IN THE COURT OF APPEALS OF IOWA

No. 0-704 / 99-1605
Filed February 28, 2001

LIBERTY BANK & TRUST OF MASON CITY, N/K/A COMMERCIAL FEDERAL BANK,
Plaintiff-Appellee,

vs.

ALPANA ALUMINUM PRODUCTS, INC., a Minnesota Corporation,
Defendant,

and

OLYMPUS ALUMINUM PRODUCTS, INC., a Minnesota Corporation,
Defendant-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Cerro Gordo County, James M. Drew, Judge.

Defendant-Appellant appeals from a district court declaratory judgment ruling in favor of plaintiff bank, declaring defendant's contract to purchase certain business property was null and void for non-performance. **AFFIRMED.**

David M. Nelsen of Nelsen Law Office, Mason City, for appellant.

Thomas H. Burke of Whitfield & Eddy, P.L.C., Des Moines, for appellee.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

MAHAN, J.

Defendant-Appellant appeals from a district court declaratory judgment ruling in favor of plaintiff bank, declaring defendant's contract to purchase certain business property was null and void for non-performance. Defendant contends the court erred by: (1) finding it had breached a related lease agreement with the bank by not paying rent; (2) finding it was contractually required to obtain consents to the sale from certain governmental lenders; and (3) failing to find the bank was barred from its equitable remedy under the "unclean hands" doctrine. We affirm.

I. Background Facts and Proceedings. Alpana Aluminum Products, Inc. (Alpana) owned property in Mason City (Alpana Property). Liberty Bank & Trust of Mason City, n/k/a Commercial Federal Bank (Bank) held two real estate mortgages against the Alpana Property and a security interest in all of Alpana's equipment, inventory, furniture, and fixtures.

Alpana began experiencing financial problems, and in the latter half of 1995 began searching for a possible successor to or purchaser of its business operations in Mason City. Alpana, Olympus Aluminum Products, Inc. (Olympus), and the Bank entered into an Agreement to Purchase Assets (Agreement) on March 8, 1996. Under the Agreement, prepared by an attorney representing Olympus, Olympus would purchase the Alpana Property from Alpana and the Bank. Olympus would take possession immediately under a lease attached to

the Agreement,[1] and Alpana and the Bank would take steps to clear title while Olympus arranged financing during the six-month lease period.

The Alpana Property was subject to various junior liens, inferior to the Bank's mortgages, which needed to be removed before completing the sale. Therefore, the Bank and Alpana engaged in an alternative non-judicial voluntary foreclosure proceeding as to the Alpana Property, pursuant to Iowa Code section 654.18 (1995). As part of that action, Alpana conveyed the Alpana Property to the Bank by special warranty deed on March 13, 1996. Junior lienholders were served with notices of foreclosure. One of the junior lienholders, Kehm Electric a/k/a Kehm Enterprises, Ltd. (Kehm), paid to the Bank the appropriate amount for redemption within the required time period. After consulting with its attorney, who advised the Bank it would have to honor the redemption, the Bank executed a deed in favor of Kehm to complete the redemption on May 9, 1996.

Kehm notified Olympus it now owned the Alpana Property and threatened Olympus it would have to enter a lease or vacate the property. Olympus eventually succeeded in an action filed in federal court to have the redemption set aside. Kehm relinquished its interest in the Alpana Property on July 19, 1996.

Olympus occupied the Alpana Property and conducted its business operations there from approximately March 8, 1996 to March 15, 1997. The lease expired on or about September 30, 1996. Olympus did not pay rent as required by the lease. The Bank extended the lease for two, month-long periods

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[1] The lease was executed as a separate document, entitled "Building and Equipment Lease."

before eventually filing a forcible entry and detainer action (FED Action) in district court on December 13, 1996. The district court issued an order for writ of removal on February 27, 1997.

Contemporaneous with its FED Action, the Bank commenced a foreclosure of its security agreements, which secured the personal property, machinery, and equipment of Alpana located at the Alpana Property (Foreclosure Action). On April 14, 1997, the district court granted the Bank's motion for default judgment and/or summary judgment, finding Alpana and Olympus in default and foreclosing the Bank's security agreements against the machinery, equipment, personal property, and other assets contained within the Alpana Property. The property was sold at a sheriff's sale pursuant to a special execution arising out of the foreclosure action. Olympus did not take part in the sheriff's sale.

In addition to its loans with the Bank, Alpana had financial obligations with the Iowa Department of Economic Development (IDED), the City of Mason City, and the Mason City Economic Development Corporation. The parties to the Agreement contemplated Olympus would assume these obligations. The parties dispute whether Alpana or Olympus was to obtain the necessary consents from the government lenders. In July 1997, IDED accepted a proposal from Olympus that called for the release and satisfaction of the IDED loan in exchange for a cash payment of $75,000 from Olympus. Olympus never made the $75,000 payment.

On June 3, 1996, IDED sued Alpana and its principal, Donald Klitzka for default pursuant to the Community Economic Betterment Account (CEBA)

Guaranteed Loan (IDED Litigation). Counsel for Alpana advised counsel for Olympus of the litigation and demanded reimbursement to Klitzka, citing a "Secondary Letter Agreement" entered into by Alpana, Klitzka, and Olympus on March 8, 1996. The terms of the letter agreement provided Olympus would, in exchange for the assignment of certain contracts to Olympus, reimburse Klitzka "for an amount equal to an amount rendered as a judgment against him personally on the CEBA guarantee by the State of Iowa or its assigns or agents." Klitzka subsequently filed a third-party action and obtained a default judgment of $150,000 against Olympus. Olympus took no steps to have the judgment set aside. IDED dismissed its action against Alpana and Klitzka.

The parties continued negotiations in an effort to close the transaction, even after the Bank informed Olympus it considered the Agreement null, void, and terminated as of May 1, 1997. Continued negotiations proved fruitless. Olympus never obtained consents or assumed the government loans. Olympus refused to agree to the termination of the Agreement.

In November 1997, the Bank filed its declaratory judgment action against Alpana and Olympus. The court entered a default judgment against Alpana in April 1998. The matter proceeded to a bench trial in equity, and the district court entered its findings of fact, conclusions of law and order on September 3, 1999. The court concluded Olympus failed to satisfy certain conditions of the Agreement, and the time for closing had long since passed. The court stated, "It would be inequitable to allow Olympus to prevent the termination of the agreement under paragraph 11.1 [closing] as it has had more than an adequate

opportunity to close." Accordingly, the court declared the Agreement null and void, thereby relieving the parties of all their rights and responsibilities under the agreement. Olympus appeals.

II. Relevant Contract Provisions. Paragraph 1.3 of the Asset Purchase Agreement provided:

> As subject to the terms and conditions hereof, upon the Closing Date Alpana hereby assigns, transfers and conveys to Buyer [Olympus], and Buyer hereby assumes from Alpana and agrees to pay according to their terms and/or any terms as renegotiated by the Buyer the following liabilities:
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> . . . .
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> (b) City of Mason City, Development and Loan Agreement in the amount of $308,000.00 (a forgivable loan based on job attainment);
> (c) State of Iowa Department of Economic Development, Community Economic Betterment Account (CEBA), Loan number CEBA-94-007 in the amount of $150,000 (a forgivable loan based on job attainment);
> (d) Mason City Economic Development Corporation in the amount of $56,000.00 (a forgivable loan based on job attainment);
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> . . . .
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> The Buyer agrees to indemnify and hold Alpana and Bank and any personal guarantors, if any, harmless for any payment of the above-stated assumed liabilities.

Paragraph 2.2(a) indicated the purchase price of approximately $1.5 million included $514,000, representing Olympus's assumption of the economic development loans. Similarly, paragraph 3.1(a) allocated $514,000 of the purchase price to the assumption of liability on the economic development loans.

Paragraph 6.3 provided:

> That in the event that Alpana defaults in its loan obligations to Bank, Bank will commence and pursue with due diligence, in accordance with all applicable state, federal and local laws, foreclosure proceedings on the assets of Alpana in which bank has a valid and senior security interest including a substantial portion of the Business Assets specified herein.

Section X of the Agreement set forth "Conditions of Closing/Abandonment of Transaction." Paragraph 10.1 provided:

> The obligations of the Buyer [Olympus] to proceed on the Closing Date shall be subject (at its discretion) to the satisfaction, on or prior to the Closing, of all the following conditions:
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> . . . .
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> (f) Required Consents. All required consents shall have been received from governmental agencies whose approval is required to consummate the transaction contemplated herein, specifically including but not limited to the City of Mason City, the State of Iowa Department of Economic Development and Mason City Economic Development Corporation.

Paragraph 10.2 provided:

> The obligation of the Bank or Alpana to proceed on the Closing Date shall be subject (at its discretion) to the satisfaction, on or before the Closing, of the following conditions:
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> . . . .
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> (b) Compliance with Commercial Lease Obligations. The Buyer shall not be in breach of any material provisions of the Commercial lease incorporated herein.
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> . . . .
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> (d) Required Consents. All required consents shall have been received from governmental agencies whose approval is required to consummate the transaction contemplated herein, specifically including but not limited to the City of Mason City, the State of Iowa Department of Economic Development and Mason City Economic Development Corporation.

Paragraph 11.1 provided:

> Closing of the transaction contemplated by this Agreement ("Closing Date") shall be held at a time, date and location mutually agreed upon in writing by all the parties. Such date of Closing is referenced herein as the Closing Date.
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> Closing date shall be set for a date within the six-month Lease term of the real and personal property from Alpana and/or Bank to Olympus.

III. Standard of Review. Our review of declaratory judgment actions tried in equity is de novo. *Owens v. Brownlie*, 610 N.W.2d 860, 865 (Iowa 2000).

We give weight to the findings of fact made by the trial court, but are not bound by them. *Id.*

IV. Analysis of the Agreement. As a preliminary matter, we note the district court concluded the provisions of paragraph 10.2 of the Agreement are conditions precedent. Olympus has not appealed from that conclusion. Thus, if Olympus failed to meet the conditions set forth in paragraph 10.2, the Bank was not obligated to proceed with closing.

A. *Payment of Rent.* Olympus argues the district court erred in finding it had breached the lease by failing to pay rent. It contends testimony by a Bank employee showed otherwise. Furthermore, Olympus argues, the district court could not take judicial notice of matters in the FED action.

The Bank introduced evidence from three litigations at trial: (1) the FED Action; (2) the Foreclosure Action; and (3) the IDED Litigation. Olympus objected to the evidence, relying on the general rule that judicial notice will not be taken of records of the same court in a different proceeding, without an agreement of the parties. *See Troester v. Sisters of Mercy Health Corp.*, 328 N.W.2d 308, 311 (Iowa 1982); *McCarthy v. McCarthy*, 162 N.W.2d 444, 447 (Iowa 1968). The district court admitted the evidence, subject to the objection. *See Davis v. Roberts*, 563 N.W.2d 16, 20 (Iowa Ct. App. 1997) (district court properly withheld ruling on objections to evidence to facilitate appellate court's de novo review of the entire record in the case). The court advised the Bank's counsel to "lay whatever foundation you think is appropriate."

Our de novo review of the record reveals the Bank's counsel laid the appropriate foundation for the introduction of the evidence, thus eliminating the district court's need to take judicial notice of the litigations. Moreover, in its findings of fact, conclusions of law, and order, the district court did not specifically take judicial notice of the litigation evidence introduced by the Bank. *See, e.g., In re Adkins*, 298 N.W.2d 273, 278 (Iowa 1980). It was unnecessary for the court to take judicial notice of the litigations, because the Bank introduced sufficient evidence to support their introduction without judicial notice.

Even if the district court did take judicial notice of the litigation evidence, its admission was not in error. The litigations, with the possible exception of the IDED litigation, involved essentially the same parties. The declaratory judgment proceeding is equitable in nature. It was appropriate for the court to consider the litigation evidence in determining its equitable remedy in this case. *See, e.g., First Nat. Bank v. Chadron Energy Corp.*, 459 N.W.2d 736, 738 (Neb. 1990) (where cases are interwoven and interdependent, and the controversy has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action).

The Bank successfully pursued its FED Action against Olympus based on nonpayment of rent. The payment of rent is a material provision of a lease. Paragraph 10.2(b) of the Agreement required Olympus comply with the material provisions of the commercial lease as a condition to closing. Olympus failed to

meet this condition of the Agreement. The district court did not err in finding Olympus breached the lease by failing to pay rent.

B. *Consents.* Olympus contends the record lacks substantial evidence to support the district court's finding it was contractually required, as a condition precedent, to obtain consents to the sale from government lenders. Rather, Olympus argues, this burden fell to Alpana. We disagree.

The Agreement contemplated the government loans would be assumed by Olympus. However, the parties dispute which party was required to obtain the required consents. Paragraph 10.1 lists obligations the Bank and Alpana must meet in order to proceed with closing. Paragraph 10.2 lists Olympus's obligations. Paragraphs 10.2(d) and 10.1(f), "required consents," are identical.

The record reveals Olympus's counsel drafted the Agreement. Therefore, any ambiguities in the Agreement must be resolved against Olympus. *See Dickson v. Hubbell Realty Co.*, 567 N.W.2d 427, 430 (Iowa 1997) (ambiguities in the contract strictly construed against the drafter). We conclude the Agreement required Olympus to obtain the appropriate consents from governmental lenders.

Olympus did little to satisfy this condition. It did reach an agreement with IDED, but failed to make the payment agreed upon by the parties. Olympus made no other real attempts to obtain consent for assumption of the economic development loans. We affirm the district court on this issue.

V. "Unclean Hands." Olympus contends the district court should have invoked the "unclean hands" defense, prohibiting recovery or relief by the Bank. Olympus argues the Bank acted to frustrate the sale and render closing the deal

impossible, thereby allowing the Bank to "keep a $1.65 million asset for a $500,000 loan."

The doctrine of unclean hands considers whether the party seeking relief has engaged in inequitable conduct that has harmed the party against whom he seeks relief. *General Car & Truck Leasing Sys., Inc. v. Lane & Waterman*, 557 N.W.2d 274, 279 (Iowa 1996). The doctrine stands for the principle that a party may be denied relief in equity based on their inequitable, unfair, dishonest, fraudulent, or deceitful conduct. *Ellwood v. Mid States Commodities, Inc.*, 404 N.W.2d 174, 184 (Iowa 1987).

After a careful review of the record, we conclude the Bank's conduct toward Olympus does not give rise to the "unclean hands" defense. A former Bank employee testified banks "absolutely deplore" owning real estate. The Bank's actions were appropriate, and went beyond what was required in attempting to close the Agreement. We affirm the district court on this issue.

VI. Conclusion. Olympus failed to comply with conditions precedent to closing the Agreement. Despite adequate opportunities to close and weeks or months of negotiations, the parties were unable to agree upon the terms for closing the transaction. Moreover, at this point, Olympus has not occupied the property for nearly four years. The equipment located on the Alpana Property at the time of the Agreement has long since been sold. The equities lie with the Bank in this case. We affirm the district court's declaration of the Agreement as null and void.

AFFIRMED.