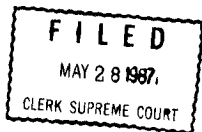


IN THE COURT OF APPEALS OF IOWA



LOUIS H. FINGERMAN and LOIS L.)
FINGERMAN, d/b/a LONDON)
PROPERTIES,)

69

Plaintiffs-Appellees,)

Filed May 28, 1987

vs.)

MID-IOWA MANAGEMENT COMPANY)
and JAMES C. CONLIN,)

7-61
86-283

Defendants-Appellants.

Appeal from the Iowa District Court for Polk County (No. 46-27039),
A. M. Critelli, Judge.

The defendants, a professional apartment management company and its president, appeal from judgment against them, contending the district court erred by permitting the jury to award damages against the individual defendant and that the district court erred by submitting both the negligence counts and the breach of contract counts to the jury. **REVERSED AND REMANDED.**

Jonathan C. Wilson, Gene R. LaSuer, and Kimberly K. Mauer of Davis, Hockenberry, Wine, Brown, Koehn & Shors, Des Moines, for defendants-appellants.

Joseph L. Marks of Marks, Marks & Marks, Des Moines, for plaintiffs-appellees.

Heard by Snell, P.J., and Schlegel and Sackett, JJ.

SNELL, P.J.

In November 1981, the plaintiffs, Louis and Lois Fingerma, doing business as London Properties, sought professional management services for a rental property which they owned. Toward that end, the Fingermans met with representatives of defendant Mid-Iowa Management Company. Representing Mid-Iowa at the meeting were Sandra K. Rasmussen and James C. Conlin, President of Mid-Iowa and codefendant in this suit. An oral agreement was reached at the meeting pursuant to which the management services were to begin on December 1, 1981. In February 1982, the Fingermans, unhappy with the services they had received to that date, cancelled the oral agreement.

The Fingermans initiated this suit on May 28, 1982. They named both Mid-Iowa Management and Conlin as defendants and, by original and amended petition, alleged the defendants' breach of the agreement and negligence. Trial to a jury commenced on October 9, 1985. Subsequently, a verdict in the amount of \$12,255.00 was returned against both defendants and in favor of the Fingermans on both the contract and negligence theories. Judgment, for the amount of the verdict, was entered on October 15, 1985. This appeal followed unsuccessful motions for new trial and for judgment notwithstanding the verdict. Our review is limited to the correction of errors at law. Iowa R. App. P. 4.

The appellants contend that the district court erred in two respects: (1) by allowing the jury to consider an award of damages against Conlin in his individual capacity and (2) by submitting both the negligence issue and the contract issue to the jury. We deal with the latter issue first.

I.

The Fingermans support their contention that the district court correctly submitted both the contract and the negligence counts to the jury by citing the following language from our supreme court's decision in Jordan v. Sinclair

Ref. Co., 257 Iowa 813, 820, 135 N.W.2d 120, 124 (1965):

A tort may be dependent upon, or independent of, contract. If a contract imposes a legal duty upon a person, the neglect of that duty is a tort founded on contract; so that an action *ex contractu* for breach of contract, or an action *ex delicto* for the breach of the duty, may be brought at the option of the Plaintiff.

See also, e.g., Porter v. Iowa Power and Light Co., 217 N.W.2d 221, 228 (Iowa 1974); Giarratano v. Weitz Co., Inc., 259 Iowa 1292, 1305, 147 N.W.2d 824, 832 (1967). This language suggests that cases in which a party alleges a tort founded on contract may be brought for breach of contract or for breach of duty, but not for both. See Giarratano, 259 Iowa at 1305, 147 N.W.2d at 832; Matthys v. Donelson, 179 Iowa 1111, 1116, 160 N.W. 944, 946 (1917); Kunz v. Cherokee Silo Co., 253 Iowa 885, 891, 114 N.W.2d 534, 537 (1962). This is consistent with the general rule that in cases in which both causes of action are possible "the plaintiff may elect which to pursue." 74 Am. Jur. 2d Torts § 24 at 641 (1974). The Fingermans, however, brought both causes of action and both were submitted to the jury which, by special verdict form, found against both defendants on both counts.

We think that the issue of which course should have been pursued by the plaintiffs or whether the two counts could have been submitted as alternatives to the jury, see Ajax Hardware Mfg. Corp. v. Industrial Plants Corp., 569 F.2d 181 (2d Cir. 1977) (applying New York substantive law), is mooted by our conclusion, which we explain in the following paragraphs, that no cause of action *ex delicto* was presented by the pleadings. It is clear that a mere breach of contract cannot be converted into a tort. 74 Am. Jur. 2d Torts § 23 at 639 (1974). To recover under a theory of tort, a plaintiff must show not merely that the defendant assumed an obligation under the contract, but that out of that obligation there arose a duty to the plaintiff. Id.

Basically, it can be said that if the cause of complaint is an act of omission or nonfeasance which, without proof of a contract to do what has been left undone, will not give rise to any cause of action, then the action is founded upon contract and not upon tort. To found an action in tort, there must be a breach of duty apart from the nonperformance of a contract. To determine whether an action is *ex contractu* or *ex delicto*, it is necessary to ascertain the source of the duty claimed to have been violated; if this duty is one imposed merely by the contract, then action for the breach thereof is necessarily *ex contractu*. But if a party sues for breach of duty prescribed by law as an incident of the relation or status which the parties have created by their agreement, the action may be one in tort, even though the breach of duty may also be a violation of the terms of the contract.

Id

That the present action is one for breach of contract only is clear from a reading of the petition. Division one of the petition contains the Fingermans' breach of contract allegations. These allegations are identical to those set forth in division two of the petition as support for the Fingermans' tort claim. The Fingermans do not even plead a duty, independent of the contractual obligations, which was breached by the defendants. Seven of the eight allegations supporting the two theories consist of claims that the defendants had failed to perform certain services. This, we think, is tantamount to an allegation that the defendants had failed to perform their contract. We are persuaded by the following statement of the pertinent law found in 1 Am. Jur. 2d Actions § 8 at 550 (1962):

If the action is not maintainable without pleading and proving the contract, where the gist of the action is the breach of the contract, either by malfeasance or nonfeasance, it is, in substance, an action on the contract, whatever may be the form of the pleading. If the plaintiff states a cause of action for breach of contract, additional averments appropriate to a cause of action for a wrong will not convert the cause of action into one for tort, and the part of his pleading appropriate to an action in tort will be considered surplusage.

The pleadings present a cause of action for breach of contract. In such cases, "the mere fact that the contract was breached through the negligence of the defendant[s] does not in and of itself change the action into one in tort."

Id. § 9 at 550. It was error to submit the tort claim to the jury with respect to either defendant.

II.

Conlin, president of Mid-Iowa Management, also maintains he was improperly named as an individual defendant in this action. As we have determined that the tort claim was improper as against either defendant, we need not address Conlin's status vis-a-vis that claim. Conlin argues, however, that he was also an improper defendant to the breach of contract claim.

As a matter of agency law, a corporate officer is not ordinarily liable in damages for breach of a contract by the corporation; the corporation as the principal is liable. Bossuyt v. Osage Farmers Nat. Bank, 360 N.W.2d 769, 778 (Iowa 1985). The Fingermans alleged in their petition, however, that Conlin entered into an agreement "to supervise the management by the Mid-Iowa Management Company." In addition, the jury was instructed of the need to find that Conlin was "a party to the contract" between Mid-Iowa and the Fingermans. The jury found, by special verdict, that Conlin had breached a contract between himself and the Fingermans. The Fingermans maintain that the record contains substantial evidence in support of the jury's finding that the contract, as pled, was proven. Substantial evidence, as our cases indicate, is evidence which a reasonable mind would accept as adequate to reach a particular conclusion. Briggs v. Board of Directors of Hinton Community School Dist., 282 N.W.2d 740, 743 (Iowa 1979). Substantial evidence cannot be based upon inference drawn from facts which are uncertain or speculative and which raise only conjecture or possibility. Omaha Indian Tribe, Treaty of 1854 with United States v. Wilson, 575 F.2d 620, 642 (8th Cir. 1978), vacated on other grounds, 442 U.S. 653, 99 S. Ct. 2529, 61 L. Ed. 2d 153 (1979).

There is no question but that if Conlin became a separate party to the agreement with the Fingermans he did so during the meeting between Conlin and Louis Fingerman in November 1981. There is some authority for the proposition that if, in executing a contract for the corporation, an officer employs terms which in legal effect charge himself, the use of such terms makes the officer a party to the contract and allows for the officer to be sued upon the contract. See J. L. Mott Iron Works v. Clark, 87 S.C. 199, 203-05, 69 S.E. 227, 227-28 (1910); 18B Am. Jur. 2d Corporations § 1831 at 683 (1985). These situations are clearly distinguishable, however, from those in which an officer is simply carrying out the corporation's business. This distinction recognizes the fact of corporate existence that corporations can do business only through officers or agents. See Rohlin Constr. Co., Inc. v. Lakes, 252 N.W.2d 403, 405 (Iowa 1977); 18B Am. Jur. 2d Corporations § 1341 at 692-93 (1985); see also White v. Elgin Creamery Co., 108 Iowa 522, 526, 79 N.W. 283, 284 (1899) (absent contrary showing, corporate president presumed to possess authority to act for corporation in all matters within corporation's ordinary course of business).

The Fingermans direct our attention to the following evidence which they argue supports the jury's finding: (1) Mr. Fingerman contacted Conlin in order to discuss Conlin's potential involvement with the management of the property; (2) a meeting was had concerning Conlin taking over the management and daily operations of the property; (3) discussions were had as to how Conlin would improve the property; and (4) a number of representations were made by Conlin concerning how he would manage the property. In addition, Mr. Fingerman testified on direct examination as follows:

Q. Well, with respect to an agreement with him to take over the management, did you end up actually entering into an agreement for him to do so? A. Yeah. We decided that day that he would be taking over the management of the Brady.

Q. And were you dealing with him or were you dealing with a company known as Mid-Iowa Management. A. As far as I was concerned, that day I was dealing with Mr. Conlin. We met, we shook hands, and he was going to take over the management.

Q. And you shook hands with him and agreed that he would take over the management? A. Yes.

We think this evidence, and that which is contained in the remainder of the record, is insufficient as a matter of law to support the jury's finding that Conlin, in his individual capacity, was a party to the contract. The record clearly shows that Mr. Fingerman knew, prior to his meeting with Conlin, that Conlin operated a property management company. Mr. Fingerman testified that he had received "mail from [Conlin's] company indicating that he ran a management firm," It was in response to this mail that the Fingermans decided to meet with Conlin. Mrs. Fingerman testified that because of the mailings "we suddenly realized that we could actually turn [the property] over to a management company" Although it does appear that during the meeting between Conlin and Fingerman Conlin discussed his ideas and plans for the management of the property, this evidence, we think, fails to manifest an agreement that Conlin individually, and in addition to the management company he represented, was entering into the oral contract with the Fingermans. There is no evidence that Conlin at any time during his discussions with Fingerman separated himself from the corporation which Fingerman knew he represented. In order for that corporation to do business with Fingerman, it had to speak, and bind itself contractually, through Conlin. That is all that the record shows was done in this case. There is no evidence on this record which would indicate that Conlin, in meeting with Fingerman, bound anyone other than Mid-Iowa Management Company to the contract. The jury's finding to the contrary was error.

In fact we believe that even assuming substantial evidence exists in support of a jury finding that Conlin "agreed to supervise the management [of the prop-

erty] by Mid-Iowa Management Company," as alleged by the Fingermans in their petition, such a finding would not suffice to impose personal liability on Conlin. The law in this state provides that "[a]n agent acting within [his] scope of authority for a fully disclosed principal is not personally liable to a contracting third party." Cryder Well Co. v. Stangl, 257 Iowa 1255, 1258, 136 N.W.2d 519, 521 (1965). Absent a showing to the contrary, a corporate president is presumed to possess authority to act for the corporation in all matters within the corporation's ordinary course of business. White, 108 Iowa at 526, 79 N.W. at 284. The record clearly shows Fingerman knew of Conlin's property management company. Our supreme court was confronted with a factual situation similar to the one at bar in Wilkins and Boussard Architects v. Carey, 203 N.W.2d 202 (Iowa 1972). In Wilkins, plaintiff performed various architectural services for property owned by the defendant but leased by him to a corporation. Defendant was president of the lessee corporation and testified it was in that capacity that he had secured plaintiff's services. Plaintiff knew of the corporation's existence. In affirming the district court's finding that the defendant was not personally liable for plaintiff's claim, our supreme court noted the following:

Plaintiff has not at any time claimed Carey operated outside the scope of his authority as president of Carey Brothers Seed and Nursery, Inc. In the absence of such proof an officer is not personally liable for a corporation's obligation.

Similarly, the Fingermans' claim that Conlin "agreed to supervise" Mid-Iowa's management of the property does not present a claim that Conlin "operated outside the scope of his authority as president of" Mid-Iowa Management, or was operating with respect to matters outside the corporation's "ordinary course of business." White, 108 Iowa at 526, 79 N.W. at 284. Absent such a claim, and proof thereof, a corporation's president is not individually liable. The case contains neither such a claim nor such proof.

III.

The problem of disposition remains. The district court presented the jury below with a special verdict form. This form, in turn, presented the jury with four issues: (1) Mid-Iowa's liability on the contract claim; (2) Mid-Iowa's liability on the tort claim; (3) Conlin's liability on the contract claim; and (4) Conlin's liability on the tort claim. If the jury found in favor of the Fingermans on any of the four claims, they were to award damages, and the special verdict form contained a space in which the amount of the damage award was to be written. The jury found for the Fingermans on all four claims and entered a single, undifferentiated damage award in the amount of \$12,255.00.

We today hold three of those verdicts to be without legal justification. The fourth verdict, that against Mid-Iowa on the breach of contract claim, is not contested on this appeal. In fact, the appellants concede in brief that "[t]he trial court should have submitted only the contract theory to the jury."

An appellate court has jurisdiction to enter appropriate judgment where the form of verdict separates the allowable damages from those items for which recovery should not be had. Team Cent. Inc. v. Teamco, Inc., 271 N.W.2d 914, 925 (Iowa 1978); see also Bossuyt, 360 N.W.2d at 778. This is not such a case. Ordinarily where unauthorized items are submitted to a jury and there is a lump sum recovery, a reversal on account thereof necessitates a new trial. Drake v Block, 247 Iowa 517, 524, 74 N.W.2d 577, 582 (1956). We think the present case must be remanded for a new trial limited, however, to the issue of damages resulting from Mid-Iowa's breach of contract. See Feldhahn v. Van DeVenter, 253 Iowa 1194, 1197, 115 N.W.2d 862, 864 (1962).

REVERSED AND REMANDED.

Schlegel, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I respectfully dissent.

I would affirm the trial court.