IN THE COURT OF APPEALS OF IOWA

No. 1999-276 (9-506) / 98-1854
Filed January 12, 2000

HILBERT E. HINKHOUSE, EVELYN HINKHOUSE and JUANITA HINKHOUSE ABBOTT,

Plaintiffs-Appellants,

vs.

WENDLING QUARRIES, INC., A Corporation,

Defendant-Appellee.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Muscatine County, David H. Sivright, Jr., Judge.

The plaintiffs appeal a district court ruling granting the defendant's motion for partial summary judgment on plaintiffs' action against defendant for breach of a lease contract. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

David L. Scieszinski, Wilton, for appellants.

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

Heard by Streit, P.J., and Vogel, and Vaitheswaran, JJ.

VAITHESWARAN, J.

We must determine: (1) the duration of a limestone mining lease and (2) the statute of limitations applicable to a claim based on breach of an implied covenant to diligently develop property and mineral deposits. We conclude the lease term was five years and the applicable statute of limitations on the implied covenant claim was ten years. We affirm in part, reverse in part, and remand.

I. Background Facts and Proceedings

Hilbert E. Hinkhouse, Evelyn Hinkhouse, and Juanita Hinkhouse Abbott are members of a farming partnership (Hinkhouse). On March 20, 1987, Hinkhouse signed identical lease agreements with Center Materials Corp. (CMC) and Center City Properties (CCP), permitting them to operate a limestone quarry on its property. CMC and CCP agreed to pay Hinkhouse $.20 per ton for limestone quarried from the sites.

CMC and CCP gained access to their sites through an adjacent county owned quarry. On April 16, 1987, the parties amended the leases to provide in pertinent part that the lessees would not attempt to buy the county quarry (paragraph two). Paragraph six of the amendment stated CMC and CCP would pay Hinkhouse "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." The parties crossed out and initialed "as long as the Lease Agreement is in effect," a phrase included at the end of paragraph six.

In March 1988, CMC and CCP assigned their leases to Wendling Quarries, Inc. On May 4, 1992, Wendling placed a successful bid for the county quarry.

On December 19, 1997, Hinkhouse sued Wendling, alleging Wendling: (1) breached the lease agreement by purchasing the county quarry; (2) breached an implied covenant to diligently develop the property and mineral deposits on its site; (3) intentionally interfered with a prospective business opportunity by purchasing the county quarry; and (4) failed to pay annual royalties for 1992 through 1997.

Wendling moved for partial summary judgment on the first three claims. The district court granted the motion. Hinkhouse only appeals the court's rulings on the breach of contract and implied covenant claims.

II. Standard of Review

We review a district court's grant of summary judgment for errors of law. *Compiano v. Hawkeye Bank & Trust of Des Moines*, 588 N.W.2d 462, 464 (Iowa 1999). Summary judgment is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

The parties agree there is no genuine issue of material fact. Therefore, we need only decide whether Wendling is entitled to judgment as a matter of law.

III. Breach of Lease Agreement

Hinkhouse contends paragraph two of the lease amendment precluded Wendling from purchasing the county quarry. Wendling counters that the lease expired forty-five days before it purchased the property, precluding Hinkhouse from suing for breach. We agree with Wendling.

The lease agreement provides:

> 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.

After the five year term expired, Evelyn Hinkhouse conceded Wendling did not exercise its option to renew the lease. The parties were unable to negotiate a mutually agreeable price per ton and Wendling did not mine any limestone from the Hinkhouse quarry. We conclude the parties did not satisfy the terms for renewal of the lease, and the lease expired on March 20, 1992.

Paragraph six of the lease amendment does not alter our conclusion. Although the provision requires Wendling to make royalty payments to Hinkhouse for a period of ten years, nothing in that paragraph modifies the lease term or the original provisions relating to renewal of the lease. *See DeWaay v. Muhr,* 160 N.W.2d 454, 456 (Iowa 1968) (stating new contract consists not only of the new terms agreed upon but as many of original contract terms as parties have not abrogated). Indeed, the parties crossed out language that limited the payments to the length of the lease agreement, thereby expressly extending the duration of these payments beyond the lease term.

Because the lease expired on March 20, 1992, and Wendling purchased the county quarry after that date, we conclude Hinkhouse's claim for breach of the lease agreement must fail as a matter of law. Accordingly we affirm the district court's ruling. In light of our conclusion, we need not address Wendling's remaining

contentions that the lease is void for public policy, is an illegal restraint of trade, and contains indefinite terms.

IV. Statute of Limitations-Breach of Implied Covenant

Hinkhouse next contends Wendling breached an implied covenant to develop the property and mineral deposits with reasonable diligence. Wendling counters if such a cause of action exists, it is subject to a five year statute of limitations. Hinkhouse responds that a ten year statute of limitations applies to this count because the implied covenant is premised on a written contract. Relying on *Sandbulte v. Farm Bureau Mutual Insurance Co.*, 343 N.W.2d 457 (Iowa 1984), the district court applied a five year limitation period to this claim and granted Wendling's partial motion for summary judgment. We conclude this was error. [1]

In determining the appropriate statute of limitations for a specific cause of action, we must characterize the nature of the underlying action. *See Bowles v. Schilling*, 581 N.W.2d 192, 193 (Iowa App. 1998). Iowa has generally recognized an implied covenant to continue operation of a business arising from a lease agreement. *East Broadway Corp. v. Taco Bell Corp.*, 542 N.W.2d 816, 819 (Iowa 1996); *Fashion Fabrics of Iowa, Inc. v. Retail Investors Corp.*, 266 N.W.2d 22, 27-29 (Iowa 1978). This implied covenant must arise from the language used in the lease agreement or must "be indispensable to give effect to the intent of the parties." *Id.*

[1] We need not decide whether Hinkhouse has in fact established the existence of an implied covenant arising out of its lease agreement with Wendling. Wendling's motion assumed the existence of this cause of action, then sought dismissal solely on statute of limitations grounds.

Iowa state and federal courts also recognize an implied covenant to diligently operate a mine. *Price v. Black*, 126 Iowa 304, 305-06, 101 N.W. 1056, 1057 (Iowa 1905); *Carter v. Certain-Teed Products Corp.*, 102 F. Supp. 280, 290-92 (N.D. Iowa 1952). This covenant is implied in fact rather than implied in law and is "as much a part of the lease as if expressed therein." *Carter*, 102 F. Supp. at 290.

We conclude from this precedent that the implied covenant Hinkhouse seeks to enforce is premised on its written lease agreement with Wendling. Because it is a covenant implied in fact from the terms of a written contract the five year limitations period prescribed by *Sandbulte* is not controlling. *Sandbulte*, 343 N.W.2d at 462 (noting five year limitations period applies to contracts implied in law, such as implied covenant of good faith in insurance contract); *Cf. Diggan v. Cycle Sat, Inc.*, 576 N.W.2d 99, 102 (Iowa 1998) (noting five year limitations period governing actions on unwritten contracts also applies to actions on implied contracts). Instead, the claim is subject to a ten year limitation period governing written contracts. *See* Iowa Code § 614.1(5) (1997). Therefore, Hinkhouse was required to file its claim within ten years of March 20, 1992, the date the lease expired. It did so. Accordingly, the district court erred in dismissing the implied covenant count. We reverse and remand for reinstatement of this count and further proceedings. Costs on appeal are assessed to Wendling.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.