

FILED

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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

JERRY BIRD and NAOMI BIRD,)

Plaintiffs-Appellants,)

Filed April 24, 1984

vs.)

BURCO BROS. TRUCKING, LTD.,)

JERALD BURCO and GAYLEN BURCO,)

4-32
83-911

Defendants-Appellees.

Appeal from the Iowa District Court for Buchanan County - T. H. Nelson,
Judge.

Plaintiffs appeal from adverse judgment in their action based on failure to
pay rent due under an oral lease of grain storage bins. **AFFIRMED IN PART,**
REVERSED IN PART, AND REMANDED.

R. L. Donohue of Donohue Law Office, Fayette, for plaintiffs-appellants.

Mark D. Buchheit, Fayette, for defendant-appellee Gaylen Burco.

Peter C. Riley of Tom Riley Law Firm, Cedar Rapids, for defendants-
appellees Jerald Burco and Burco Bros.

Considered by Oxberger, C.J., and Donielson and Snell, JJ.

Plaintiffs appeal from adverse judgment in their action based on failure to pay rent due under an oral lease of grain storage bins. They claim that: (1) the evidence was insufficient to support judgment for defendants Jerald Burco and Burco Bros. upon their counterclaim for abuse of process; (2) the court improperly set off against judgment for plaintiff a portion of the value of beans stored in the bins when the court had previously denied defendant Gaylen Burco's request for permission to add a counterclaim based on plaintiffs' alleged conversion of the beans; and (3) counsel for defendants Jerald Burco and Burco Bros. was improperly allowed to cross-examine witnesses concerning matters not related to the Burco counterclaim after plaintiffs' claim against them was dismissed, thereby depriving plaintiffs of a fair trial. We affirm in part, reverse in part, and remand.

Plaintiffs commenced a legal action based on defendants' alleged failure to pay rent due under an oral lease of grain storage bins. Defendants Jerald Burco and Burco Bros. Trucking, Ltd. denied being parties to the lease and counter-claimed for abuse of process, alleging that the action was brought against them in bad faith due to malice on the part of counsel for plaintiffs, who had represented Jerald Burco's wife in dissolution proceedings. Plaintiffs dismissed their claim against Jerald Burco and Burco Bros. prior to trial.

Following trial the court entered a judgment for plaintiffs against Gaylen in the amount of \$2,400 but set off against the entirety of that amount a portion of the value of beans stored by Gaylen in the bins. No additional award to Gaylen was made because his compulsory counterclaim for conversion of the beans was not timely pled. Gaylen's motion to amend the pleadings to conform to the proof was denied. With regard to the counterclaim, the court found no evidence of malice but awarded counterclaimants \$910, representing the amount of attorney fees the court found that they had incurred in defending against plaintiffs' claim. Plaintiffs brought this appeal, challenging the setoff awarded to Gaylen against

the \$2,400 judgment in their favor and the judgment for \$910 in favor of counter-claimants Jerald Burco and Burco Bros. Trucking.

I.

We first consider plaintiffs' claim that the trial court erred in awarding Jerald Burco \$910 for his costs in defending against plaintiffs' action. We agree. Initially, it is not clear on what basis the trial court made this award. At trial, Jerald testified, in support of his counterclaim against plaintiffs for abuse of process, that he had incurred legal expenses in defending against plaintiffs in the amount of \$910. In its findings of fact, the court apparently found no merit to Jerald's abuse of process counterclaim when it found "no evidence of malice in either the Plaintiff or either Defendant or any loss of business as the result of defending the above litigation by either Defendant, Jerald Burco or Burco Bros. Trucking Ltd." The court also found that "any animosity between R. L. Donohue [plaintiffs' attorney] and Jerald Burco is not relevant to the institution of this action." In its conclusions of law, however, the court held plaintiffs liable to Jerald in the amount of \$910 for his defense costs. The court did not state the basis for this award; we can only presume that it was founded on Jerald's abuse of process counterclaim. This presumption is at least inferentially supported by the fact that the court did not specifically dismiss Jerald's counterclaim although, as already noted, the court's fact findings lead to the conclusion that the court found no merit in the counterclaim.

We need not resolve this apparent contradiction, however, because we conclude that the judgment in Jerald's favor must be reversed in any event. If the award was not based on the abuse of process counterclaim, then it must be reversed under the general rule that litigation expenses or attorney fees cannot be recovered as damages unless authorized by statute or contract. 25 C.J.S. Damages § 50, p. 777 (1966); Rauch v. Senecal, 253 Iowa 487, 491, 112 N.W.2d 886, 888 (1962). No such authorization exists in this case. Nor can the award be

sustained on a theory of abuse of process. This tort has been defined as "misuse or perversion of regularly issued legal process, after it has been issued, to achieve some collateral purpose not justified by the nature of the process." Brody v. Ruby, 267 N.W.2d 902, 905 (Iowa 1978). Jerald failed to show any such collateral purpose behind plaintiffs' action to recover rent for use of their grain bins. We agree with the trial court that any ill feelings that may exist between Jerald and plaintiffs' attorney had no bearing on plaintiffs instituting this action. We therefore reverse the trial court's decree insofar as it rendered judgment for \$910 in Jerald's favor.

II.

Plaintiffs also allege that the trial court erred in allowing Gaylen a setoff against the entire amount of the \$2,400 judgment in plaintiffs' favor for Gaylen's use of their grain bins from March of 1980 to March of 1981. The court awarded Gaylen this setoff for the value of the beans in the bins after plaintiffs padlocked them and prohibited Gaylen from coming on their land to retrieve the beans. The setoff was awarded for the additional reason that, according to the court, plaintiffs did not account for the disposition of the beans. Gaylen does not challenge the propriety of the initial \$2,400 judgment in plaintiffs' favor for rental of the bins.

We agree with plaintiffs that Gaylen is not entitled to the setoff. Gaylen's claim for setoff, based on the theory that plaintiffs unlawfully converted his beans to their own use, is in the nature of a compulsory counterclaim since it arose out of the same transaction or occurrence that gave rise to plaintiffs' claim against him for past rent due. See Iowa R. Civ. P. 29. Such claims for setoff must be pleaded. Id.; Lord v. Ellis, 9 Iowa 301, 303 (1859); see also 20 Am. Jur. 2d Counterclaim, Recoupment, and Setoff § 141 (1965); Cel-Ko Builders & Developers, Inc. v. BX Corporation, 140 Ga. App. 501, 501, 231 S.E.2d 361, 362 (1976). Gaylen did not attempt to plead his setoff claim until the day before trial when he filed a

motion to amend his answer to assert his counterclaim against plaintiffs for conversion. The trial court overruled this motion as well as Gaylen's posttrial motion to amend to conform to proof. We agree with the court that Gaylen's motions were untimely since "he and his counsel were quite aware of the facts giving rise thereto long prior to the day of trial"; in any event, the court did not abuse its discretion in overruling the motions to amend and assert a counterclaim. Farmers Insurance Group v. Merryweather, 214 N.W.2d 184, 188 (Iowa 1974); Fischer, Inc. v. Standard Brands, Inc., 204 N.W.2d 579, 584 (Iowa 1973).

Since Gaylen's motions to amend were properly overruled, his counterclaim or setoff for conversion against plaintiffs was not before the trial court or this court on appeal. Therefore, the trial court erred in allowing Gaylen a setoff against the entire \$2,400 judgment for plaintiffs. The trial court held, and Gaylen does not contest, that plaintiffs are entitled to \$2,400 for Gaylen's use of their bins from March, 1980, to March, 1981. We affirm that holding. Since Gaylen did not establish his right to a setoff against this amount, plaintiffs are entitled to judgment of \$2,400 against Gaylen.

In view of the above rulings, we need not consider plaintiffs' claim that they did not receive a fair trial. We remand for entry of judgment in conformity with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.