FILED
SEP 20 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ANDERSEN CONSTRUCTION COMPANY OF COUNCIL BLUFFS,

Plaintiff-Appellant,

vs.

NATIONAL BANK OF DES MOINES,

Defendant-Appellee.

Filed September 20, 1979

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2-62432

Appeal from Polk District Court - Robert O. Frederick, Judge.

Plaintiff-construction company appeals from a judgment for defendant-bank, alleging that trial court erred in sustaining motion for directed verdict on certain issues and that trial court erred in refusing to instruct jury on doctrine of estoppel. Affirmed.

Peter J. Peters, Council Bluffs, for Plaintiff-Appellant.

Jerry E. Williams and Gerald J. Newbrough, of Nyemaster, Goode, McLaughlin, Emery & O'Brien, Des Moines, for Defendant-Appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Plaintiff-construction company appeals from a judgment for defendant-bank. The judgment was based in part on a directed verdict for defendant on plaintiff's asserted grounds of recovery based on a trust theory, an agency-based third-party beneficiary theory, and a letter of credit theory. Plaintiff alleges that the trial court erred in sustaining defendant's motion for directed verdict on the third-party beneficiary and letter of credit theories.[1] Plaintiff also alleges that the trial court erred in refusing to give plaintiff's requested instruction on the doctrine of promissory estoppel to the jury. We affirm the decision of the trial court.

Plaintiff-construction company entered into a contract with a motel developer to construct a Ramada Inn in Council Bluffs. Defendant-bank granted the motel developer a loan, the proceeds of which were to be used to pay plaintiff for work completed. Pursuant to a provision in the contract between plaintiff and the motel developer, defendant sent a letter to plaintiff's bonding company stating that the motel developer was being financed through a loan from defendant, and that payments from the proceeds of the loan would be made to the contractor as warranted by construction.[2] Plaintiff

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[1]Plaintiff did not claim on appeal that the trial court erred in directing the verdict on the trust theory.

[2]The provision in the contract states as follows:

> It is understood that the Owners will be required to submit documents suitable to the Contractor's Bonding Company showing proof of financing in the amount of this contract along with a letter from the financing institution that they have this money set aside and will disperse [sic] same based on approved monthly draws.

The letter written by a representative of defendant-bank pursuant to the above-stated provision states:

> September 25, 1972
>
> Mr. Vernon Killion
> Ohio Casualty Insurance Co.
> 704 2nd Ave.
> Des Moines, Iowa
>
> Re: Gepada, Inc. building loan for motel, Council Bluffs, Iowa
>
> Dear Mr. Killion:
>
> This is to advise you that we have granted a loan for interim financing on a Ramada Inn Motel to be constructed in Council Bluffs, Iowa. The amount of funds available is $1,450,000.00. Payment to the contractor from proceeds of this loan will be made as warranted by construction.
>
> Sincerely,
>
> /s/ R. W. Horner
> Vice President.

regularly received progress payments from defendant as work was completed, and on completion of the work required of it under the contract, plaintiff demanded final payment for work performed, in an amount alleged to be $67,317.75. However, defendant then informed plaintiff that the entire loan proceeds had been depleted, and that there was no money left for disbursements to plaintiff.

Plaintiff obtained a default judgment against the motel developer who was subsequently adjudicated bankrupt. Plaintiff then brought this action against defendant, ultimately asserting four theories of recovery: (1) a guaranty theory; (2) a trust theory; (3) an agency-based third-party beneficiary theory; and (4) a letter of credit theory. At the conclusion of plaintiff's evidence, defendant moved for a directed verdict on all of plaintiff's theories of recovery. The trial court sustained the motion, directing a verdict for defendant on the trust, third-party beneficiary, and letter of credit theories, but decided that the guaranty theory should be submitted to the jury. Neither at the time of defendant's motion, nor at the time of the trial court's ruling on the directed verdict did plaintiff make an effort to resist, object to, or except to the motion or the ruling, although full opportunity to do so was available. At the close of defendant's evidence, defendant reiterated the prior motion for a directed verdict and the trial court reiterated its prior ruling. Plaintiff was again silent. However, prior to the giving of instructions to the jury, plaintiff objected to the trial court's refusal to submit plaintiff's requested instructions on the three theories on which the trial court directed the verdict for defendant and plaintiff's requested instruction on the doctrine of estoppel. The trial court overruled plaintiff's objections to the instructions and the jury returned a verdict for defendant on plaintiff's guaranty theory. The trial court overruled plaintiff's subsequent motion for a new trial.

I. Defendant asserts on appeal that by failing to make a timely objection to the granting of a directed verdict for defendant, plaintiff has waived the right to claim that the ruling on the directed verdict was in error. While it may well have been more appropriate for plaintiff to object to, or except to the trial court's ruling on the directed verdict at the time it was made, we conclude that plaintiff's objections and exceptions to the refusal of the trial court to submit instructions to the jury on those issues that were dismissed by the directed verdict were sufficient to alert the trial

court to plaintiff's objection to the directed verdict and to preserve plaintiff's claim of error in that ruling.

In ruling on a motion for a directed verdict, the court must view the evidence in the light most favorable to the party against whom the motion is made. Beitz v. Horak, 271 N.W.2d 755, 757 (Iowa 1978); Iowa R. App. P. 14(f)(2). Whether or not the facts are in dispute or contradicted, if reasonable minds could draw different inferences from them a jury question is engendered. Meeker v. City of Clinton, 259 N.W.2d 822, 828 (Iowa 1977); Iowa R. App. P. 14(f)(17). The motion should be overruled if there is substantial evidence supporting each element of the cause of action. Beitz, 271 N.W.2d at 757; Oak Leaf Country Club, Inc. v. Wilson, 257 N.W.2d 739, 744-45 (Iowa 1977). In reviewing the propriety of a directed verdict, the appellate court views the evidence in accordance with the same principles required for the trial court's determination. Meeker, 259 N.W.2d at 828; Schiltz v. Cullen-Schiltz & Associates, Inc., 228 N.W.2d 10, 17 (Iowa 1975).

In light of the foregoing principles, we conclude that the trial court correctly directed the verdict in this case. Plaintiff's third-party beneficiary theory, based on the relationship between defendant and the motel developer, was not supported by substantial evidence, even when all the evidence is viewed in the light most favorable to plaintiff. "[F]or anyone to be a third-party beneficiary entitled to recover on a contract both parties to the contract must so intend and must indicate that intention in the contract." Bailey v. Iowa Beef Processors, Inc., 213 N.W.2d 642, 645 (Iowa 1973), cert. denied, 419 U.S. 830, 95 S. Ct. 52, 42 L. Ed. 2d 55 (1974) (quoting 17 Am. Jur. 2d Contracts § 304, at 730 (1964)) (emphasis added to original). The construction and financing agreement between defendant and the motel developer introduced into evidence by plaintiff contained a provision directly contradicting such an intention.[3]

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[3]The pertinent part of that provision states:

> 45. NO AGENCY RELATIONSHIP: The Borrower understands and agrees that the lender is not the agent or representative of the Borrower, and this Agreement shall not be construed to make the Lender liable to materialmen, contractors, craftsmen, laborers or others for goods or services delivered by them upon the Security, or for debts or claims accruing to the said parties against the Borrower, and it is understood and agreed that there is no contractual relationship, either express or implied, between the Lender and any materialmen, contractors, craftsmen, laborers, or any other person supplying any work, labor, or materials in the improvement of the Security.

Plaintiff's assertion that the letter from defendant to plaintiff's bonding company constituted a letter of credit was also not supported by substantial evidence. "The essential element of a letter of credit . . . is a direct promise by the bank to pay the addressee of the letter." Johnston v. State Bank, 195 N.W.2d 126, 130 (Iowa 1972). Since the letter was addressed to plaintiff's bonding company and not to plaintiff, plaintiff cannot assert on the basis of the evidence presented that the letter constituted a letter of credit to it.

It is clear from the lack of substantial evidence to support plaintiff's asserted theories of recovery, and from the evidence introduced that directly contradicts plaintiff's assertions and supports facts from which no reasonable minds could draw different inferences, that the trial court appropriately directed the verdict for defendant on the third-party beneficiary and letter of credit claims.

II. Plaintiff's claim that the trial court erred in refusing to give plaintiff's requested instruction on the doctrine of estoppel is unrelated to the trial court's granting of the directed verdict and thus must be addressed separately. The submission of an instruction to the jury on an issue must be warranted by substantial support in the record and a mere scintilla of evidence does not suffice. Franken v. City of Sioux Center, 272 N.W.2d 422, 428 (Iowa 1978). In determining the sufficiency of the evidence, the court must give it the most favorable construction it will bear in favor of the party requesting the instruction. Id. With these considerations in mind, we conclude that there was not sufficient evidence to support an estoppel instruction, and the trial court was not in error for refusing to submit such an instruction.

It is unclear from plaintiff's petition and requested instruction whether plaintiff was asserting an estoppel in pais theory or a promissory estoppel theory. Regardless, the record reveals an insufficiency of evidence to support either theory.

One of the essential elements of estoppel in pais is a false representation or concealment of material facts. Walters v. Walters, 203 N.W.2d 376, 379 (Iowa 1973). Giving the evidence the most favorable construction it will bear in favor of plaintiff, we find that the record does not provide substantial support for a false representation or concealment of material facts by defendant. One of the essential elements of promissory estoppel is a clear and definite agreement, Warder & Lee Elevator, Inc. v.

Britten, 274 N.W.2d 339, 342 (Iowa 1979), or that "a specific agreement, express or implied, must exist or actual fraud in the making of the promise must appear. . . ." Swift v. Petersen, 240 Iowa 715, 719, 37 N.W.2d 258, 260 (1949). Once again giving the evidence the most favorable interpretation for plaintiff, our review of the record establishes that there is no substantial support for a clear and definite agreement between plaintiff and defendant. The only basis for an agreement relied on by plaintiff is the letter from defendant to plaintiff's bonding company. We conclude that reasonable minds could not differ from the obvious conclusion that this letter addressed to a third party does not establish a clear and definite agreement between plaintiff and defendant. Consequently, we find that the trial court did not err in refusing to submit plaintiff's requested instruction on estoppel to the jury.

AFFIRMED.