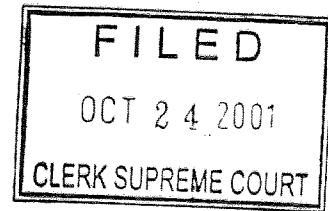


IN THE COURT OF APPEALS OF IOWA

No. 1-330 / 00-0301
Filed October 24, 2001



JEANNE B. GARLAND,
Plaintiff-Appellant,

vs.

MONROE D. BRANSTAD,
Defendant-Appellee.

Appeal from the Iowa District Court for Hancock County, Jon Stuart
Scoles, Judge.

The plaintiff appeals from district court orders dismissing her action to
collect on a promissory note and foreclose on a mortgage and denying her
motion to enlarge findings and conclusions. **REVERSED AND REMANDED.**

Louis R. Hockenberg and Matthew D. Gardner of Sullivan & Ward, P.C.,
Des Moines, for appellant.

Herman P. Folkers of Folkers & Keen, Mason City, and Richard P.
Schwarm, Lake Mills, for appellee.

Heard by Sackett, C.J., and Hecht and Vaitheswaran, JJ.

HECHT, J.

Jeanne B. Garland appeals from district court orders dismissing her action to collect on a promissory note and foreclose on a mortgage and denying her motion to enlarge findings and conclusions. We reverse and remand to the district court for proceedings consistent with this opinion.

I. Factual Background and Proceedings. In November of 1990, Monte Branstad borrowed one hundred thousand dollars from Garland, his maternal aunt, to purchase a farm located in Hancock County, Iowa. Branstad executed and delivered a promissory note ("Note") on November 1, 1990.¹ The Note provided for a nine percent interest rate to accrue for the first two years, and for annual payments of principal and interest thereon until January 1, 2010. Branstad executed a mortgage, securing the Note with the real estate he purchased. Branstad has made eight payments totaling thirty-three thousand dollars to Garland since the execution of the promissory note with the last payment received on June 6, 1997.

On May 6, 1998, Garland caused Branstad to be served with a notice of right to cure default ("Notice"). The Notice informed Branstad of his failure to pay interest on the loan from November 1990 to 1997, and his failure to make principal payments from 1992 to 1997. Branstad failed to make the payments demanded in the Notice, and Garland received a release from mandatory

¹ The Note contains the following provisions: "Accrued interest only on or before January 1, 1992. All subsequent payments of principal and interest to be made on or before January 1 of each succeeding year, with the remaining principal balance and accumulated interest due in full on or before January 1, 2010. Lender and Borrower shall agree on or before January 1, 1992, as to the amount of principal to be repaid annually. However, in no event shall this sum exceed \$5000.00 of principal per year."

mediation upon Branstad's failure to attend farmer/creditor mediation as required under Iowa Code section 654A.11 (1997).

On July 24, 1998, Garland filed a petition in equity against Branstad requesting judgment on the promissory note and seeking foreclosure of the real estate mortgage. Although Branstad did not raise any technical defenses to the mortgage foreclosure action and admitted receipt of the Notice, he maintained Garland was not entitled to foreclosure. Branstad alleged in his answer he and Garland had entered into a contemporaneous oral collateral agreement waiving annual interest payments under the Note in exchange for Branstad's services maintaining other properties owned by Garland in Iowa. Branstad subsequently claimed in an answer to an interrogatory that the oral agreement was formed before the Note was executed. At trial, Branstad, and his wife, Lynette, testified the oral agreement arose after the Note was signed. Branstad maintained the Notice was flawed because Garland claimed entitlement to interest payments which had been satisfied by services rendered pursuant to the oral agreement.

Prior to trial, Garland filed a motion in limine seeking to exclude evidence of the alleged oral agreement under the parol evidence rule. The district court reserved ruling on the motion. The case was tried on November 4, 1999, and the court entered an order for dismissal on December 13, 1999. The district court overruled Garland's motion in limine and found by a preponderance of the evidence that an oral agreement had been formed, thereby relieving Branstad of the obligation to make interest payments until January 1, 1998. Because the Notice demanded payment of interest for the period before 1998, the court found

the Notice substantially inaccurate, and dismissed the petition for judgment and foreclosure.

On December 23, 1999, Garland filed a motion to enlarge or amend findings and conclusions. In her motion, Garland maintained the alleged oral contract violated the statute of frauds, since it was an oral contract which could not be performed within one year. The district court rejected this contention finding the partial performance exception applied in this case. Garland also maintained Branstad had waived any technical defenses to the Notice. The district court also rejected this argument holding under Iowa Code section 537.5111(1), the notice inadequately indicated interest due and was therefore defective. Garland appeals.

II. Contentions on Appeal. Garland contends the district court erred in (1) failing to exclude Branstad's evidence of an alleged subsequent oral contract because his answer and responses to interrogatories claimed the oral contract occurred either prior to or contemporaneously with the written contract, (2) considering evidence of the alleged oral collateral agreement between the parties which the court should have excluded under the parol evidence rule, (3) applying the partial performance exception to the statute of frauds, and (4) dismissing the case for inaccurate notice provisions because Branstad waived any objection to improper notice.

III. Standard of Review. The parties dispute the standard of review. Garland correctly contends all issues should be reviewed de novo since the case was tried in equity. See Iowa R. App. P. 4 ("Review in equity cases shall be

de novo.”). Branstad maintains any issues on admissibility of evidence are subject to correction of error review.

Generally, our review is governed by how the case was tried in the district court. *Ralfs v. Mowry*, 586 N.W.2d 369, 371 (Iowa 1998) (citing *Howard v. Schildberg Constr. Co.*, 528 N.W.2d 550, 552 (Iowa 1995)). Although Garland’s case was tried in equity, the district court ruled on evidentiary objections, “normally the hallmark of a law trial.” *Howard*, 528 N.W.2d at 552 (citing *Sille v. Shaffer*, 297 N.W.2d 379, 381 (Iowa 1980)). Nonetheless, these rulings do not automatically convert a case tried in equity into one at law, particularly when neither party claims the trial court improperly excluded any evidence, thereby preventing a review of the entire record. *Howard*, 528 N.W.2d at 552. In this equity case, neither party contends evidence was improperly excluded and we are able to consider all relevant evidence. Accordingly, our review of the district court’s judgment is de novo.

IV. Discussion.

A. Branstad’s Admissions in his Pleadings. Garland contends the district court erred in failing to exclude Branstad’s evidence of an alleged subsequent oral contract because his answer and interrogatory responses claimed the oral contract was formed either prior to or contemporaneous with the written contract.

“The rule is well-settled in Iowa ‘that admissions in the pleadings, if not amended or withdrawn, stand as conclusive proof of the admitted facts.’” *Beyer v. Todd*, 601 N.W.2d 35, 41 (Iowa 1999) (quoting *Smith v. Bitter*, 319 N.W.2d 196, 199 (Iowa 1982)); see also *Long v. McAllister*, 319 N.W.2d 256, 258 (Iowa

1982). ("When a fact alleged in a pleading is admitted, the fact is no longer an issue."); 29A Am. Jur. 2d *Evidence* §§ 774-75, at 141-43 (1994). This court has stated the rule as follows:

A party cannot take a position contradictory to or inconsistent with his pleadings, and the facts that are admitted by the pleadings are to be taken as true against the pleader, whether or not they are offered as evidence. Admissions in the pleadings may render proof of the admitted facts unnecessary or render proof contradicting them inadmissible. If countervailing evidence, either through inadvertence or the passive consent of the parties, is admitted, it is entitled to no consideration.

Miller v. AMF Harley-Davidson Motor Co., Inc., 328 N.W.2d 348, 352 (Iowa Ct. App. 1982) (citing *Hanson v. Lassek*, 261 Iowa 707, 710-11, 154 N.W.2d 871, 873 (1968)).

Branstad failed to amend or withdraw his pleadings admitting the oral agreement arose prior to or contemporaneous with the written agreement. At trial, Branstad and his wife testified the oral agreement arose after the written agreement was signed, explicitly contradicting the position taken in his pleadings. Branstad contends Garland failed to preserve this issue for review. We disagree. This court has held parties may raise this issue for the first time on appeal. *Carlson v. Vondrak*, 555 N.W.2d 238, 241 (Iowa Ct. App. 1996) (holding defendants to admissions in pleadings regarding whether or not they were in partnership, despite issue being raised "for the first time on appeal"). We find Branstad is bound by his admissions in his pleadings claiming the alleged oral agreement arose either prior to or contemporaneous with the written agreement between Garland and Branstad.

B. Admissibility of Alleged Oral Agreement Between Garland and Branstad. Garland next contends the district court erred by improperly

considering evidence of the alleged oral agreement between the parties which the court should have excluded under the parol evidence rule. The parol evidence rule “generally precludes the use of extrinsic evidence to vary or contradict the terms of an unambiguous and integrated contract – a writing the parties have adopted as the expression of their final agreement.” 29A Am. Jur. 2d *Evidence* § 1092, at 551 (1994); see also *Montgomery Properties Corp. v. Econ. Forms Corp.*, 305 N.W.2d 470, 476 (Iowa 1981) (“the parol evidence rule forbids the use of extrinsic evidence, to vary, add to, or subtract from a written agreement”).

The parol evidence rule renders written, as well as oral, agreements unenforceable if entered into prior to or contemporaneous with the adoption of a written contract. Restatement (Second) of Contracts § 213, at 129 (1981). A written agreement that embodies the parties' full and final understanding, a completely integrated document, discharges any prior agreements that fall within its scope. *Id.*; see also *Montgomery Properties Corp.*, 305 N.W.2d at 476 (“An integrated agreement is one in which the parties adopt a writing or writings as the final and complete expression of the agreement.”). A promissory note can be a fully integrated document, rendering prior agreements inadmissible under the rule. See 11 S. Williston, *Contracts*, § 33:34, at 750-51 (4th ed. 1999) (citing *Big G Corp. v. Henry*, 148 Vt. 589, 536 A.2d 559, 6 U.C.C. Rep. Serv. 2d (CBC) 769 (1987) (holding “a negotiable instrument which expresses on its face an absolute promise to pay cannot be cut down into a conditional promise, or enlarged, varied, or contradicted by evidence of a prior or contemporaneous parol agreement”)).

Branstad attempts to avoid Garland's parol evidence claim by pointing the court to the "doctrine of collateral contract." The doctrine of collateral contract is an exception to the parol evidence rule. 29A Am. Jur. 2d *Evidence* § 1122, at 577 (1994). "[U]nder this doctrine, a prior or contemporaneous oral contract which is independent of, collateral to, and not inconsistent with, the written contract, may be proved by parol evidence." *Id.* Three requirements must be met "before evidence of an extrinsic oral agreement" may be received:

- (1) the agreement must be collateral in form; (2) it must not contradict the express or implied provisions of the written contract; and (3) it must be one the parties would not ordinarily be expected to embody in the writing – that is, it must not be so clearly connected with the principal transaction as to be part and parcel of it.

Id.; see also *Seastrom v. Farm Bureau Life Ins. Co.*, 601 N.W.2d 339, 345 (Iowa 1999) (holding parol evidence admissible to prove existence of *independent* oral contract) (emphasis added) (citing *Cox v. Fleisher Const. Co.*, 208 Iowa 458, 463, 223 N.W. 521, 523 (1929) ("We have, however, recognized the rule that where the parol evidence tends to show an independent oral contract which is not a contradiction, modification, or qualification of the written contract, evidence of the parol contract is admissible.")).

Branstad maintains the alleged oral agreement meets the requirements of the exception because it was purely collateral, was supported by its own consideration, and did not vary the terms of the written agreement. We disagree. We find the alleged oral contract directly contradicts the interest provisions of the Note as it specifically addresses repayment provisions including calculations of interest at nine percent per annum. This unequivocal contradiction of the terms of the Note prevents an application of the collateral contract exception to the

parol evidence rule; therefore, Branstad's evidence of the claimed oral contract was inadmissible.

C. Notice to Cure. Garland additionally contends the district court erred in dismissing her case for inaccurate notice provisions because Branstad waived any objection to improper notice. Moreover, Garland contends the district court erred by applying Iowa Code section 537.5111(1)² in the adjudication of the sufficiency of the Notice.

Iowa Code section 537.5111(1) is part of the Consumer Credit Code. According to sections 537.1301(14)(a)(1)-(5), the provisions of this statute apply to consumer loans made by persons "regularly engaged in the business of making loans," "incurred primarily for personal, family, or household purpose," and in an amount "not exceeding twenty-five thousand dollars." Iowa Code §§ 537.1301(14)(a)(1)-(5). We find the transaction in this case clearly does not satisfy these requirements. Garland is not in the lending business, the loan primarily was a business transaction for the purpose of purchasing land, and the loan was for one hundred thousand dollars – well above the twenty-five thousand dollar limit.

Garland correctly maintains Iowa Code chapter 654, Foreclosure of Real Estate Mortgages, is the correct statute for evaluating the Notice. Section 654.2B specifies the requirements for a notice to cure, and provides:

failure of the notice of right to cure to comply with one or more provisions of this section is not a defense or claim in any action

² The statute provides, in relevant part: "The notice of right to cure shall be in writing and shall conspicuously state . . . the total payment, including an itemization of any delinquency or deferral charges, or other performance necessary to cure the alleged default . . ." Iowa Code § 537.5111(1).

pursuant to this chapter and does not invalidate any procedure pursuant to chapter 655A, unless the person asserting the defense, claim, or invalidity proves that the person was *substantially prejudiced* by such failure.

Iowa Code § 654.2B (emphasis added). Branstad argues he suffered prejudice by the inclusion of the interest obligation in the notice to cure. We disagree. Given our resolution of the parol evidence issue, the Notice correctly indicated interest due. We find Branstad was not prejudiced by the inclusion of interest owed on the note, and reverse the district court's ruling on this issue.

D. Conclusion. Based on our de novo review of the record, we find the district court erred in considering evidence of an alleged oral agreement between Garland and Branstad as it should have been excluded under the parol evidence rule. We further conclude the district court erred in dismissing the case for insufficiency of the Notice as Branstad was not prejudiced by the inclusion of interest in the amount demanded by Garland. We decline to address Garland's statute of frauds argument in light of our ruling on the alleged oral agreement. Although we have not addressed all of the issues raised and arguments made, we have carefully considered them. Those we have not addressed lack merit, were not preserved, or are moot. We reverse and remand to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Vaitheswaran, J., concurs; Sackett, C.J., concurs in part and dissents in part.

SACKETT, C.J. (concur in part and dissents in part)

I concur in part and dissent in part. I would affirm the district court's well-reasoned decision in all respects except on the notice to cure issue.

First, I disagree with the majority's conclusion defendant should lose because of alleged admissions in his pleadings.³ Plaintiff admits defendant testified the parties entered into an oral agreement, subsequent to the execution of the note providing that interest on the note would be waived in exchange for defendant's management. Plaintiff further admits that defendant's wife testified she participated in the telephone conference where the agreement was to have taken place. The district court believed this testimony and relied on it in reaching its decision.

Plaintiff does not claim she objected to the admission of this testimony at trial nor does the majority find that she did. Rather the plaintiff argues, and the majority concludes, that the district court ruling was erroneous because defendant is bound by an admission in his pleading that the collateral agreement was contemporaneous⁴ with the execution of the note and mortgage.⁵

The majority appears to agree error on this claim was not preserved at trial. Nor does plaintiff show in her brief how the error was preserved on this issue. Plaintiff has not shown the objection she now urges to the evidence was

³ The issue as stated in plaintiff's brief is, "Did the trial court err in failing to exclude defendant's evidence of an alleged subsequent oral contract as the defendant's answer claimed the oral contract occurred either prior or contemporaneously with the written contract?"

⁴ Though the majority suggests an admission in Branstad's pleading that the agreement was prior, I do not find such an admission.

⁵ Brandstad's pleading also stated that Branstad performed services subsequent to the mortgage and note and plaintiff by her conduct waived interest.

made at the time of trial. Nor was it raised in a motion to enlarge filed after the district court ruled.⁶

Yet the majority has concluded this error did not need to be preserved and can be raised for the first time on appeal. In arriving at this conclusion the majority relies on *Carlson v. Vondrak*, 555 N.W.2d 238, 240 (Iowa Ct. App. 1996). In *Carlson* the plaintiff contended on appeal contrary to the district court's conclusion that defendant's wife was his partner. We noted that apparently for the first time on appeal plaintiff pointed to the fact that defendant alleged in their petition and in its amended petition Carlson and his wife were partners and defendants in answering both pleadings admitted they were. *Id.* at 240. We found a partnership saying defendants were bound by their admissions. *Id.* In doing so we relied on *Welter v. Heer*, 181 N.W.2d 134, 135 (Iowa 1970). In *Welter* the plaintiff sued on an oral contract which plaintiff pled and defendant admitted in both pleadings and testimony and its existence was not an issue on appeal.

I find these two cases factually different from the case at bar. I do not find them as authority to support the majority position. Additionally, I find no hint in either *Carlson* or *Welter* that preservation of error as an issue was raised on appeal or addressed by the appellate court. Defendant here contends error was not preserved. Finding this error was not preserved and plaintiff has failed to

⁶ Iowa Rule of Appellate Procedure 14(a)(5) provides in relevant part:

The brief of appellant shall contain under appropriate heading in the following order:

5. . . . and shall state how the issue was preserved for review, with reference to the places in the record where the issues was raised and decided.

show how it was preserved, I must disagree with the majority decision to reverse on this basis. If *Carlson* is contrary to this position I believe it should be overruled.

The majority next finds evidence of the oral agreement was not admissible. The trial court found "that a preponderance of the credible evidence establishes that the parties agreed that Garland would not require Branstad to pay interest on the note if he would manage the commercial property owned by her in Forest City, including paying for routine maintenance and repairs." Plaintiff does not claim this finding is not supported by sufficient evidence, only that the evidence should have been excluded because of the parol evidence rule.

Defendant argued from the onset of this case that the parol evidence rule does not apply to the oral agreement because the oral agreement was collateral. While the parol evidence rule excludes extrinsic evidence solely offered for the purpose of varying adding to or subtracting from a written agreement, it is admissible to prove the existence of an independent oral contract. See *Glastrom v. Farm Bureau Life Ins. Co.*, 601 N.W.2d 339, 345 (Iowa 1999). I would affirm this issue.

In considering all issues I would affirm the district court in all respects except I agree with the majority's resolution of the notice to cure issue.