At oral argument, defendant advances he should have attorney fees under the purchase agreement. This issue was not raised in defendant's brief and is not considered.

We have considered all other issues raised by both parties and find them to be without merit.

Court costs on appeal are taxed one-half to each party.

AFFIRMED.

Huitink, J., concurs; Streit, J., specially concurs.

STREIT, J. (concurring specially)

I concur in the result only.