IN THE COURT OF APPEALS OF IOWA

No. 3-079 / 92-896

FILED
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CLERK SUPREME COURT

JOSE BUCKSBAUM and **CARYL BUCKSBAUM,**

Appellants,

vs.

MIDKIM CO. INC., and **DENNIS L. ANDERSON,**

Appellees.

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Appeal from the Iowa District Court for Scott County, James R. Havercamp, Judge.

The plaintiffs appeal a judgment of the district court in a declaratory judgment action finding plaintiff Caryl Bucksbaum had no rights to a lease or to shares of stock in Midkim Co., Inc., and that the Bucksbaums were entitled only to a $7500 judgment. **AFFIRMED.**

Arthur L. Buzzell, Davenport, for appellant.

Wayne M. Newport, Davenport, for appellee.

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

DONIELSON, J.

The plaintiffs, Jose and Caryl Bucksbaum, appeal from a judgment of the district court in a declaratory judgment action finding plaintiff Caryl Bucksbaum had no rights to a lease or to shares of stock in Midkim Co., Inc. and awarding the Bucksbaums a $7500 judgment.

Dennis Anderson leased a parcel of real estate, parcel A, from Moday Realty. The lease had a termination date of December 9, 1993. In June 1986, Jose Bucksbaum subleased parcel A from Anderson. In October 1986, Jose Bucksbaum entered into a lease agreement directly with Moday Realty for parcel A and for parcel B. Parcel B was comprised of real estate which surrounded parcel A. The lease between Moday Realty and Jose Bucksbaum was to be effective upon termination of Anderson's lease for parcel A in 1993 through the year 2011.

In November and December of 1986, Jose Bucksbaum failed to pay rent on parcel A and became in default of his sublease to Anderson. In January 1987, Anderson served Jose Bucksbaum with a three-day notice to quit. Jose Bucksbaum responded to Anderson by pointing out that, by virtue of his lease of parcel B, Anderson would be left without easy access to parcel A. As a result, Anderson and Jose Bucksbaum entered into an agreement to form a corporation known as Midkim Co., Inc. (Midkim). Anderson would provide capital and his lease of parcel A and Bucksbaum would provide his leasehold interests in parcel A

and parcel B. Midkim would then hold the leasehold interest and would forbear any action against Jose Bucksbaum.

At this point, the specific terms of the agreement between Anderson and Jose Bucksbaum is disputed. The Bucksbaums contend the agreement provided Anderson and Jose Bucksbaum would jointly develop both parcel A and parcel B. However, Anderson contends they agreed Anderson would develop parcel A and Jose Bucksbaum would develop parcel B. Although the parties signed a written shareholders' agreement, the specific terms which are at issue in this appeal were never put in writing.

After the formation of Midkim, Jose Bucksbaum assigned his lease to his wife, Caryl Bucksbaum, who then assigned the interest to Midkim. A stock certificate was issued to Anderson and to Caryl Bucksbaum for 2500 shares of Midkim stock valued at $3 per share. No other consideration was given to Caryl Bucksbaum for the assignment of her leasehold interest to Midkim. In December 1988, the 1986 lease into which Moday Realty and Jose Bucksbaum had entered was amended. The lease took notice of the assignment from Jose Bucksbaum to Midkim and provided for ten additional years, with four options to renew ending in the year 2018.

Anderson then proceeded to develop parcel A. This development included the removal of underground storage tanks, landscaping, and the construction of a new

building. Anderson is the sole obligor of the mortgages and debts associated with the development of parcel A. Anderson continued to be responsible for paying the rent to Moday on parcel A. Jose and Caryl Bucksbaum incurred no debts or obligations in the development of parcel A.

During this same period, Bucksbaum attempted to lease from Moday Realty additional property necessary for the development of parcel B. However, Bucksbaum was unable to develop parcel B because Target, Moday Realty's largest tenant, would not agree to any improvements on the land.

In a prior suit between the parties, Jose and Caryl Bucksbaum brought an action for breach of written contract, relying upon the written shareholders agreement. In January 1991, the district court found Jose Bucksbaum failed to prove by a preponderance of the evidence the existence of a contract from the shareholders' agreement. The court also determined Midkim was not a legal entity with the authority to contract.

The Bucksbaums then filed this action for declaratory judgment, requesting the court to determine their respective rights regarding the lease between Midkim and Moday Realty and regarding any shares of Midkim stock. Following trial, the district court determined the Bucksbaums had effectively surrendered their leasehold interests to Midkim and thus were not entitled to any interest in either the lease or any shares of stock of Midkim. However, the court ordered Midkim and Anderson

were liable for the payment of $7500 to Caryl Bucksbaum. That amount reflected the value of Caryl's interest in the "de facto" corporation.

The Bucksbaums now appeal. They contend the district court erred in finding the Bucksbaums had no interest in either the lease or the stock of the corporation. They request the decision of the district court be modified to award Caryl Bucksbaum a fifty-percent interest in the real estate project which had been developed on the land she leased and assigned to Midkim.

Our scope of review is for the correction of errors of law. Iowa R. App. P. 4. Findings of facts in a law action are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). We construe the trial court's findings broadly and liberally. Grinnell Mut. Reins. Co. v. Voeltz, 431 N.W.2d 783, 785 (Iowa 1988). In case of doubt or ambiguity, we construe the findings to uphold, rather than defeat, the district court judgment. Id. We are prohibited from weighing the evidence or the credibility of the witnesses. Id.

The specific terms of the agreement between the Bucksbaums and Anderson regarding their respective interests in Midkim were only reduced to writing in the shareholders' agreement. In a prior suit, the court found the terms of that agreement did not constitute a contract. Thus, the question of whether that agreement was binding

cannot be relitigated. Israel v. Farmers Mut. Ins. Ass'n of Iowa, 339 N.W.2d 143, 146 (Iowa 1983).

There is no other written agreement between the Bucksbaums and Anderson regarding their respective interests in the real estate leases. However, "a contract will be implied where there has been a mutual manifestation of assent by acts and deeds (rather than words) to the same terms of an agreement." McBride v. City of Sioux City, 444 N.W.2d 85, 91 (Iowa 1989). The substance of an implied contract is determined from the acts of the parties in light of the subject matter and the surrounding circumstances. Id. (citing Newman v. City of Indianola, 232 N.W.2d 568, 574 (Iowa 1977)).

At issue is whether the agreement provided Jose Bucksbaum and Anderson would become involved in a joint project or that Jose Bucksbaum and Anderson would independently develop two separate parcels of land. Because the agreement was not in writing, the district court had to rely upon the conduct of Anderson and the Bucksbaums in determining its terms.

At trial, the testimony of both Jose Bucksbaum and Anderson was relatively self-serving and described two entirely different agreements. Jose testified he believed the agreement between himself and Anderson provided he and Anderson would be 50/50 shareholders of all profits made. Anderson would provide all the money necessary to complete the real estate project and would be repaid from any

profits generated. However, Anderson testified the Midkim agreement provided Bucksbaum and his partners would develop parcel B and Anderson would develop parcel A. Anderson maintained he had absolutely no intentions of personally becoming financially involved with Jose Bucksbaum. On our review, we will not assess de novo the credibility of these witnesses. Grinnell Mut. Reins. Co. v. Voeltz, 431 N.W.2d 783, 785 (Iowa 1988).

The district court concluded:

> Jose and his wife Caryl took the risk of losing their personal leasehold interests in tracts A and B in 1987; first by being unable to themselves financially support those interests; second by exchanging it for stock in Midkim; and third, by agreeing later to themselves arrange for third-party development financing and securing an expanded tract B through negotiations with Moday.

The acts and conduct of the Bucksbaums and Anderson support a finding that each party would develop a separate real estate project. The following facts were undisputed at trial: Jose and Caryl Bucksbaum assigned their leasehold interests in parcel A and parcel B to Midkim. The agreement into which the parties entered provided that any action against Jose Bucksbaum for nonpayment of rent would be forborne. Anderson developed parcel A entirely at his own expense and he paid the rental for parcel A. Jose Bucksbaum, while unsuccessful, attempted to develop parcel B. The Bucksbaums have incurred absolutely no debts or obligations in the development of parcel A and Anderson has not been involved the development of parcel B.

On our review, we are not inclined to disturb the findings of the district court. There is substantial evidence the Bucksbaums risked losing their leasehold interests to avoid otherwise inevitable financial problems. On the other hand, we do not find substantial evidence that the parties intended to jointly develop parcel A and parcel B. We agree with the district court's finding that the Bucksbaums gave up their leasehold interests in parcel A and parcel B in the formation of Midkim and that the Bucksbaums had no interest in the lease or in the shares of stock of Midkim.

We note the district court did recognize the value contributed by the Bucksbaums in this agreement. Caryl was awarded $7500 by the district court for the interest she had in parcel B. Therefore, although the Bucksbaums had no interest in the stock or in the leases of Midkim, the defendants, Midkim and Anderson, were found liable for the value of Caryl's interest.

The costs of this appeal are taxed to the Bucksbaums.

For the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.