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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-236 / 91-1381

341

WAYNE M. NEWPORT, Individually and As a Shareholder of Davendorf Investment Co.,

Appellant,

vs.

DAVENDORF INVESTMENT CO., WALTER NEWPORT, and **MILDRED A. NEWPORT,**

Appellees.

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

Wayne Newport appeals a decision of the district court entering judgment on several promissory notes and dismissing his claim under Iowa Code section 496A.76 (1989). Walter Newport cross appeals. **AFFIRMED AS MODIFIED.**

Stephen W. Newport, Davenport, for appellant.

Walter Newport, Davenport, pro se.

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

DONIELSON, P.J.

In November 1957, Bettarc Corporation was established for the purchase of the Bettendorf Arcade Building located in Bettendorf, Iowa. The building was a two-story commercial building consisting of offices on the lower level and apartments on the upper level. Bettarc had five shareholders who each paid $10.00 per share for the stock. Each shareholder loaned $8,569.76 to the corporation. The loans were evidenced by promissory notes "with interest to be paid semiannually at the rate of six percent per annum."

By the time of these proceedings, Bettarc had changed its name to Davendorf Investment Company. Three of the original shareholders had transferred their shares and their rights to receive money pursuant to the promissory notes to Walter A. Newport (the appellee). One of the notes was paid off. Thus, Walter held three notes and four-fifths of Davendorf's common stock.

Walter's brother, Wayne (the appellant), currently owns one-fifth of Davendorf's common stock and holds one note. In a related transaction, Wayne borrowed $8,569.76 from Sylvan Acres, Inc., Walter's corporation used for farming. Walter is now holder of that note (the Sylvan Acres note), which contains similar terms as the Davendorf notes.

By 1985, the corporation was not doing well financially and the building was in disrepair. Walter's wife, Mildred, became manager of the building. Walter and Mildred, as Davendorf's board of directors, converted nine of the

building's twenty-three units into condominiums and conveyed two units to Walter and six apartment units to a third party who intended to become the building's manager. Those six units were subsequently conveyed to Walter. Walter and Mildred then served notice and held a special meeting of the corporation's shareholders which ratified the conveyances. Wayne did not attend the meeting.

Wayne subsequently instituted these proceedings seeking: (1) $57,060.08 based on Davendorf's promissory note to him; and (2) to nullify the conversion of the Arcade building to condominiums and the conveyance of those condominiums. Walter filed a counterclaim against Wayne demanding Wayne pay the Sylvan Acres promissory note. Walter filed a cross-claim against Davendorf demanding payment on his three promissory notes.

The district court believed the conversion of the building to condominiums did not constitute a sale or exchange of the building and dismissed Wayne's challenge of the conversion. The court then focused on the promissory notes and entered judgment in favor of Wayne against Davendorf for $12,169.04 and in favor of Walter against Davendorf for $36,507.12. The court used corporate tax returns prepared in 1983 as a gauge by which to measure the current value of the notes rather than relying on the computations introduced by the parties. The court entered judgment in favor of Walter against Wayne on the Sylvan Acres note for $9,457.07. All three judgments were to

accrue interest at ten percent per annum from the date of trial, February 6, 1991.

Wayne appeals. He contends the district court erred in: (1) limiting the balance due Wayne by Davendorf to $12,169.04 instead of the $57,060.08 figure he had presented at trial; (2) not requiring Walter to reconvey the Davendorf condominiums; (3) entering judgment in favor of Walter against Wayne for $9,457.07 based on the Sylvan Acres note; (4) entering judgment in favor of Walter against Davendorf for $36,507.12; and (5) accruing interest on the judgment from the date of trial rather than from the date of filing.

Walter cross appeals. He asserts the district court erred by not awarding compound interest on the promissory notes. He also asserts interest on the judgments should accrue from the date of trial rather than from the date of filing.

Our scope of review is for the correction of errors of law. Iowa R. App. P. 4.

I. **Interest on the Promissory Notes.** Wayne and Walter both contend the trial court erred in computing the interest on these notes with simple rates rather than compound rates. They argue compound interest was required by each of the notes in issue. Both parties also contend the district court erred in accruing interest from the date of trial, February 6, 1991, rather than the date of filing,

June 5, 1989, as required by Iowa Code section 535.3 (1991).

A. Simple v. Compound Interest. Wayne contends the district court erred in not computing the interest on his note against Davendorf with a compound rate. In his cross-appeal, Walter contends the district court erred in not using a compound rate on his notes against Davendorf and on the Sylvan Acres note.

In the decision of the district court, the judgments were calculated using simple interest. No specific findings were ever made regarding whether the notes required interest to be calculated with a compound rate. It was incumbent upon the party challenging the absence of this finding to file a timely motion to enlarge or amend the findings with the trial court, a rule 179(b) motion.

> It is well settled that a rule 179(b) motion is essential to preservation of error when a trial court fails to resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication. . . . Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and decided upon appeal.

State Farm Mut. Auto. Ins. Co. v. Pflibsen, 350 N.W.2d 202, 206-07 (Iowa 1984) (citations omitted).

If no rule 179(b) motion is made, or an issue not raised, we will assume as fact an unstated finding necessary to support the trial court's judgment. Hubby v. State, 331 N.W.2d 690, 695 (Iowa 1983). Any ambiguity in the trial court's findings is decided in favor of the judgment. Id.

All three promissory notes are the same in form. The terms of the notes are as follows:

> [T]he undersigned . . . promise to pay to the order of Wayne M. Newport [(or Walter A. Newport)] . . . . the sum of $8,569.76 with interest thereon from 11-30-57, payable semi-annually at the rate of 6 per cent per annum until payment hereof as follows: . . . Accrued interest shall be paid semi-annually but principal may be paid in whatever amount and at whatever times as maker may desire but the entire principal balance must be paid no later than ten years after date hereof.

Both Wayne and Walter argue the above language provides for compound interest. However, "[t]o create such an obligation of [compound] interest, there must be a direct promise and it has been held that it is not enough that the note or contract merely provide for the payment of interest." 47 C.J.S. Interest § 9 (1982). See Landals v. George A. Rolfes Co., 454 N.W.2d 891 (Iowa 1990) (regarding prejudgment interest, "[t]he general rule in the United States is that, when interest is allowable, it is to be computed on a simple rather than a compound basis in the absence of express authorization"); Weinrich v. Hawley, 236 Iowa 652, 659, 19 N.W.2d 665, 669 (Iowa 1945) (the court, construing a note and mortgage together, held the language "with interest upon both principal and interest after maturity at the rate of eight per cent per annum" did not provide for compounded interest). Cf. Cram & Sons v. Cent. Trust Co., 205 Iowa 409, 411-12, 216 N.W. 71, 72-73, (1928) (The court held the promissory notes did provide for interest on interest based on the parties' agreement, as

evidenced by the eleven renewals of note. At each renewal, the interest was added to the principal and the notes formerly executed were surrendered.)

The parties have presented absolutely no authority and no evidence that compound interest applies to these notes, other than the notes themselves. They do not explain how the terms of the note are to be interpreted so as to require compound interest. We affirm the district court's decision to calculate the judgments using a simple interest rate.

B. Iowa Code Section 535.3. Wayne and Walter next contend the district court erred in accruing interest from February 6, 1991, the date of the trial, rather than from June 5, 1989, the date of the commencement of the action. Again, neither party filed a rule 179(b) motion regarding this issue.

Iowa Code section 535.3 (1991) states:

> Interest shall be allowed on all money due on judgments and decrees of court at the rate of ten percent per year, unless a different rate is fixed by the contract on which the judgment or decree is rendered, in which case the judgment or decree shall draw interest at the rate expressed in the contract, not exceeding the maximum applicable rate permitted by the provisions of section 535.2, which rate must be expressed in the judgment or decree. The interest shall accrue from the date of the commencement of the action.

Iowa Code § 535.3 (1991) (emphasis added).

As to the judgment rendered on the Sylvan Acres note, that interest shall accrue from the date the counterclaim was filed, June 26, 1989. See Sedco Int'l, S.A. v. Cory,

522 F. Supp. 254, 330-331 (S.D. Iowa 1981), aff'd, 683 F.2d 1201 (1982), cert. denied, 459 U.S. 1017 (1982).

Pursuant to the above language in Iowa Code section 535.3, the interest allowed on the notes, after judgment was entered by the trial court, shall be at the rate as fixed by the the note itself. The terms of the note, in addition to that which was cited above, provide "[p]rincipal and interest not paid when due, shall draw interest at the rate of seven per cent per annum" (emphasis added).

Therefore, construing the language of Iowa Code section 535.3 (1991) and the terms of the promissory notes together, we hold interest on the Davendorf notes shall be computed at six per cent until the date of the commencement of the action, June 5, 1989. Following the filing date, the applicable rate of interest shall then be seven per cent, pursuant to the terms of the promissory note. Interest on the Sylvan Acres note shall be computed at six per cent until the date of the filing of the counterclaim, June 26, 1989.

Accordingly, as of November 30, 1983, a 1983 corporate tax return showed Davendorf owed $8,570 on one of its promissory notes. Like the district court, we will rely on this figure for our computations of the amount owed on the Davendorf promissory notes. Simple interest at six per cent for five years and 188 days (November 30, 1983 to June 5, 1989) is $2,833.24.

Therefore, the judgment on the Davendorf note in favor of Wayne is modified and entered in the amount of 11,403.24, together with interest at the rate of seven per cent per annum from June 5, 1989. Judgment in favor of Walter (who is owed three promissory notes in the same amount) is modified and entered in the amount of $34,209.72 together with interest at the rate of seven per cent per annum from June 5, 1989.

Regarding the Sylvan Acres note, we will rely upon the figure of $5,817.43 as calculated by the district court. As discussed later in this opinion, we reject Wayne's challenge of the district court's judgment against him on this note. Simple interest at six per cent for eight years and 276 days (September 3, 1980 to June 26, 1989) is $3,316.60. Therefore, judgment on the Sylvan Acres note in favor of Walter against Wayne is modified and entered in the amount of $9,134.03, together with interest at the rate of seven per cent per annum from June 26, 1989.

II. **Conversion of the Bettendorf Arcade Building and the Subsequent Conveyances.** Wayne next contends the district court erred by not requiring Walter and Mildred to reconvey to the corporation the condominium units which he had converted from the building and conveyed to himself and to a third party.

At trial, the issue to be resolved specifically was whether this so-called conversion violated Iowa Code section 496A.76 (1989), regarding the sale or disposition

of all or substantially all of the corporation's property and assets. In his decision, Judge Kelley found neither the conversion nor the conveyance of nine[1] of the twenty-three units constituted a "sale or exchange" and dismissed this portion of Wayne's cause of action.

On appeal, Wayne is now contending his cause of action was really a "derivative suit" and Walter's actions constituted self-dealing. Wayne does not even address the issue of section 496A.76. The issue of self-dealing was not even submitted to the trial court. There have been no proceedings in the lower court in which Walter has had an opportunity to address this issue. The appellate court will not review issues which were not presented to the district court. State ex. rel. Iowa Dep't of Human Servs. v. Duckert, 465 N.W. 2d 871, 873 (Iowa 1991).

We agree with the district court's reasoning behind its dismissal of this portion of Wayne's suit:

> The submission of a parcel of real estate to a Horizontal Property Regime by the owner of that real estate does not result in itself in the sale[,] exchange or other disposition of all or substantially all of the property. Submission to a Horizontal Property Regime, that is creation of a condominium, is not a sale or exchange. The sale or exchange of nine (sic) of the twenty-four (sic) units is not a sale or exchange of "all or substantially all" of the assets of the owner.

We affirm the district court on this issue.

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1. According to the record, it appears the conveyance of eight, not nine, of these units is in dispute.

III. Amount Due on the Sylvan Acres Note. Wayne next contends the court erred in entering any judgment against him on the Sylvan Acres note. Wayne argues a check, dated September 3, 1980, in the amount of $40.18, was accepted by Walter as payment in full of the note.

In the district court's ruling of Wayne's 179(b) motion on this issue, the court rejected this argument. We agree with the district court's conclusion that there was no evidence of accord and satisfaction in relation to this check and the debt owed on the Sylvan Acres note:

> Since accord and satisfaction involves a question of intent, the Court must look to the intent of both parties. Although Wayne testified that it was his intent to submit the check in full accord and satisfaction, there is no such showing of an intent of Walter Newport to accept the check as such. Both parties agree that Walter did not endorse the check: the signature on the back of it is not his signature. The circumstances here show that the check may not even have been delivered directly to Walter. Both parties were partners in the same law office on the date the check was allegedly submitted. Both parties knew that Walter's secretary was habitually allowed to deposit checks in Walter's personal account, and often did so.

On appeal, Wayne offers no additional evidence on this issue other than his own self-serving testimony. "Whether there is accord and satisfaction ordinarily involves a pure question of intention." Robinson v. Norwest Bank, Cedar Falls, 434 N.W.2d 128, 130 (Iowa App. 1988) (citation omitted). Again, our scope of review is limited to the correction of errors of law. Iowa R. App. P. 4. We affirm the district court on this issue.

IV. Amount Due on Walter's Notes against Davendorf. Wayne finally contends the district court erred in its judgment on the promissory note in favor of Walter against Davendorf. He asserts the court should have deducted, from the judgment, $28,000 for a warranty deed Walter received for two of the condominium units and $65,000 for a conveyance of six of the condominium units.

Again, no rule 179(b) motion was filed regarding this issue. We will assume as fact an unstated finding necessary to support the trial court's judgment. Hubby v. State, 331 N.W.2d 690, 695 (Iowa 1983). Any ambiguity in the trial court's findings is decided in favor of the judgment. Id.

The evidence shows Walter has already paid in full for the first conveyance of the two units, by giving to the corporation a percentage of Walter's stock which was equal in value to the two units. Regarding the second conveyance, Walter is still responsible for any unpaid balance under a contract. However, Wayne presented no evidence to establish the promissory notes should be offset by this unpaid balance.

We affirm the district court on this issue.

We determine any other issues the parties may have raised are either covered by this opinion or are without merit.

The costs of this appeal are taxed to Wayne.

For all the reasons stated, we affirm the district court, as modified.

AFFIRMED AS MODIFIED.