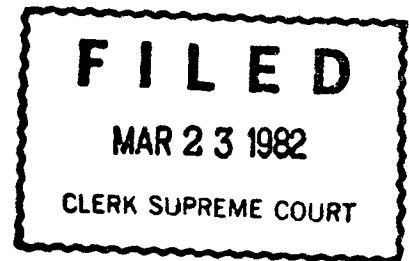


IN THE COURT OF APPEALS OF IOWA



PICKWICK COMPANY,)

Plaintiff-Appellee,)

vs.)

HERALD A. SMITH, JR.)

Defendant-Appellant.)

Filed March 23, 1982

1-433
2-66143

501

Appeal from Linn District Court - Harold J. Swailes, Judge.

Defendant appeals from judgment for plaintiff in an action seeking damages resulting from breach of an alleged oral contract for payment of the debt of another, asserting: (1) that he did not receive a direct benefit and thereby fall within an exception to the statute of frauds; (2) that promissory estoppel should not constitute an exception to the statute of frauds; and (3) that the measure of damages should have been the cost of the goods involved or their market value rather than their contract price of sale. AFFIRMED.

Gregory Alan Lewis and Robert E. Konchar of Moyer & Bergman, Cedar Rapids, for defendant-appellant.

William H. Carmichael and Iris E. Muchmore of Simmons, Perrine, Albright & Ellwood, Cedar Rapids, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

PER CURIAM

Defendant appeals from judgment for plaintiff in an action seeking damages resulting from breach of an alleged oral contract for payment of the debt of another, asserting: (1) that he did not receive a direct benefit and thereby fall within an exception to the statute of frauds; (2) that promissory estoppel should not constitute an exception to the statute of frauds; and (3) that the measure of damages should have been the cost of the goods involved or their market value rather than their contract price of sale. We affirm.

Our scope of review is limited to correction of errors at law. Iowa R. App.

P. 4.

I.

Plaintiff Pickwick Company supplied parts to Armstrong & Associates, Ltd. (A & A) for the manufacture of CB antennas. Both Pickwick and A & A had substantial loans at United State Bank in Cedar Rapids. Defendant Herald Smith was a director and shareholder of United State Bank, as well as a director and major investor in A & A.

Due to generally poor economic conditions in the CB industry during 1977, A & A started to have cash flow problems which made it impossible to pay parts suppliers such as Pickwick on a timely basis. In November of 1977, Pickwick required that A & A pay cash for parts and inventory delivered as well as pay an amount on the account receivable owing by A & A to Pickwick. Despite this procedure, on February 28, 1978, the outstanding balance on accounts receivable that A & A owed Pickwick was \$60,274.36.

In March of 1978 A & A had \$25,000 of orders that could not be filled unless Pickwick would agree to deliver parts to A & A. On March 8, 1978, a meeting was held to see if a solution to this problem could be reached that would enable A & A to pay Pickwick and get the parts as soon as possible. Plaintiff's witnesses

testified that at this meeting defendant suggested that plaintiff and A & A work out an agreed amount due on accounts receivable that A & A owed Pickwick and work out the inventory values. If this could be done satisfactorily, then defendant would pay the agreed A & A account to Pickwick and purchase the Pickwick inventory for A & A.

At a March 10, 1978, meeting between the bankers, Pickwick, A & A, and defendant, it was agreed that the total account receivable was \$51,257. After this meeting the inventory was counted to determine its value. From March 13 to 16 most of the Pickwick inventory, machinery, tools, and equipment necessary to supply parts to A & A was delivered to A & A and set aside in a separate place.

On April 7, 1978, plaintiff sent a statement to A & A in connection with the delivery of these assets for the amount of \$67,180.81. When no payment was received, plaintiff wrote a letter to defendant, dated May 10, 1978, demanding payment in the sum of \$123,818.83 on or before May 15, 1978. This amount would be full payment for both the accounts receivable and inventory. No payment was made. Plaintiff filed suit against defendant on August 17, 1978, alleging defendant had orally agreed to pay the accounts receivable and purchase Pickwick's inventory. On November 11, 1978, A & A filed a Chapter 11 bankruptcy petition.

Trial was to the court, which found the statute of frauds inapplicable due to an exception treating as an original understanding outside the statute an agreement in which the promisor receives a direct benefit. Alternatively the court found the statute of frauds inapplicable due to promissory estoppel. The original judgment for \$123,300.85, based on terms of the oral contract, was later modified to include prejudgment interest. The court found the testimony of witnesses who testified that an agreement was reached more credible than the testimony of those who testified that no agreement was reached. The court found that defendant directly benefited from the agreement by purchasing plaintiff's goods

for the purpose of reselling them to A & A. Although A & A rather than defendant was initially billed for the goods, they were segregated from other goods in inventory upon delivery.

II.

Defendant asserts that plaintiff's claim should be barred by the statute of frauds, section 622.32(2), The Code, which provides in part:

Except when otherwise specifically provided, no evidence of the following enumerated contracts is competent, unless it be in writing and signed by the party charged or by his authorized agent:

1.
2. Those wherein one person promises to answer for the debt, default or miscarriage of another, including promises by executors to pay the debt of the decedent from their own estate.

Maresh Sheet Metal Works v. N.R.G., Ltd., 304 N.W.2d 436, 438 (Iowa 1981)

held that oral promises which are collateral to an already existing contract are barred by the statute while those which create an original or primary obligation on their own are not barred by the statute. It has long been the rule in Iowa that "where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties, the case is not within the statute." Id. at 439.

"Whether a promise is collateral to an existing contract or creates a primary obligation on the part of the promisor is a question of fact." Id. at 440. The trial court found that defendant directly benefited from the oral contract. Due to defendant's large investment in A & A, it was beneficial for him to do whatever necessary to allow A & A to continue business. The court also found that defendant personally purchased the inventory for resale to A & A. The personal purchase is supported by the fact that after delivery to A & A, the Pickwick inventory was kept separate from other supplies and considered not subject to the

United State Bank's security interest. The trial court's finding that there was new consideration is supported by substantial evidence. We are bound by that finding. Iowa R. App. P. 14(f)(1). Therefore, plaintiff's claim is not barred by the statute of frauds and we affirm the trial court.

Since we affirm the trial court's decision as to this issue, there is no reason to decide whether defendant is correct in asserting that promissory estoppel should not constitute an exception to the statute of frauds. In addition, since we do not decide this case under the doctrine of promissory estoppel, defendant's allegations of error with regard to the award of damages under that doctrine are also without merit. The trial court's decision is affirmed.

AFFIRMED.