THE COURT OF APPEALS OF IOWA

No. 1-454 / 00-1441
Filed November 28, 2001

FILED
NOV 2 8 2001
CLERK SUPREME COURT

HILBERT E. HINKHOUSE, EVELYN HINKHOUSE, and JUANITA HINKHOUSE ABBOTT,
Plaintiffs-Appellants,

vs.

WENDLING QUARRIES, INC.
Defendant-Appellee.

Appeal from the Iowa District Court for Muscatine County, Patrick J. Madden, Judge.

The plaintiffs appeal from the district court ruling granting Wendling Quarries, Inc., a summary judgment. **AFFIRMED.**

David L. Scieszinski, Wilton, for appellants.

Brian C. Ivers of McDonald, Stonebraker, Cepican & Woodward, P.C., Davenport, for appellee.

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

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MAHAN, J.

The plaintiffs appeal from the district court ruling granting Wendling Quarries, Inc. a summary judgment. The plaintiffs contend the district court erred by finding that the provision in a lease agreement for an annual royalty payment supplants any implied covenant to mine the plaintiffs' property diligently. We affirm.

Background Facts and Proceedings.

Hilbert E. Hinkhouse, Evelyn Hinkhouse, and Juanita Hinkhouse Abbott are members of a farming partnership (Hinkhouses) in Muscatine County. On March 20, 1987, the Hinkhouses leased a small portion of their property to Center Materials Corp. (CMC) and Center City Properties (CCP) for the mining and sale of the limestone and rock materials located on their property. CMC and CCP signed identical lease agreements.

The lease had a five-year term with a five-year option to renew. CMC and CCP also agreed to pay the Hinkhouses twenty cents per ton for limestone quarried from the site. On April 16, 1987, CMC and CCP signed almost identical amendments to the original lease agreement.[1] The amended lease provides in pertinent part that the lessees would not attempt to buy the county quarry.[2] The amended lease also provided CMC and CCP would pay the Hinkhouses "an advance royalty of $1,500 per year for each year of the Lease Agreement,

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[1] To avoid confusion, we will treat both "amendments" as one for purpose of this opinion.

[2] CMC and CCP gained access to the Hinkhouse site through an adjacent county-owned quarry.

payable May 1, 1987, and each May 1 until 1996." All annual advance royalty payments were made as required by the lease agreement.

In March 1988 CMC and CCP assigned their leases to Wendling Quarries, Inc., which assumed its predecessors' rights and obligations under the lease. At the end of the initial five-year term, the parties could not agree on an acceptable price per ton for stone to be removed during the option term. As a result, Wendling did not exercise the option to renew the lease and did not remove any stone from the Hinkhouses' property after the lease expired on March 20, 1992. On May 4, 1992, Wendling placed a successful bid for the adjacent county quarry.

On December 19, 1997, the Hinkhouses filed suit against Wendling asserting Wendling had breached the mining leases: (1) by breaching an implied covenant to develop the property and mineral deposits with reasonable diligence; (2) by failing to make the required royalty payments for the years 1992 through 1997; (3) by purchasing another nearby quarry in breach of the lease terms; and (4) by interfering with prospective business opportunities with the purchase of the nearby quarry. Wendling eventually obtained a partial summary judgment. In its ruling, the district court dismissed (1) claims I and IV on grounds they were filed after the applicable five-year statute of limitations had expired; and (2) claim III on grounds the lease had expired before Wendling purchased the other quarry, and thus Wendling was not in breach.

The Hinkhouses appealed only on the breach of contract and implied covenant claims.[3] We affirmed the district court ruling on the breach of contract claim, but we reversed the district court on the implied covenant claim and remanded to the district court for reinstatement of this claim and further proceedings. *Hinkhouse v. Wendling Quarries, Inc.*, No. 1999-276 (9-506) / 98-1854 (Iowa Ct. App. Jan. 12, 2000). On remand, Wendling again obtained a summary judgment. The district court agreed with Wendling that no implied covenant to mine the property could exist given the advance royalty provision in the lease agreement. The Hinkhouses appeal.

Implied Covenant to Mine.

The Hinkhouses contend the district court erred in granting Wendling's motion for summary judgment. We review a ruling on a summary judgment motion for errors at law. *Crippen v. City of Cedar Rapids*, 618 N.W.2d 562, 565 (Iowa 2000); *Swartzendruber v. Schimmel*, 613 N.W.2d 646, 649 (Iowa 2000).

A district court properly grants summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c); *Crippen*, 618 N.W.2d at 565; *Swartzendruber*, 613 N.W.2d at 649. A factual issue is "material" only if "the dispute is over facts that might affect the outcome of the suit." *Fouts ex rel. Jensen v. Mason*, 592 N.W.2d 33, 35 (Iowa 1999). The burden is on the party moving for summary judgment to prove the facts are undisputed. *Interstate Power Co. v. Insurance Co. of N. Am.*, 603 N.W.2d 751, 756 (Iowa 1999).

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[3] On October 9, 1998, the Hinkhouses filed a dismissal on claim II after the remaining issues of the case has been resolved.

In ruling on a summary judgment motion, the court must look at the facts in a light most favorable to the party resisting the motion. *Crippen*, 618 N.W.2d at 565. The court must also consider on behalf of the nonmoving party every legitimate inference that can be reasonably deduced from the record. *Id.* An inference is legitimate if it is "rational, reasonable, and otherwise permissible under the governing substantive law." *Butler v. Hoover Nature Trail, Inc.*, 530 N.W.2d 85, 88 (Iowa Ct. App. 1994). On the other hand, an inference is not legitimate if it is "based upon speculation or conjecture." *Id.* If reasonable minds may differ on the resolution of an issue, a genuine issue of material fact exists. *Swartzendruber*, 613 N.W.2d at 649.

Because leases are contracts as well as conveyances of property, ordinary contract principles apply. *Dickson v. Hubbell Realty Co.*, 567 N.W.2d 427, 430 (Iowa 1997). We review the construction and interpretation of a contract as a matter of law. *Hartig Drug Co. v. Hartig*, 602 N.W.2d 794, 797 (Iowa 1999). The cardinal principle of contract interpretation is to determine the parties' intentions at the time they executed the contract. *Id.* Therefore our goal in interpreting this lease is to ascertain the meaning and intention of the parties as expressed in the language used. *Howard v. Schildberg Constr. Co.*, 528 N.W.2d 550, 554 (Iowa 1995). Consequently, where the intent of the parties is expressed in clear and unambiguous language, we enforce the contract as written. *Id.*

Despite the absence of any express language in the written agreement supporting their position, the Hinkhouses contend the district court erred by finding that the provision in the lease agreement for an annual royalty payment

supplants any implied covenant to mine the property diligently. We disagree. A party must meet a high standard to establish a implied covenant in a contract:

> Courts are slow to find implied covenants. The obligation must arise from the language used or it must be indispensable to give effect to the intent of the parties; it must have been so clearly within their contemplation that they deemed it unnecessary to express it. It can be justified only on the ground of legal necessity and can arise only when it can be assumed it would have been made part of the agreement if attention had been called to it.

Fashion Fabrics of Iowa, Inc. v. Retail Investors Corp., 266 N.W.2d 22, 27-28 (Iowa 1978). Our review of the record reveals no evidence from which a fact finder could conclude that an implied covenant to mine the property diligently arises from the language of the contract or is a "legal necessity" to effectuate the parties' intent.

In leasing land for the extraction of minerals, an obligation to pay minimum advance royalties does not create an implied duty to mine under Iowa law. We have never implied such a duty and decline to do so now. *But see Price v. Black*, 126 Iowa 304, 305-06, 101 N.W. 1056, 1057 (1905) (implied a duty to mine in a lease agreement which did not provide for minimum royalties in the absence of mining); *Carter v. Certain-Teed Prods Corp.*, 102 F. Supp. 280, 290-92 (N.D. Iowa 1952) (recognizing an action lies under Iowa law for damages for breach of implied covenant for reasonably diligent operation of a mine on leased premises). The Eighth Circuit states the law of implied covenants in relation to royalty provisions in conveyances of mineral rights as follows:

> The court cannot make contracts for parties, and can declare implied covenants to exist only when there is a satisfactory basis in the express contracts of the parties which makes it necessary to imply certain duties and obligations in order to effect the purposes of the parties in the contracts made. Before a covenant will be

> implied in the express terms of a contract, and in some cases in view of the customs and practices of the business to which the contract relates, *it must appear therefrom that it was so clearly in the contemplation of the parties as that they deemed it unnecessary to express it*, and therefore omitted to do so, or that it is necessary to imply such covenant in order to give effect to and effectuate the purpose of the contract as a whole.

Carter v. Certain-Teed Prods. Corp., 200 F.2d 754, 756 (8th Cir. 1953) (citation omitted) (emphasis added).

In the present case, implying a duty to mine in the face of a minimum advance royalty clause ignores the terms agreed to by the contracting parties. The 1987 lease agreement authorizes Wendling to mine the leased premise, but it does not explicitly impose any affirmative obligation on Wendling to mine all recoverable limestone and rock materials located on the premises. The lease agreement also does not establish any timetable for mining the limestone. In addition, the term clause of the lease does not require active mining as a precondition to extending the term past the initial five years:

> The lease is granted for five years from the above date with an option to renew for a period of five years at the end of the first period, subject to negotiation of a mutually agreeable price per ton of stone removed.

The lease agreement also specifically provided that the Hinkhouses would be paid "an advance royalty of $1,500 per year for each year of the Lease Agreement, payable May 1, 1987, and each May 1 until 1996", regardless if the lease agreement was still in effect. Therefore, the contracting parties themselves have dealt expressly with the possibility of a failure to mine by providing for a guaranteed $1500 annual advance royalty payment for ten years. These provisions of the lease directly contradict any implied covenant to diligently mine.

We hold as a matter of law that because the parties have expressly agreed to the minimum advance royalty payments, there is no failure of consideration in the absence of mining and it is not necessary to imply a covenant to mine. *See Inman v. Milwhite Co.*, 402 F.2d 122, 124 (8th Cir. 1968) (concluding that where "the contracting parties have dealt specifically with the question of development and operation, their agreement governs, and 'there can be no reason for implication'"). Hilbert Hinkhouse in his deposition stated unequivocally that not only did Wendling have no obligation to mine the property under this agreement but also the advance royalty payments provision was to guarantee the Hinkhouses a minimum amount of income each year regardless of the mining activity on the property. Specifically, he stated, "Whether you quarry it or not, we would get $1,500 a year, and we had that written into it." Thus, the advance royalty payments were separate and independent consideration regardless if Wendling mined the quarry. Such reasoning recognizes minimum advance royalties as the consideration flowing from mining company to the landowner in lieu of the tonnage royalties, which would be paid if mining operations were undertaken. Under these circumstances, implying a duty to mine in the face of a minimum advance royalty clause ignores the terms agreed to and intended by the contracting parties.

In viewing the record, even in the light most favorable to the Hinkhouses, we find the Hinkhouses did not generate a genuine issue of material fact that the lease contained an implied covenant to diligently mine. Accordingly, we conclude the district court properly granted summary judgment.

Amended Answer.

Although the Hinkhouses questioned whether the district court properly granted Wendling leave to amend its answer to assert that no implied covenant to diligently mine the property existed because of the required advance royalty payments as an affirmative defense, these concerns were not identified as distinct issues in the Hinkhouses' brief. The Hinkhouses' random mention of this issue, without elaboration or supportive authority, is insufficient to raise the issue for our consideration. *Soo Line R.R. Co. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 691 (Iowa 1994); Iowa R. App. P. 14(a)(3) ("Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue."). "[A] random discussion of difficulties, unless assigned as an issue, will not be considered." *Hubby v. State*, 331 N.W.2d 690, 694 (Iowa 1983). Because the deficiency in the Hinkhouses' brief has hindered this court from its review and consideration of the issue, we find this issue has been waived.

Even if the Hinkhouses had properly raised this issue, the district court did not err in allowing Wendling to amend its answer. Because the leave to amend shall be freely given when justice so requires, allowing amendments is encouraged and denying permission to amend is discouraged. *Grace Hodgson Trust v. McClannahan,* 569 N.W.2d 397, 399 (Iowa Ct. App. 1997). In this case, the motion to amend was not only filed five months before trial but also over two months before the pleadings deadline. Under these circumstances, the district court did not abuse its discretion when it allowed Wendling leave to amend its answer.

AFFIRMED.

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