IN THE COURT OF APPEALS OF IOWA

No. 7-278 / 96-713

DALE G. GEROT,

Plaintiff-Appellant,

vs.

TOD CAHILL, EDDY COLE, and COLE EXCAVATING,
A Partnership,
Defendants-Appellees.

Appeal from the Iowa District Court for Johnson County, William R. Eads, Judge.

The plaintiff appeals from the district court's ruling granting the defendants a new trial in an action for breach of contract regarding the defendants' lease and purchase of a truck. **REVERSED AND REMANDED WITH DIRECTIONS.**

Jay T. Schweitzer and Timothy K. Wink of Schweitzer & Wink, Columbus Junction, for appellant.

Joseph C. Johnston of Johnston, Potterfield & Nathanson, Iowa City, for appellees Cahill and Cole Excavating.

John E. Beasley of Phelan, Tucker, Mullen, Bright & Walker, L.L.P., Iowa City for appellee Cole.

Considered by Cady, P.J., and Streit, and Vogel, JJ.

CADY, J.

Dale Gerot appeals from an order by the district court granting a new trial following a jury verdict for Gerot in the amount of $7,427.75 in a breach of contract action against Tod Cahill, Eddy Cole and Cole Excavating. We reverse and remand with directions to enter judgment for Gerot.

Gerot entered into a written agreement with Cahill in August 1993 for the lease and purchase of a 1981 Ford dump truck. Cahill and Cole were partners in an excavation business. Gerot represented in the agreement he was the owner of the truck and held title to the vehicle. The agreement required Cahill to make monthly lease payments of $800 for 24 months. Cahill was given the option to purchase the truck for one dollar after completion of the lease payments.

Gerot did not in fact own the dump truck or hold title to the truck. Gerot had lost the truck in bankruptcy, but regained possession after a friend purchased it from a Ford dealership pursuant to an installment contract with Ford Motor Credit Company following the bankruptcy. Gerot gave his friend the money to make the down payment required under the purchase agreement and agreed to pay the required monthly installment payments to Ford. Title to the truck was retained by Ford pending completion of the installment payments, and Gerot and his friend agreed title would pass to Gerot once the installment contract with Ford was satisfied.

Cahill was not aware Gerot did not have title to the truck at the time he entered into the lease-purchase agreement. When he learned a few months later Gerot did not have title, he did not immediately bring it to Gerot's attention.

Cahill paid the first five lease payments under the agreement with Gerot. After the truck engine failed, however, Cahill returned the dump truck to Gerot and refused to make the additional payments. Gerot subsequently repaired the engine and sold the truck to a third party. He then instituted this action for breach of the lease-purchase agreement.

At trial, the district court refused to permit Cahill to argue he was discharged from the lease-purchase agreement due to Gerot's misrepresentation that he held title to the truck. The district court also refused to give the jury a corresponding instruction. Following the jury verdict, however, the district court granted Cahill's motion for a new trial. It determined the issue of the ownership of the truck was material and the jury should have been permitted to consider whether Gerot's lack of title discharged Cahill from performing under the lease-purchase agreement.

Gerot appeals. He claims the district court abused its discretion by granting a new trial because the breach of the covenant of ownership was not material or serious enough under the facts presented to justify Cahill to escape responsibility under the lease-purchase agreement. Gerot also claims Cahill failed to preserve error. We need not address this latter claim.

Our review is for the corrections of errors at law. Iowa R. App. P. 14(f). We will not disturb a ruling by the district court on a motion for new trial unless the evidence clearly shows the court abused its discretion. *Benson v. Richardson*, 537 N.W.2d 748, 762 (Iowa 1995).

Contractual obligations do not terminate as a matter of course after a breach of contract has occurred. 17A Am. Jur. 2d *Contracts*, § 570, at 583 (1991). Instead, a party's obligation to perform under a contract may be discharged upon the breach of a condition by the other party if the breach of the condition constituted the entire agreed exchange by the other party, or was expressly recognized in the bargain as a condition for the other party's performance. *Union Story Trust & Sav. Bank v. Sayer*, 332 N.W 2d 316, 322 (Iowa 1983). On the other hand, a minor failure to perform on the part of one party will not discharge the other party from responsibility to perform. *See Beckman v. Carson*, 372 N.W.2d 203, 208 (Iowa 1985) (breach will support unilateral termination of a contract only where it is so substantial as to defeat object of contracting parties.) Clearly, the right of one party to terminate a contract as a remedy to a breach by the other party may not be utilized to permit a party to use an insignificant breach as a pretext for avoiding a contractual obligation. *See Stanley Gudyka Sales Co. v. Lacy Forest Products Co.*, 915 F.2d 273, 277 (7th Cir. 1990).

In this case, the written lease purchase agreement did not expressly recognize the transfer of title by Gerot as a condition for Cahill's obligation to make the lease payments. Thus, we must decide if a jury question was generated at trial on the issue whether Gerot's covenant that he possessed title to the truck constituted his entire agreed exchange.

In granting the new trial, the district court found a jury issue had been generated. In doing so, it focused on the unfairness of requiring Cahill to "make payments of thousands of dollars to [Gerot] in the hope that [Gerot] would be able to gain title from Ford Motor Credit Company that could then be conveyed to [Cahill]." It found Gerot offered no conclusive proof he would obtain the title to transfer the truck to Cahill at the conclusion of the lease payments.

We conclude the district court abused its discretion by granting a new trial. The inquiry in permitting discharge upon a breach of a covenant is not on the unfairness that would result if the covenant is not performed, but whether the covenant was the essence of the agreement. Any unfairness ultimately resulting from nonperformance can be remedied by an award of damages in a breach of contract action. *Union Story Trust & Sav. Bank,* 332 N W 2d at 322. Where a contract "has been largely carried into execution, and the engagements of the parties were to be performed in the future, and their performance was not made a condition, but rested merely in covenant, their breach lays the foundation of an action, but nothing more" 17A Am. Jur. 2d *Contracts* at § 570.

In this case there were no facts presented at trial which would have permi'

the jury to conclude the covenant of title was the entire agreed exchange by C

See Peters v. Bander Kool, 494 N.W.2d 708, 713 (Iowa 1993) (instructions not be submitted upon issues that have no support in evidence). Cahill was given possession of the dump truck and the right to use it for a period of two years prior to the time of purchase. Clearly, the right to use the truck during the lease period was a major exchange. It would preclude a finding by a jury that the breached covenant constituted the entire agreed exchange. Moreover, Gerot was not required to transfer title to Cahill until the lease terms were satisfied. *See* 17A Am Jur. 2d *Contracts* § 570 (Supp.1997) (An exchange contract is not subject to rescission because a party did not have good title at the time of entering into the contract, where he secured title within the period of limitation).

The district court correctly refused Cahill's requested instruction at trial on discharge upon breach. It abused its discretion when it changed its decision and granted a new trial for failing to give the requested instruction. Accordingly, we reverse the district court order granting a new trial and remand the case with directions to enter judgment in favor of Gerot in the amount of $7,427.75, together with interest and costs.

REVERSED AND REMANDED WITH DIRECTIONS.