

IN THE COURT OF APPEALS OF IOWA

No. 0-432 / 89-1283

C & J LEASING II LIMITED PARTNERSHIP,

Plaintiff-Appellant,

vs.

NURSING CARE MANAGEMENT, LTD.,

Defendant-Appellee.

FILED

DEC 27 1990

CLERK SUPREME COURT

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Appeal from the Iowa District Court for Buchanan
County, William G. Klotzbach, Judge.

Plaintiff appeals an adverse judgment. **AFFIRMED.**

Ronald A. Baybayan, Des Moines, for appellant.

Michael J. Cross, Hampton, for appellee.

Considered by Donielson, P.J., and Sackett and Habhab,
JJ.

SACKETT, J.

Plaintiff-appellant C & J Leasing II Limited Partnership appeals following the trial court's refusal to grant judgment in their suit against defendant-appellee Nursing Care Management, Ltd., for claimed delinquencies on vending machine leases. The machines were sold to defendant by Hawkeye Business Service Corp., who installed the machines and then transferred ownership to plaintiff, who entered into a lease with defendant. Plaintiff took the machines back and then sued defendant for rent of \$20,881 plus penalties and interest of \$35.82.

The trial court found the machines were sold to a predecessor of defendant who relied on statements made by a Hawkeye Business Corp., representative that the machines would pay for themselves through the income generated by the machines. There were three separate leases. The machines were installed in March and May of 1985. In April and May of 1986 defendant advised plaintiff the machines were not generating enough money to make the rental payments. On December 31, 1986, two of the leases were amended to provide for payments of \$230 a month instead of the initial rent amount of \$320.50 per month. By September 1987 defendant told plaintiff to pick up the machines. Defendant's employees were also complaining about the quality of the product produced by the vending machines, but insufficient revenue was the main problem.

Plaintiff did not pick up the machines when first requested to do so. In September 1987, at the direction of plaintiff, the defendant delivered the machines to Standard Vending in Waterloo, Iowa. No attempt was made to re-lease the equipment to anyone else. Plaintiff wanted the accelerated balance provided for in the agreements. A representative of Standard Vending offered \$3,593 for the property in November 1987. In July 1988 plaintiff advertised the items for sale in the Des Moines Register inviting sealed bids. On October 25, 1988, Standard Vending renewed their bid and the items were sold for \$3,593.

A paragraph in each of the agreements executed by plaintiff and defendant contains language that no warranties are made by lessor and "all warranties made by the supplier to lessor, if any, are hereby assigned to lessee for the lease term."

The trial court concluded:

1. Defendant relied upon the representations made by the salesman of the equipment who expressly warranted that the machines will cash flow.
2. Defendant entered into the agreements relying on this express warranty.
3. The machines did not cash flow.
4. The machines were returned to the plaintiff in good condition.
5. Plaintiff is bound by the warranty made by the salesman.
6. Plaintiff did not take any steps to mitigate its damages.
7. Defendant failed to prove any damages it suffered.

Plaintiff appeals the district court's ruling. It contends the district court erred by finding that: (1) the statements made by its agent are binding on the original lessees' successors in interest; (2) the statements constituted warranty; and (3) plaintiff failed to mitigate its damages.

This is a law action. The question, therefore, is whether there is substantial evidence to support the trial court's findings. Iowa R. App. P. 4. Plaintiff agrees it was under a duty to mitigate damages. It was defendant's responsibility to plead and prove mitigation. RET Corporation v. Frank Paxton Company, Inc., 329 N.W.2d 416, 422 (Iowa 1983).

The vending machines were removed from defendant's businesses in September 1987. There is evidence the machines were not offered for sale until July 1988, and no prior effort was made to re-lease the machines.

We find substantial evidence to support the trial court's conclusion plaintiff failed to mitigate damages and failed to prove the damages it suffered. We find it unnecessary to address its other contentions on appeal.

AFFIRMED.