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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CITIZENS SAVINGS BANK and SMALL BUSINESS ADMINISTRATION, An Agency of the U.S. Government,

Plaintiffs-Appellees,

vs.

AMERICAN MOTORISTS INSURANCE COMPANY, and COLBURN & SON, INC., A Corporation and EARL LAWRENCE,

Defendants-Appellants.

EARL K. LAWRENCE,

Cross-Claimant,

vs.

AMERICAN MOTORISTS INSURANCE CO.,

Cross-Claimant,

vs.

AMERICAN MOTORISTS INSURANCE CO.,

Counterclaimant,

vs.

CITIZENS SAVINGS BANK,

Counterclaim Defendant.

Filed April 30, 1985

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Appeal from the Iowa District Court for Sac County - R. K. Richardson, Judge.

Defendant insurer appeals from adverse judgment in an action to reform an insurance contract. REVERSED AND REMANDED.

M. Gene Blackburn of Blackburn, Stockdale & Brownlee, Ft. Dodge, for the defendant-appellant/cross-appellee.

Thomas L. McCullough and Colin J. McCullough, of McCullough Law Firm, Sac City, for the plaintiffs-appellees/cross-appellants.

Francis Fitzgibbons, of Fitzgibbons Brothers, Estherville, for the defendants/cross-appellees.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ.

SACKETT, J.

The building and contents of Bill's A.G.I store in Sac City were destroyed by fire. The fire was of an incendiary nature, and the owner, one Lorentzen, subsequently was charged and convicted of arson in connection with the fire. Lorentzen had given Plaintiffs Citizens Savings Bank and Small Business Administration a mortgage on the real estate and a security interest in the contents of the store. The mortgage and security interest were outstanding at the time of the fire. Defendant American Motorists Insurance Company insured the building and contents at the time it burned. Defendant Colburn & Sons, Inc., had written the Motorists policy through their employee, Duane Fort. The policy of insurance listed the plaintiffs as mortgagees. The policy foreclosed Lorentzen from recovery because of the arson. This fact is not disputed.

The plaintiffs were not foreclosed from recovering the building insurance because of the following clause in the policy:

> 10. MORTGAGE CLAUSE - - - APPLICABLE ONLY TO BUILDINGS . . . . As it applies to the interest of any mortgagee designated in the Declarations, this insurance shall not be affected by any of the following:
> (a) any act or neglect of the mortgagor or owner of the described buildings;

Such a mortgage clause has been referred to as a "New York," "standard," or "union" form, the salient features of which are: 1. It creates an independent contract between the company and the mortgagee. 2. The mortgagee cannot be affected by any act of the mortgagor. 3. The rights of the mortgagee are subject to all the terms and conditions of the policy. 5A Appleman, Insurance Law and Practice §3401 (1970).

The mortgage clause was limited to buildings. Motorists claimed that under the terms of the policy as written, plaintiffs had no greater right than the insured to recover on the personal property. The plaintiffs claimed it was the intention of

the parties that the mortgage clause also extend to the personal property. Plaintiffs brought suit seeking to reform the insurance contract. The trial court ordered the contract reformed. Trial court in its order concluded ". . . the policy should be reformed to express the true intention of the parties and to provide coverage on the personal property under the policy with the loss payable as the mortgagees' interest," and then went on to provide for judgment. Motorists has appealed challenging the order.

The very narrow issue before us is not whether the policy provided coverage on the personal property but whether or not the policy should be reformed to give plaintiffs an independent contract with Motorists on the personal property not affected by the actions of Lorentzen.

This case was tried solely on the contention that there was a mutual mistake and the policy should be reformed.

In a reformation case the plaintiff has the burden to prove by a preponderance of clear, satisfactory and convincing evidence that through mistake the policy failed to express the mutual intent of the parties.

> In reformation cases involving insurance policies, less proof is required than in contract cases generally. (Citations omitted.) A mistake within the meaning of reformation doctrine "is a belief that is not in accord with existing facts."

Johnson v. United Investors Life Ins. Co., 263 N.W.2d 770, 774 (Iowa 1978), quoting Restatement (second) of Contracts §293 (Tent. Draft No. 10, 1975).

To entitle plaintiffs to reformation it must appear that the contract does not express the true agreement of the parties. Wall v. Mutual Life Ins. Co., 228 Iowa 119, 127, 289 N.W. 901, 904 (1940).

> By mutuality is not meant that both parties must agree on the hearing that the mistake was in fact made, but the evidence of the mutuality of the mistake must relate to the time of the execution of the instrument and show that at that particular time the parties intended to say a certain thing and by mistake expressed another.

Schuknecht v. Western Mut. Ins. Co., 203 N.W.2d 605, 609 (Iowa 1973), quoting 76 C.J.S. Reformation of instruments §28 at 36 (1952).

Our review is de novo. We accord weight to trial courts' findings of fact but are not bound by them. We are particularly mindful when credibility issues are involved, that the trial court had the advantage of seeing and hearing the witnesses. Johnson, 263 N.W.2d at 774.

Motorists argues that there is no factual basis in the record to show the parties intended the policy to contain a clause providing plaintiffs' right to recover under the policy on personal property was not affected by the acts of Lorentzen.

Both parties agree the bank specifically requested of the insurance agent that a mortgage clause similar to the New York Standard Mortgage Clause be included in the policy. Motorists claims the plaintiff got the clause they asked for; plaintiffs claim they did not because the mortgage clause should have extended to personal property.

Plaintiffs contend in essence that Fort understood they wanted the coverage because a mortgage clause, creating an independent contract between them and the company and not affected by any acts of Lorentzen, covered the personal property insured by the first AID policy. The first AID policy provided in part:

> . . . this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner. . . .

The words "applicable only to buildings" did not appear in the first policy with reference to the mortgage clause. The Motorists policy in existance at the time of the fire was the fourth policy written by Colburn on Lorentzen's grocery store. The first three policies were with AID Insurance. The last two AID policies and the Motorists policy had the identical mortgage clauses specifically limited "only to buildings."

The issue of whether or not the first AID policy would have paid plaintiffs for personal property coverage under like circumstances is not before us. However, AID never indicated in renewals that the second and third policies changed coverage.

Since the adoption of the Uniform Commercial Code in Iowa in 1965, an interest in personal property or fixtures which secures payment or performance of an obligation has been referred to as a "security interest." Iowa Code 554.1201(37).[1] A consensual secured interest in real estate is referred to as a mortgage. See Iowa Code §554.9105(j).

The documents securing the interests of plaintiffs in the personal property were security agreements not mortgages; plaintiffs and Lorentzen were referred to as secured parties and debtor. We note the language on the first policy refers to mortgagor and mortgagee - not secured party and debtor.

The negotiations on the policy were carried on between insurance agent Fort and Russell Spearman, the loan officer of the bank. Neither man is positive about his recollection of the events. Spearman[2] was the only person to have talked to Fort about coverage. The very most Spearman's testimony shows is that he made a general request for a clause on buildings and contents. There is absolutely no evidence in the record that these two men discussed the issue of paying a loss under circumstances where the premises were destroyed because of arson by the insured or coverage where the lender was not affected by the acts of the mortgagor or debtor. Rather, plaintiffs claim that the parties both knew Spearman was requesting this type of insurance when he requested mortgage insurance or a New York Standard Mortgage clause.

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[1] Prior to the adoption of the commercial code, Iowa referred to such interests as chattel mortgages. See Iowa Code §652 (1963), repealed by Acts 1965 (61 G.A.), ch. 413.

[2] Spearman was not a neophyte in the world of finance and insurance. He had been a banker for 31 years and had limited experience as an insurance agent in the fire and casualty area.

Considering all of the following, we fail to find the plaintiffs met their burden.

1. There is an obvious disagreement about whether a mortgage clause is intended to cover personal property.

2. The term mortgage is not now used in the Iowa Code in connection with a security interest in personal property but refers only to liens on real estate.

3. It is reasonable for a party to assume a mortgage clause would only apply to real estate.

4. A mortgage clause applying only to real estate is fairly standard in the industry and the protection requested for personal property is generally offered by another rider.

5. There is no evidence that coverage in the event of the insured's dishonest act was ever discussed.

6. There is no evidence of any discussion of protection for the bank on an arson loss.

7. The policy was written clearly in large print providing coverage only on buildings.[3]

8. The questioned portion was in the same form as the second and third policies written by AID.

Under this record we fail to find that Fort and Spearman negotiated for and intended to include the particular coverage requested in the reformation action. We reverse the trial court and determine the policy should not have been reformed.

We remand to the trial court with instructions to find that the plaintiffs cannot recover on the personal property insurance and modify plaintiffs' judgment by reducing the judgment by the amount the trial court allowed for recovery on personal property.

Plaintiffs have also cross-appealed contending that if Motorists should be successful in its appeal on any theory, judgment should be entered against

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[3] Spearman claimed he read the first AID policy. He claimed he never read the other three. His failure to read the policy does not bar him from reformation. Johnson v. United Investors Life Ins. Co., 263 N.W.2d 770, 776 (Iowa 1978).

Defendant Colburn. The plaintiffs argue that Motorists suggests the mistake was not that of Motorists and that if this court finds the fault in this case was that of the agent and not the company, judgment should be entered against the agent.

This case was tried in equity only on a reformation theory against Motorists and Colburn. A claim not made or preserved in the trial court will not be considered on appeal. See Regal Ins. Co. v. Summit Guaranty Corp., 324 N.W.2d 697, 706 (Iowa 1982).

The issue of negligence was not before the trial court nor was it considered by us. The only issue before us was the reformation issue. Plaintiffs claimed recovery directly from the policy itself not by virtue of a finding of negligence. There is no basis for plaintiffs' cross-appeal.

The costs on this appeal are taxed to plaintiffs.

REVERSED AND REMANDED.